



Constitution-making and Reform

Options for the Process

Michele Brandt, Jill Cottrell, Yash Ghai, and Anthony Regan

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It supports national teams in countries across Africa, Asia, Central America, Europe, and the Middle East. Interpeace also has a thematic program on constitution-making. Over 300 peacebuilding experts work to help their societies manage their internal divisions and conflicts without resorting to violence or coercion.

The Interpeace approach contributes to building lasting peace through inclusive and nationally led processes of change.

Interpeace also works to assist the international community, and in particular the United Nations, to play a more effective role in supporting peacebuilding efforts around the world.

It is headquartered in Geneva (Switzerland), and has offices in Brussels (Belgium), Guatemala City (Guatemala), Nairobi (Kenya), and New York (USA).

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Foreword

By Lakhdar Brahimi

To consolidate peace after war is a long-term process; to consolidate democracy is an even longer one. There are no quick fixes. Ultimately, consolidating peace in any country depends on the people of that country. They alone must determine the path to peace—the international community can only assist.

Early gains have often proved short-lived. If peace is to be sustained, it must rely on effective and accountable national institutions; international assistance must be converted, as quickly as possible, into nationally owned and sustainable systems.

Such international assistance is often needed. Efforts are under way at the United Nations, in multilateral organizations, and in many countries to develop and improve on the assistance that can be made available to communities emerging from conflict, including in the areas of security and stabilization, elections and political reconciliation, human rights and judicial reform, institution-building, governance, and the reenergizing of social and economic development. Yet, as is evident from numerous postconflict experiences, the collective efforts of the international community have often been insufficient to support sustainable peace.

One key reason is the low importance that has historically been placed on rebuilding state institutions and functioning political systems. This is slowly being remedied. As countries attempt to address the factors that have fed conflict in the past, it is often necessary to rebuild the rule of law and trust in good governance, and a fundamental underpinning of this effort, in many cases, has been constitutional reform.

This handbook offers one such important remedy. It provides both international and national actors with comprehensive, practical guidance on designing, implementing, and supporting constitution-making processes. Although it focuses specifically on the needs of divided societies, this handbook will be a tool useful to any country undertaking to reform its constitution.

Until a few years ago, the focus of international constitutional assistance was on providing guidance about the content of a constitution rather than on the process by which it is made. But the way a constitution is made in a war-torn country can play a key role in rebuilding or strengthening state and political systems as well as in securing a durable peace—particularly if it entails an inclusive process that leads to the creation of a consensus-based road map for a more just economic, political, and social order. Despite the important role such a process can play, little attention has been paid to how to design and implement a participatory and inclusive constitution-making process that supports a lasting peace.

This book, *Constitution-making and Reform: Options for the Process*, is a welcome addition to

the toolbox at the disposal of national and international organizations, as well as governments involved in postconflict constitution-making. It is especially commendable because it does not provide one-size-fits-all solutions to what are highly political and sensitive processes, each with its own unique challenges and opportunities.

I wish *Constitution-making and Reform: Options for the Process* had been available to the international community when I was the special representative of the United Nations Secretary-General for Afghanistan. This book asks the right questions, beginning with the most basic one, which often gets overlooked: “Do you need a new constitution?”—a question we failed to ask when we started our constitutional process in Kabul. In hindsight, I am strongly inclined to say that we might well have spared the people of Afghanistan and ourselves the effort; the 1964 constitution, cleaned of its articles concerning the monarchy, could have served Afghanistan well for many years, allowing peace to take root and trust between former enemies to be reestablished.


This handbook would have helped us avoid counting mainly on “gifted amateurs”—not to mention what I call “supply-driven help,” which we were not always able to push back. Equally important, the handbook would have been a great resource when we were addressing various gaps and weaknesses, including minimal civic education efforts to prepare marginalized citizens to have a voice in the process.

The authors’ effort is laudable because they draw not only upon their own extensive experience, but also upon that of dozens of practitioners from across the globe. Such collective experience, gained through practical struggles with the issues covered, is evidenced throughout. The handbook reminds the reader that historic, cultural, institutional, ethnic, and linguistic differences among countries will lead to different outcomes; no two processes are alike and no single model will necessarily lead to the hoped-for result—the variables are too great. This is perhaps more true of the task of constitution-making than of any other democratization or peacebuilding task. The stakes may be highest here because the outcome will determine how power and resources are shared. Despite the variety of processes and contexts, the authors deftly raise the practical issues and concerns that constitution-makers should consider at each stage, and identify the core institutions and tasks of constitution-making and the risks and opportunities associated with each.

I appreciate that the handbook speaks primarily to national constitution-makers and is a tool for their empowerment. In some contexts, nationals may have all of the human and material resources necessary to conduct their own processes effectively. However, in many contexts, nationals must rely on the international community for assistance as they overcome the devastating impact of war. The handbook stresses options for strategies that nationals can employ to maintain ownership of the process in the face of pressure to follow an external agenda. It also provides guidance for members of the international community to help them avoid the pitfalls of constitutional assistance efforts, including the common mistake of imposing short timetables and rushing the process. As this work emphasizes, the existence of a constitution

does not mean the international community's effort has achieved its end. The goal is to consolidate peace—and this takes time.

Ending a conflict and rebuilding state institutions and societies torn apart by war are highly delicate tasks. Nowhere is this more evident than in the constitution-making process, where the past must be examined and agreements reached between often mistrustful citizens and communities. This handbook is an important tool for international actors and national actors alike; it will enrich the learning process as we seek to improve our efforts to secure peace and transform societies.

A handwritten signature in black ink, reading "Lakhdar Brahimi". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Lakhdar Brahimi, a former Foreign Minister of Algeria, served as Special Representative of the UN Secretary-General to South Africa, Haiti, Afghanistan and Iraq.

Preface

By Scott M. Weber

Improving the process of constitution-making and constitutional assistance is critical to peacebuilding efforts in the twenty-first century. We live in an era of constitution-making; more than half of the nearly two hundred national constitutions in existence have been either reformed or written in the last thirty years. Some twenty constitutional reforms or new constitutions are adopted each year, many as part of a peacebuilding process in a war-torn country or as a result of economic or social crises. Establishing the constitutional foundation in these cases is not business as usual. Conflicts over resources, rights, powers, identities, and past injustices are endemic, and mistrust runs deep. Every point of tension is potentially explosive, political, and urgent. Because of this urgency, the tendency—in particular within the international community—can be to focus on putting a constitution in place quickly as a way to reorder society and further the political transition. This is a common peacebuilding problem—a tendency to focus on the *what* rather than the *how*. However, it is precisely in such contexts that the constitution should develop through a *process* that encourages a durable consensus and allows democratic processes, principles, and values to take root.

There has been a critical dearth of practical guidance for national constitution-makers, their advisors, and the international community about how to design and implement a constitution-making process that supports a durable peace. Interpeace launched its constitution-making program, “Constitution-making for Peace,” to fill this gap because the *how* of making a constitution in today’s world is as important as the resulting content. Interpeace’s approach to building lasting peace is to reinforce the capacities of societies to overcome deep divisions and to address conflict in nonviolent ways.

This handbook has been prepared as a first step in providing critically needed guidance. It builds on the peacebuilding principles that underpin and guide Interpeace’s mission and work.

A peacebuilding process must be locally owned and led

Local ownership begins by ensuring that priorities are determined locally. It is crucial that time, space, and processes exist to promote dialogue that can lead to a consensus-based constitution. In a peacebuilding process, if local actors participate in defining the problem they are more likely to take ownership of the solutions. Similarly, if people feel a sense of ownership of the constitution they are more likely to protect it and exercise their duties under the new constitutional order. A constitution—like peace—cannot be imposed from outside.

All parties must be included in the process

When all relevant groups in society are involved in the dialogue and the priority-setting process is ensured, actors from each social group are instilled with a sense of responsibility for the rebuilding and reconciliation process. Our experience has shown that the exclusion or

marginalization of certain actors breeds resentment and sows the seeds for renewed violence. A constitution-making process can be one of the defining moments in a country in which, if key actors are excluded, the peace is more likely to collapse.

The heart of the challenge is building trust

Trust cannot be imposed, imported, or bought. It emerges slowly and sometimes reluctantly and is built through collective engagement on issues large and small, and through a consistent, daily commitment to and application of a common vision. Building trust is at the heart of peacebuilding, and it is the most difficult outcome to achieve. More than the revitalization of infrastructure or the presence of government, trust is the glue that keeps society together in intangible but crucial ways. It gives institutions their legitimacy and helps individuals and groups remain engaged on the long path toward lasting peace. Constitution-making, if it is to be a participatory and deliberative process, must be designed to allow for time to build trust.

Peacebuilding is a long-term commitment

There are no shortcuts. Recognizing that the process of overcoming mistrust and deep divisions can be a difficult one, we must empower local actors to establish independent institutions, which can continue to address root causes of conflict and promote peace over the long term. Through its constitution-making program, Interpeace is committed not only to improving the process of making a constitution, but also to implementing the constitution so that conflict is resolved by constitutional means.

For a constitution to be credible and durable, the voices of people from across society must be heard and incorporated in its creation. After all, a constitution should be a document that unites rather than divides. It is therefore vital that those designing, implementing, and supporting a process of constitution-making do not become so focused on arriving quickly at the destination that they overlook the importance of the journey. Bringing people together, building trust, and developing shared ownership takes time, but it is always time well spent.

This handbook does not propose a universal template—no single approach is applicable to all contexts. It is designed to provide a wide range of options for each phase of the constitution-making process, from deciding whether such a process is needed to choosing the type of body to lead the process, as well as how to implement the constitution. The handbook is also intended to be a planning tool that provides an overview of the variety of tasks and institutions that may be required.

Just as constitution-making should be viewed in terms of the process rather than simply the result, so too the creation of this handbook is an ongoing process. As we generate new expertise and lessons learned we will integrate them into the online version of this handbook or add additional guidance papers. The website can be found at www.interpeace.org/constitutionmaking. This will ensure that—like the best constitutions—it is a living document that will be relevant across the years. Other guidance materials on constitution-making can also be found at this site.

This handbook could not have been written without the wisdom, keen intellect, and unwavering commitment of the authors—Michele Brandt, Jill Cottrell, Yash Ghai, and Anthony Regan. They have drawn upon their scholarship and extensive practical experience not only to produce this handbook but also to provide valuable advice and support to Interpeace’s Constitution-making for Peace program. Creating a handbook that would cover the range of issues and dilemmas that may confront today’s constitution-makers was a pioneering and daunting task; we are grateful that the authors remained committed to meeting the challenge. Yash Ghai, in particular, has spent the last four decades both leading and advising constitution-making processes all over the world. His breadth of knowledge in this field is unprecedented. We are honored and grateful for his role as Senior Advisor to the Constitution-making for Peace program and the production of this handbook. We also owe a considerable debt of gratitude to Jill Cottrell for her extensive contributions and advice as the program progressed, as well as her devotion to editing and continually improving the handbook. Special thanks also go to Anthony Regan, who gave so freely of his time not only to the conception and development of Interpeace’s Constitution-making for Peace program but also for his contributions to, and extensive editing of, the handbook. Finally, we wish especially to thank Michele Brandt, who launched and directs the Constitution-making for Peace program. Her passionate and persistent efforts have driven the process of bringing this handbook to life and addressing this key peacebuilding gap. We are also grateful for her editing efforts to finalize the handbook.

We partnered with International IDEA, the United States Institute of Peace (USIP) and Princeton’s Bobst Center for Peace and Justice to organize several international dialogues with practitioners that explored constitution-making issues. The handbook has benefited from these partnerships and the considerable research and input from dozens of practitioners and academics from every region, particularly the global south.

We also wish to express our appreciation to Jane Lincoln Taylor and Rhonda Gibbes, who carefully copyedited the handbook as it progressed, and E. Ashley Fox-Jensen for the design of the handbook.

Finally, we are grateful to the donor governments of Australia, Denmark, the Netherlands, and Switzerland, and to the Canadian International Development Research Centre, which supported this pioneering effort. Thanks also go to the State, Society, and Governance in Melanesia Program at the Australian National University for the time it granted to allow Anthony Regan to contribute not only to the book but to launching our program, and to the law firm Cleary Gottlieb Steen & Hamilton LLB in New York, and to its senior partner Jeffrey Lewis, for their special contribution of staff time to help compile vast amounts of research for this handbook.

A handwritten signature in black ink, appearing to read "Scott M. Weber". The signature is fluid and cursive, with a long horizontal stroke at the end.

Scott M. Weber is the Director-General of Interpeace.

About the authors

Michele Brandt

Michele Brandt is a constitutional lawyer. She launched and directs Interpeace’s Constitution-making for Peace program, which develops tools and resources to improve constitution-making practice and provides technical assistance to both international organizations and national actors. In this capacity she has also organized several international workshops on key constitution-making issues. Michele has spent over a dozen years directly assisting processes in the field. She was the full-time constitutional advisor to the United Nations Assistance Mission in Afghanistan and the Afghan Constitutional Commission. In Timor-Leste, Michele served with the United Nations Transitional Administration as a judicial affairs officer and was a member of the Transitional Judicial Service Commission as well as the Cabinet Legislative Committee and later directed the Asia Foundation’s Constitutional Development program. In Cambodia, Michele cofounded the Cambodian Women’s Crisis Center and directed an eleven-office legal aid association. She has published numerous articles on human rights, capacity development, gender, peacebuilding, and the rule of law, including a study of the United Nations’ constitutional assistance efforts.

Jill Cottrell

Jill Cottrell retired in 2006 after teaching law for 40 years at universities in Nigeria, the United Kingdom, and Hong Kong. She was educated at the University of London and Yale Law School. She has been a consultant on constitution-making for Timor-Leste, Maldives, Iraq, and Somalia. From 2006 to 2008, Jill was a consultant with the Constitution Advisory Support Unit (CASU), UNDP, Kathmandu, Nepal. She has also been involved with International IDEA on a project for women members of the Constituent Assembly.

Yash Ghai

Yash Ghai studied at Oxford and Harvard. He held positions at a number of universities, including the Universities of Dar es Salaam, Warwick, Uppsala, and Hong Kong, and visiting appointments at Harvard, Yale, the Universities of the South Pacific, Wisconsin, Toronto, and Melbourne, and the National University of Singapore. He retired from university teaching in 2006. He has published extensively on constitution-making, public law, sociology of law, ethnic relations, comparative law, and law and development. Yash has over 35 years of experience advising countries on constitutional matters, including the making or reviews of constitutions. He was the chair of the Constitution of Kenya Review Commission and of the Kenya National Constitutional Conference (2000–2004). More recently, he headed the Constitution Advisory Unit of UNDP, Nepal (2006–2008), which advised on the constitution-making process in Nepal.

He has been working as a consultant for UNDP on the constitution for Somalia, of which the draft is currently (2011) the subject of public consultation.

Anthony Regan

Anthony Regan is a constitutional lawyer who has worked since 1997 for the Australian National University (Canberra) as a fellow in the State, Society, and Governance in Melanesia Program, College of Asia and the Pacific. He studies the law and politics of constitutions, and the design of the state as part of postconflict political settlements and peacebuilding efforts. Anthony has undertaken advisory work in a number of countries, particularly Papua New Guinea, where he has lived and worked full-time for 15 years (including more than two years in Bougainville from 2002 to 2004, assisting in the development of a postconflict subnational constitution) and Uganda (where he worked for over three years from 1991 to 1994 assisting the Uganda Constitutional Commission and the Uganda Constituent Assembly in developing a new constitution). Anthony has also been involved in advising on constitution-making or conflict-resolution work in Timor-Leste, the Solomon Islands, India (especially Nagaland), Sri Lanka, and Fiji. He assisted in developing Interpeace's Constitution-making for Peace program. Anthony has written extensively on peacebuilding and constitution-making. His most recent book is *Light Intervention: Lessons from Bougainville*, published by the United States Institute of Peace late in 2010.

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Overview

Need for and purposes of this handbook

Making available knowledge of options for the processes of constitution-making and reform

Until now there has been nothing like this handbook available to constitution-makers. Since the end of the Cold War in the late 1980s, there has been a dramatic increase in constitution-making, in large part aimed at ending violent conflict or deep divisions. Yet constitution-makers and international constitutional-assistance actors have had little guidance or information about the process of making constitutions, the wide range of past experience of constitution-making processes in both postconflict situations and more generally, and the range of possible outcomes. Anyone contemplating what might be involved in designing, starting, and carrying out a process of constitution-making could look at case studies of particular processes and comparative academic analyses of a few particular institutions or procedures. But there are thousands of design, implementation, and other choices involved in developing a process, especially where such difficult goals as conflict transformation and resolution are involved. Yet until now there has been nowhere for a constitution-maker to explore practical knowledge about the range of tasks and institutions that might need to be considered as part of such a process.

We have been in the shoes of such constitution-makers. Among us, we have been involved in leading or advising dozens of constitution-making processes. We have had to learn on the job—sometimes from one another or from other practitioners—but without the knowledge of the full range of options and relevant experiences from the last forty years of constitution-making.

This handbook attempts to meet that need. Much of the knowledge required to prepare it was not available in the academic literature. To survey the range of options and experiences in constitution-making, we conducted workshops and interviews over a period of three years with more than 120 practitioners and academics from every region and from dozens of countries.

Although constitution-making processes often have unique contexts, procedures, and bodies, this handbook identifies the myriad tasks that need to be carried out, the variety of institutions and procedures that can be used to carry out those tasks, and who can do them. It also discusses the opportunities and dilemmas sometimes involved in carrying out specific tasks or using particular institutions. This handbook is not about the contents of a constitution (about whether to have a presidential system or a parliamentary one, whether to have a right to food, or an audit court, and so on), but just about the processes that can be used to make the decisions about contents.

The handbook emphasizes the goal of making a constitution in a democratic, participatory,

transparent, inclusive, and representative way while underscoring the deeply political nature of constitution-making and the risks and opportunities that relate to applying these principles in a sensitive manner at each step in the process. For example, the promotion of dialogue and debates on constitutional issues may be helpful in some contexts but could derail the process at an early stage in a deeply divided society where such discussions could increase levels of polarization.

At the same time, the handbook emphasizes that there is no single correct way of designing a constitution-making process. There are endless variations in the tasks carried out, the sequence in which they are executed, and the institutions and processes involved in getting that work done.

The handbook pays particular attention to the special needs of constitution-making processes intended to end violent conflict, or to contribute to reconciliation and consensus in otherwise deeply divided societies. It alerts readers to both the opportunities and the dilemmas that are peculiar to constitution-making in conflict or postconflict situations. And it emphasizes that the constitution-making process will not serve so constructive a role as it might unless peacebuilding opportunities are maximized and constraints overcome. For example, we note that in a conflict or postconflict context the designers of the process may need to consider the purposes of a process other than simply creating the framework for governance and adopting a constitution, such as:

- identifying the underlying societal issues and defining the agenda for reform;
- developing a national consensus on the goals of the constitution;
- resolving outstanding national or regional issues and difficulties;
- promoting a national identity (a particular problem in multiethnic states);
- educating the people in principles of democratic theory as well as democratic practice—through the experience of making a constitution in a deliberative and participatory fashion;
- ensuring wide public participation in the process and knowledge of the constitution—in part to facilitate its implementation, protection, and legitimacy;
- negotiating entry into the international community; and
- transitioning to a democracy, civilian rule, or social justice.

Another goal of this handbook is to bring a particular focus to the importance of the processes by which constitutions are made. There is much study (by constitutional lawyers and political scientists, among others) of the effect on conflict and deep division of choices on the content of constitutions. There has so far been limited research on the impacts of constitution-making processes, either on conflict resolution and reduction of deep divisions or on the success or failure of constitution-making more generally (for example, as when observers might attempt to measure success by longevity). As discussed further in part 1, the little research done to date has so far not provided the evidence that permits prediction of effects arising from the use of one procedure over another or in particular combinations. Some scholars have broadly noted that more democratic processes tend to produce more democratic constitutions, and that the

more representative the constitution-making body, the greater the likelihood that the country will not return to violence.

The lack of such evidence is related to the immense variety in both the shape of processes and the context in which the processes take place. Context alone tends to ensure that in any case there are multiple variables that have a great effect on the outcomes of a constitution-making process that cannot readily be taken into account in either evaluating a process or determining lessons from past processes when planning later ones. Such variables include culture, history, leadership, resources and economic activity, the nature of the conflict or division, numbers of languages, geography, and degree of strategic interest on the part of international actors. Another reason why an assessment of outcomes is difficult is that processes are often not so much designed as negotiated through intensely political interactions usually dominated by politicians and often behind closed doors. (See the discussion of this issue in part 1.) Extensive public participation can generate involvement of new actors, which can make what is often an ongoing series of negotiations about the process ever more unpredictable.

Accordingly, outcomes of a process or procedure may depend less on its design and implementation than on other dynamics: whether political leaders or spoilers derail the process; the levels of resources available for the process; the availability of skilled political leaders or negotiators; a change in the international community's agenda or commitment to the process; and the cost of failure (for example, whether it might mean a return to war); and the like.

Even determining what is a "success" or a "failure" for a constitution-making process is difficult. A legitimate constitution may be an element of success. But who defines what is a "legitimate" outcome, and how is this measured? Longevity of a constitution may be seen as a measure of success of the process that adopted it. But many people assert that constitutions made to assist in the transition from war to peace may succeed in that role at that time, but then need to be changed to meet the needs of more stable times. It may also be difficult to link longevity to procedural or implementation choices. A constitution may be short-lived for reasons little related to the process by which it was made. Moreover, a process that does not result in a constitution may set the stage for future constitutional reform and more democratic institutions and practices. For example, extensive civic education in a "failed" process may lead to demands for a consensus-based constitution in the future, or even have positive impacts on constitutionalism under the existing constitution.

Despite the lack of evidence about the effects of constitution-making processes and procedures, there are clear trends toward new standards in such processes and general principles about what may support a more durable peace in conflict and postconflict contexts. As discussed further in parts 1 and 2, this handbook places a particular emphasis on public participation, which is closely connected to gradually broadening concepts of people's democratic rights. There are other broad principles of constitution-making—inclusiveness, representation, transparency, and national ownership—that, together with public participation, are seen by some as part of a "new constitutionalism." Those principles and their potential

benefits are discussed toward the end of this section.

The intended audience for the handbook

Our intended readers include anyone who may be engaged in a process or who is interested in improving constitution-making practice. They could include members of constituent assemblies or constitutional commissions, government officials, politicians, civil society, activists, donors, foreign advisors, policy analysts, academics, and international-aid actors. We have tried to cover a wide range of issues, ideas, experiences, problems, and successes, and to provide practical tips, in the hope that the book will be helpful to the greatest possible range of people.

Although we have prepared this handbook to be of use to a wide audience, we pay special attention to the needs of the reader undertaking a constitution-making process in a conflict or postconflict country. Divided societies face unique challenges in achieving a consensus-based constitution. Mistrust may be endemic among communities or between new and old leaders. Spoilers may remain outside the constitution-making process or emerge as it proceeds. Leaders or institutions involved in the process may have fuelled the conflict. International actors may have assisted in promoting constitutional negotiations, but may also be exerting pressure for particular outcomes.

Our focus on conflict and postconflict situations does not mean we are ignoring any aspect of the tasks, procedures, and institutions found generally in constitution-making processes. Processes of constitution-making during or after conflict are as varied as they are in any other situation. However, our focus on constitution-making as a means for conflict resolution and transformation has led us to consider particular aspects more intensely. One example concerns interim constitutional arrangements, which can often play an especially prominent role in a postconflict process. It also means that we discuss the conflict issue at each step of the process, including the first decision: whether a new constitution should be prepared. In some cases, the process of creating an entirely new constitution may risk exacerbating or restarting the conflict.

The handbook as a tool in ongoing dialogue with constitution-makers

It is our hope that this handbook will become a tool in the continuing dialogue with a variety of practitioners and experts to improve constitutional practice. A key challenge in preparing this handbook was organizing the wide range of knowledge, experiences, and complex combinations of institutions, tasks, and procedures into a format that could be easily accessed and digested. For these reasons Interpeace has placed this first draft of the handbook on the Internet at www.interpeace.org/constitutionmaking, for feedback and to promote continued discussion. After each section of the handbook on the website, there is a space for readers to provide comments. We would be grateful if readers would enlighten this first draft of the handbook with their experiences, observations, and suggestions with regard to the content and how to improve the

accessibility of the material. In 2012 we will be providing a mechanism on the website whereby those involved in a process can get answers to their constitution-making questions.

How to use this handbook

This handbook draws on experiences of constitution-making in all parts of the world. Those experiences show that there is no single correct approach to constitution-making. Furthermore, unlike elections or other tasks involved in creating a democracy, constitution-making does not follow neatly prescribed stages. A wide range of tasks can be carried out as part of a constitution-making process, and in designing and developing a process, many choices are made that result in major differences between processes. Similarly, there are many choices that can be made about the institutions or procedures used to carry out any particular task. As a result, there was no point in organizing this handbook in a linear fashion, starting with a particular task that should ideally be carried out by a specific institution. Instead we have organized the main discussion (in parts 2 and 3) around, first, the tasks, and second, the institutions and procedures that can be used to carry out those tasks. They are the common elements of a constitution-making process from which to choose when designing a process. Many factors can influence the choices made when designing a particular process. Some institutions are commonly used in countries with particular legal and political traditions but rarely used elsewhere. At the same time, ideas about both constitution-making and the contents of constitutions that originate in one place are often copied or modified in other places. As a result, even an institution that might at first sight seem quite exotic can be of interest in other places. For that reason alone we need to be comprehensive in our coverage of the wide variety of experiences of constitution-making processes.

Even if institutions do not always travel well between countries, the tasks that need to be performed as part of a constitution-making process tend to be similar. For example, it is usually necessary for constitution-makers to do most of the following:

- think through and research the issues facing the country;
- consider the choices of constitutional arrangements that will best respond to the issues;
- educate and consult the people about the issues and the choices;
- negotiate among major political groups and those with powers of decision-making about the constitutional choices;
- administer and manage the constitution-making process;
- draft, debate, and adopt a new constitutional document; and
- make arrangements for implementation of the new constitution.

Although some of the main tasks involved in constitution-making have to be carried out in nearly any process, the institutions used to carry them out tend to be quite different from country to country. It is in part for this reason that we have separated the discussion of tasks from the

discussion of the institutions and procedures used to carry them out. Additionally, certain groups that often play key roles in a process (e.g., media, civil society, government departments, political parties, and the international community) are in many ways outside the process, so we discuss them separately from tasks and institutions.

We must emphasize that we are not recommending that any particular set of tasks should always be undertaken, or that any particular institutions should be used to carry them out. Instead, we offer a wide menu of options that can be considered by anyone designing a constitution-making process (or even gradually developing one in response to ever-changing circumstances).

We have divided the handbook into four main parts:

Part 1 is an introduction to constitution-making processes. It outlines the key issues about the roles of constitutions (the main reasons why they are made) and some of the challenges, dilemmas, and opportunities involved in constitution-making, especially in situations of conflict.

Part 2 discusses common tasks carried out in constitution-making processes. Although we seek to impose a degree of order through the sequence of our discussion of these tasks, they cannot be dealt with entirely in chronological order; constitution-making processes do not all do the same things, nor do they do them in the same order, and many tasks are done simultaneously or repeatedly.

Part 3 is concerned with the institutions and procedures commonly established to carry out the tasks. These include commissions, constituent assemblies, and national conferences, as well as bodies created for other purposes but that may be involved in the constitution-making process by necessity or in exceptional circumstances—including a parliament, the secretariat of a parliament, the courts, and the election-management authorities. We have also included here what we refer to as “procedures,” such as referendums.

Part 4 provides guidance for external actors in the process, who may act on their own initiative or be linked with the official process. This section focuses on the role of civil society and the media in activities such as starting the process, voting, civic education, public consultation, making submissions, research, lobbying, and monitoring the process. It also discusses the common pitfalls for constitution-making processes when the international community has taken a leading role, either officially or unofficially. It concludes with an observation about the lack of guidance in this area for international constitutional-assistance actors and some brief practical tips for improving international engagement in these situations.

A series of appendices provides case studies, a glossary of terms as specifically used in this handbook, examples of codes of conduct, references, and suggested readings. Appendix A introduces the reader to a range of constitution-making processes. Short case studies are included to help the reader in a number of ways. Although there are numerous examples of tasks, institutions, devices, and dilemmas included in the main text, we are conscious that these are

Table 1: Countries/regions discussed in handbook

Afghanistan	(see case study at appendix A.1)	Madagascar	
Albania		Malawi	
American Samoa		Malaya	
Angola		Malaysia	
Australia		Maldives	
Austria		Mali	
Bangladesh		Mauritania	
Belgium		Mauritius	
Benin	(see case study at appendix A.2)	Montenegro	
Bolivia	(see case study at appendix A.3)	Mozambique	
Bosnia-Herzegovina	(see case study at appendix A.4)	Myanmar (formerly Burma)	
Bougainville	(see case study at appendix A.9)	Namibia	
Brazil		Nauru	
Bulgaria		Nepal	(see case study at appendix A.8)
Burkina Faso		New Caledonia	
Burundi		New Zealand	
Cambodia		Nicaragua	
Cameroon		Niger	
Canada		Nigeria	
Central African Republic		Northern Ireland	
Chad		Norway	
Chile		Pakistan	
Colombia		Papua New Guinea	(see case study at appendix A.9)
Croatia		Peru	
Cyprus		Philippines	
Czechoslovakia		Poland	(see case study at appendix A.10)
Democratic Republic of the Congo		Portugal	
Ecuador		Puntland (Somalia)	
Egypt		Qatar	
El Salvador		Republic of the Congo	
Eritrea		Russia	
Ethiopia		Rwanda	
Fiji		Saint Kitts and Nevis	
Finland		São Tomé and Príncipe	
France		Saudi Arabia	
Gabon		Serbia	
Georgia		Sierra Leone	
Germany		Solomon Islands	
Ghana		Somalia	
Great Britain		South Africa	
Greece		South Korea	
Guatemala		South Sudan	
Haiti		Spain	
Hungary		Sri Lanka	
Iceland		Sudan	
India	(see case study at appendix A.5)	Sweden	
Indonesia		Switzerland	
Iran		Tanzania	
Iraq	(see case study at appendix A.6)	Thailand	
Ireland		Timor-Leste (formerly East Timor)	(see case study at appendix A.11)
Israel		Togo	
Italy		Uganda	(see case study at appendix A.12)
Japan		United Kingdom	
Jordan		United States	
Kashmir		USSR	
Kenya	(see case study at appendix A.7)	Vanuatu	
Kosovo		Venezuela	
Kuwait		Zambia	
Kyrgyzstan		Zimbabwe	
Lithuania			

not organized in a way that provides a reader with a strong sense or overview of how institutions, processes, and tasks fit together in a process. The case studies illustrate how these various elements have been combined in actual processes.

Each case study provides an overview of why a new constitution was prepared, how long the process took, what institutions and processes (including referendums) were involved, whether it was broadly a participatory process, how much international involvement took place, and whether the process led to a constitution that was adopted. The cases were chosen to be geographically balanced and to illustrate the diversity of constitutional objectives, circumstances, tasks, institutions, involvement of external groups, and outcomes. In appendix D the reader will find references to other works, in particular case studies that go more in depth to particular processes.

Some of the country examples that appear in the body of the handbook to illustrate particular points refer to the case studies in appendix A. By referring to the case study from which the example was taken, the reader will be able to understand the overall structure of the process in that country.

We have designed this handbook to be used in a flexible way depending on the needs of the reader. Some people might read it from beginning to end. Others are more likely to be interested in certain aspects, or will focus on particular sections as they become relevant to them. Although we have tried to make each section as self-contained as possible, we do recommend that all readers begin with part 1. It is essential to a better understanding of key aspects and challenges that are referred to in the rest of the handbook.

Because the book cannot be organized in tidy stages, we include many cross-references. These will help the reader move readily between widely separated parts of the handbook that are related. For example, there will be a cross-reference from a discussion of the tasks of managing a process (in part 1) to an exploration of the bodies that manage processes (in part 3), and from a discussion of referendums to one on the task of adopting a constitution and one on dealing with a divisive issue (all discussed in part 2). Cross-references are provided to case studies in appendix A and to material in other appendices, which include sample codes of conduct and a glossary of the terms used by constitution-makers and those who write about them.

Throughout the text, a year that appears in square brackets following the name of a country (e.g., “Afghanistan [2004]”) indicates the year that a given constitution-making process ended, whether or not the process resulted in the adoption of a constitution or a proposed set of reforms. Where the phrase “[ongoing process]” appears after the name of a country, it indicates that a process was still under way in that country at the time of writing (mid-2011).

Table 1 sets forth the country contexts referred to in the handbook and notes those that have a corresponding case study in the appendices.

Acknowledgments

Over the course of four years, dozens of experts and practitioners contributed to the development of this handbook by participating in global meetings and workshops organized by Interpeace on constitutional issues. Some of the reports (and the names of those participating) from these discussions are available at www.interpeace.org/constitutionmaking. Dozens more were interviewed on specific issues as part of our research for this handbook.

They represented every region (although primarily from the Global South), were a gender balanced group, and had experience in constitution-making processes from a variety of perspectives: as advisors, as leaders of constitution-making or administrative bodies, as members of political parties, and as members of civil society. They hailed from or worked in such diverse countries as Afghanistan, Benin, Bolivia, Bougainville, Cambodia, Colombia, the Democratic Republic of the Congo, Timor-Leste, El Salvador, Eritrea, Fiji, Georgia, Hungary, Iraq, Kenya, Nauru, Nepal, Puntland, the Solomon Islands, Somalia, South Africa, Thailand, and Uganda. We are most grateful for their contributions.

Although the focus of this handbook is practical rather than scholarly, we would like to acknowledge the debt we owe to a number of scholars whose studies have informed this text. In appendix D you will find references to works we have referred to. We are grateful to Nicholas Haysom and Professor Jennifer Widner for helpful comments on a draft of the handbook.

Some emerging guiding principles

The broad principles of “participatory” constitution-making can be summarized as public participation, inclusiveness (including gender equity) and representation, transparency, and national ownership.

Public participation

Political elites inevitably play a major role in making decisions about how to structure a new state. However, there is now an established trend to build into the process broad participatory mechanisms in order to avoid a constitution that simply divides the spoils among competing factions, and to improve the chances of the new constitution enjoying a high degree of popular legitimacy. The forms of public participation now go beyond voting for constitutional representatives or in a referendum. Instead, they include civic education and media campaigns, public consultation (both on how the process should be undertaken and on the substance of the constitution), national dialogue, and other creative means. We discuss throughout this handbook opportunities to make the process more genuinely participatory, along with the potential risks associated with public participation and how to minimize these risks. (See, in particular, part 2.2.)

Inclusiveness (including gender equity) and representation

An inclusive process will attempt to draw in all key stakeholders to the constitutional negotiations (see box 9). Special efforts will be made to reach out to marginalized segments of society, such as the disabled, women, youth, indigenous populations, and the poorest of the poor. This handbook discusses how to design a process that is inclusive at all stages. Some recent constitutional processes have deliberately undertaken special measures to ensure that women are represented by at least 25 percent in constitution-making bodies, and that they participate more fully during each stage of the process (e.g., Afghanistan [2004]). We provide examples throughout the handbook of how to ensure women's full participation in the process, including in the institutions' rules of procedure, during civic education and public consultation, as staff members or leaders of an administrative management body, and in playing a role in civil society activities such as lobbying and monitoring the constitution-makers. These gender equity tips are provided in each relevant section rather than having a specific section on gender issues.

Transparency

In contrast with the elite-dominated processes that occurred in closed conference rooms that were the rule until the 1970s, a transparent process enables the public, the media and civil society to participate by keeping them informed about how the process will be conducted, the modes of appointment and election of their representatives, the adoption process, their role in the process, and providing feedback about the results of public consultations. Transparency also involves providing for media access at appropriate times. This handbook discusses throughout when transparency is a benefit and when a more open process can be a drawback.

National ownership

Solutions to conflict and division must come from within a country if a durable peace is to have a chance. There is a need, in contexts where educated or experienced professionals or political actors have fled the country, to provide the space, time, and resources to develop the capacity of inexperienced national actors to manage and implement the process effectively. We discuss in several sections what national actors can do to manage or relate to international actors, in particular the international community, to reduce the influence of competing or foreign agendas that do not support the national objectives for the process. The handbook is also focused throughout on promoting a broader national ownership of the public through participatory mechanisms such as civic education and public consultation, etc.

Impacts of adherence to guiding principles

Designing a constitution-making process on the basis of such principles is regarded by some as likely to have a range of beneficial effects, including:

- providing a framework within which divided groups can work toward consensus on addressing causes of conflict and a governance framework promoting a durable peace;
- influencing the contents of the constitution by reflecting the concerns and rights of minorities;
- informing constitution-makers about the aspirations of the people;
- creating political space for the emergence of new actors and strengthening civil society actors;
- building trust between communities and leaders through dialogue;
- educating the public about constitutionalism;
- improving public ownership of the resulting constitution;
- laying foundations for democratic and participatory government and a culture that respects the rule of law;
- enhancing public willingness to defend the constitution and achieve its implementation; and
- contributing to future conflict prevention and transformation by encouraging conflict resolution through constitutional means.

While research has yet to provide clear evidence for beneficial effects of the kind just outlined, it can be expected that designing processes around such principles will often have a positive impact. On the other hand, there are no one-size-fits-all prescriptions for constitution-making processes leading to such outcomes. Such processes are intensely political and each context will have unique challenges and opportunities.

Inclusive, participatory, transparent, and nationally owned processes usually take a considerable amount of time to complete. In the constitution-making processes in Uganda [1995], South Africa [1996], and Bougainville–Papua New Guinea [2004], national actors took years to deliberate on their new constitutional order because of the special measures they adopted for greater public participation, transparency, and inclusion at each stage of the process. They did so in processes that involved little international guidance (though in Uganda and Bougainville there was international support in terms of funding, and a limited provision of advisors).

In each case the opportunity was seized to use the constitution-making process to promote national identity and national ownership through direct public participation, civic education campaigns, dialogue, reconciliation and conflict resolution among estranged communities, public consultation about constitutional options, and a process of consensus-building among all key stakeholders. Leaders of these nationally owned processes more readily understood the benefits of focusing on the process and not just the content of the constitution. This can be contrasted with intensely international settings where short timetables are imposed, which have led to the exclusion of civil society and the broader public. (See part 4.2.)

While these guiding principles are referred to at various points in this handbook, they are not promoted as the key to success if applied uniformly. In some circumstances it may be necessary to implement a process that does not adhere in full to the principles. Accommodation of elites may be necessary at particular stages. For example, processes that lead to interim constitutions,

and processes conducted in the context of high levels of instability, may require that parties to the conflict negotiate constitutional change to reduce conflict in the absence of fully participatory and transparent means (e.g., negotiations for the changes to the Papua New Guinea constitution agreed to in the Bougainville Peace Agreement of 2001).

During violent conflict, constitution-makers may need to limit public participation because a lack of security prevents the public or just key groups from being consulted. Popular participation can be hard to manage, does not readily involve people from all social groups, and can be manipulated by entrenched political interests, sometimes contributing to division and uncertainty. True inclusiveness is almost impossible to achieve, and efforts to achieve it can make a process unwieldy or unmanageable. Taken too far, it adds to the difficulties for decision-makers in making balanced and informed decisions. Transparency, while a laudable goal, may derail the process if deliberators are forced to try to reach constitutional compromises under the public's gaze.

Practice shows that these principles should be applied in ways that minimize risks and contribute to a durable peace by taking into consideration the unique circumstances of each case. This handbook provides guidance on the application of these principles, but always with reference to the political and social realities that constitution-makers face.

Part 1: Introduction to constitution-making processes

1.1 The role of a constitution

An understanding of the role of a constitution is critical to designing the process for making it. And the process is not only for making the constitution but for generating or creating the environment, promoting the knowledge, and facilitating the public participation that are conducive to a good constitution and to the prospects for implementing it. We therefore begin with a short discussion of the importance and role of the constitution.

1.1.1 Increase in constitutions

There has been much concern with constitutions and constitution-making in the last three to four decades. The world order has changed a great deal in this time; the final mopping-up of colonialism, with the emergence of new states, the end of military regimes, the collapse of communism, and efforts to end civil conflicts, particularly in multiethnic states, have all contributed to the production of constitutions. The variety of contexts in which constitutions have been made shows that the primary purposes a constitution serves vary considerably: nation-building as a new state emerges; the consolidation of democracy as the military retires to the barracks or authoritarian presidents are deposed; liberalism and the creation of private markets with the end of communism; peace and cooperation among communities to end internal conflicts. These purposes determine the orientation of the constitution, and often also the process by which it is made.

Constitutions are dependent on national contexts in another significant way. The conception and understanding of, and therefore the respect for, constitutions vary, depending in considerable part on national history and the reliance on and respect for law as a key mode of organizing society and state. So the terms “constitution” and “constitutionalism” do not always have the same meaning or impact in all countries.

1.1.2 Importance of, but difficulty in implementing, constitutions

A new constitution can take root easily if the country has a commitment to and the infrastructure necessary for the rule of law. But other social and political orders of authority may compete

with it where charismatic politics or the tradition of the “strongman” prevails, where high authority is ascribed to religious or customary leaders, or where society is closely regulated by social norms, institutions, and hierarchies. In a society that is largely homogenous, with common values and aspirations, and with members who have been part of the same state for a long period, constitutional reform is relatively easy, but not particularly critical (for example, consider the reform of the governmental system in Finland in 2000). Such a country may indeed be able to dispense with, at least, a formal constitution (as is, or at least until recently was, the case in Great Britain and New Zealand). A state that has several communities with different languages, religions, or modes of social organization is less able to rely on common values and social institutions for the regulation of society. Instead it may have to depend in part on the values, aspirations, rules, institutions, and procedures incorporated in the constitution—and this is not easy, as old loyalties and habits persist but also take on new political significance.

Sometimes the provisions of the constitution to protect the rights of the people, promote constitutional values of equality and social justice, and ensure the integrity and the accountability of the government fail. One reason is that the state in many developing, and indeed some developed, countries is the principal means by which ministers, bureaucrats, and others with special access to the state accumulate illegal wealth, give state jobs and contracts to relatives and friends, and protect themselves from due process of the law (by impunity, bribery, or intimidating the judiciary). Even when new institutions to promote the accountability of state organs or fight corruption or protect citizens’ rights are established (as they are in many new constitutions), they are corrupted and often rendered ineffective by ministers, bureaucrats, and tycoons.

A particular difficulty in implementation arises with regard to constitutions that are made in conflict or postconflict situations. They are made under considerable pressure or even coercion, often from powerful Western states, and assume demilitarization, the establishment of consensual institutions and orderly state processes, and an end to violence. But rarely do the antagonisms and the armed forces that led to conflict end, nor does the cease-fire last long. A particular focus of this handbook is constitution-making in conflict situations.

1.1.3 Constitutions as symbols and manifestos, and as legal rules

A constitution has several dimensions. A distinguished authority on constitutions, the late Professor Kenneth Wheare, drew a distinction between those who regard a constitution as primarily and almost exclusively a legal document in which, therefore, there is place only for rules of law and for practically nothing else, and those who think of a constitution as a sort of manifesto, a confession of faith, a statement of ideals, a “charter of the land” (Wheare 1966). Since he wrote this in 1966, the debate over the proper function of constitutions has intensified.

1.1.4 Constitutions as contracts among people or peoples

Fundamentally, a constitution is the basis for the organization of the state. The state is the mechanism through which a society provides for the exercise of political, administrative, and judicial powers in order to ensure law and order, the protection of the rights of the people, and the promotion and regulation of the economy. As the notion of the sovereignty of people has superseded other beliefs about the source of ultimate authority, the constitution has come to be regarded as a contract among the people on how they would like to be governed. In most cases this is a fiction, as the people may have had no substantive role in making, or even influencing the decisions about, the new constitution. However, due to the notion of people's sovereignty and the fundamental right of the people to participate in public affairs, there is a tendency, indeed a compulsion, to promote people's participation in constitution-making (which is part of the inspiration for this handbook).

But the idea of a constitution as a social contract derives from another recent development—a contract not among the people to which each individual is a party, but among diverse communities in the state, often relatively new, where the bonds among the different communities are few and weak. Communities decide on the basis for their coexistence, which is then reflected in the constitution, based not only on the relations of the state to citizens but also on its relations to communities, and the relationships of the communities among themselves. In such situations, the constitution sometimes provides for “partnerships” among the communities in government and other forms of communal power sharing.

1.1.5 Orientation of new constitutions

In this way—and also because of changing understandings and expectations of the functions of the state, which now include public welfare and policies for a just society, the promotion rather than just the protection of rights, honest administration, and a sustainable environment—the scope of the contemporary constitution goes well beyond its older counterpart. That constitution dealt principally with the structures and powers of the state (and often assumed rather than provided the method for electing the legislature or the government). The constitution did not specify policies of the state but left them to be developed by the political process within the framework of the constitution. With the rise of the middle classes in the nineteenth century, some civil rights of citizens (including property) were incorporated in the framework for policy and lawmaking, but for a long time there were no serious restrictions on state power.

With the increase in the functions, powers, and duties of the state, the constitution began to intrude on society, to try to change it, to assist disadvantaged citizens or communities, to take responsibility for education, health, the economy, and other matters that impinge deeply on society. India was one of the first countries to see the constitution as a means of transformation of social, political, and economic relations. This development has been criticized by some, for two reasons. They consider that the proper function of a constitution is to define state institutions

and limit their functions. And they say that the impossibility of achieving most constitutional values and aspirations discredits and delegitimizes the constitution. This is a statement—often driven by the ideology of the commentator—that is hard to assess.

In many countries with great poverty, a constitution without the commitment to eradicate poverty and ensure social justice would enjoy little legitimacy from the mass of the people. There are also other dangers in a constitution intended to transform society. It raises high expectations, which if disappointed also lead to the loss of legitimacy. A constitution that seeks to transform social and economic relations will almost certainly be resisted by the privileged and the well-off, who normally have enough power and skills to undermine the constitution.

1.1.6 Choices for constitution-makers

Some other issues also constitute serious dilemmas for constitution-makers. How much salience should the constitution give to ethnic differences? What is the proper balance among national, tribal, religious, and linguistic identities? Is it morally right to design all decisions for majority voting? What is the appropriate balance between principles and the details of policies? Are there some principles that must be stated in the constitution? Are there some matters of policy that are so clearly matters for governmental decision-making that they should never be entrenched in the constitution (and if so which are these)? The same questions can be raised about institutions, especially given the current vogue for independent institutions. Do too many independent institutions incapacitate the state and undermine legitimate political processes? In all these ways, does the constitution become too rigid, unable to respond to unanticipated problems? Are there problems with a constitution that is long, as many new ones are? And what are the criteria for success of the constitution that constitution-makers should apply? Is longevity one of them? If so, why? Shouldn't each generation (the "people" for the moment) decide on its own system of governance?

In his assessment of many of these issues, the distinguished political scientist Giovanni Sartori concludes: "most recent constitutions are poor instruments of government" (Sartori 1997: 197). This conclusion may not resonate with some other commentators, who consider that the constitution in the contemporary world must serve several important functions and that it must balance competing interests. Constitution-makers have to decide on the orientation and scope of the constitution. For the purposes of this handbook, we need to understand the impact of different methods of constitution-making on the orientation and scope of the constitution, and in particular the consequences of popular participation. We discuss this matter throughout.

1.1.7 Constitutionalizing responsibilities and duties

This section returns to a key legal dimension of the constitution. The constitution is not only law, it is supreme law. This means that no law or policy that is inconsistent with the constitution is valid—and the social contract is safeguarded, both in its symbolic and in its substantive

elements. The constitution binds all the people and their institutions, not only state organs. Experience has shown that the purposes and dictates of the constitution are not easily achieved. It is difficult to establish the rule of law under which state power is exercised for the purposes for which it is granted or in accordance with procedures prescribed by the constitution. Because this is not easy, especially in societies where other sources of power (such as customs or religion) are often inconsistent with those of the constitution, constitution-makers have to pay special attention to rules and procedures for implementation and enforcement.

1.2 Issues of process

In this section we provide an overview of the issues that must be considered in designing the constitution-making process.

1.2.1 Changing ideas and practices of constitution-making

Processes for constitution-making have changed over time. Once it was the prerogative of the monarch to decide on and grant the constitution to the people. (We find traces of this belief in several constitutions made as late as the twentieth century—for example, in Ethiopia, Jordan, Kuwait, Nepal, and Saudi Arabia.) Many constitutions were imposed on a vanquished or colonized people (for example, in Western imperial systems—the MacArthur constitution in Japan after World War II, and to a lesser extent in postwar Germany and in colonies at independence). In the early and middle years of the twentieth century, democratic processes of constitution-making became the norm, with the principal responsibility assigned to a parliament or constituent assembly (though many constitutions were still made without much public participation). Since the last quarter of that century, the emphasis has shifted to the active and intensive participation of the people—whether as individuals, social organizations, or communities—in the process (as in processes in such diverse countries as Bolivia, Kenya, Papua New Guinea, Thailand, and Uganda). This shift has been facilitated considerably by the broadening of the concept of people’s democratic rights, including public participation, as reflected in the International Covenant on Civil and Political Rights, and particularly the right of self-determination.

Public participation, in the context of the variety of purposes that a contemporary constitution may be expected to fulfill, leads to a complex and often lengthy process. In previous ages, experts in constitutional law and political science, under the auspices of the executive (or, less frequently, the legislature), played a key role in the process. Today the range of participants in the constitution-making process has increased greatly, as have the issues that constitutions need to address. Consequently, considerable attention is paid to the design of the constitution-making process and the fundamental principles that must determine the substance of a constitution. The design of the process is often a matter of domestic negotiations (which can be protracted); sometimes it is determined or influenced by the

international community (especially in cases of intense internal conflict, as in Afghanistan, Cambodia, Kenya, Kosovo, Namibia, and Zimbabwe).

1.2.2 Can the constitution-making process be designed?

The notion of designing a process may suggest a high degree of rationality, based on an understanding of the consequences of different possible arrangements. In recent years researchers have been trying to assess, for example, whether a parliament or a constituent assembly is better geared to the task of constitution-making, whether transparency or a measure of confidentiality in negotiations is more likely to produce consensus, whether deadlines should be prescribed for the conclusion of different stages of the process, and, significantly, the consequences of a high degree of popular participation. The research is not so advanced that we can make any predictions with confidence, although case studies are beginning to provide some basis for advice on the design.

Another difficulty is that even if we had enough knowledge to design the process, constitution-making is intensely political, with high stakes for many groups in society, particularly politicians. Constitution-making processes are not so much designed as negotiated. Often there is little scope to control political actors, who seek to dominate the process. There was considerable agreement on the design of the Kenyan process that began at the end of 2000, involving a key role for experts and a high degree of popular participation. However, as the implications of constitution-making for substance (and perhaps also for the growth of people's consciousness of power) became clear, the agreement dissolved as politicians tried to exclude others from decision-making. In mid-2004, politicians took charge, and the process beginning in 2008 was substantially firmly lodged in the control of the political class.

Furthermore, the process generates its own momentum, popular participation leads to the expansion of the reform agenda, groups hitherto excluded seek representation, and spoilers appear unexpectedly—all of which may place a strain on the original scheme. There may be a selective boycott of the process by an interest group (or even, as in Iraq and Somalia, intimidation of those who engage in the process). A significant part of the process will consist of negotiations, at different levels and at various stages of the process, whose outcome cannot be predicted. The survival of the process may depend on the ability to accommodate these forces or to respond constructively to fresh demands. A sense of the dynamic of the process is a valuable asset.

In designing the process, attention is focused largely on what we may call the “official” process: of institutions created or used for deliberation and decisions, of constituencies and interest groups formally represented, of rules for decision-making, and so forth. But these do not capture the range or complexity of the activities, including lobbying and scheming, that go on outside the formal process. National or foreign civil society organizations may run a

sort of parallel process, or aspects of one (such as civic education or the mobilization of marginalized communities; see part 4.1). The international community can play a critical but unscripted role. There may also be a parallel or subterranean “official” process, with all sorts of negotiations among the parties (and others) that have a significant influence on outcomes (e.g., in respect to Japan’s post-World War II constitution, or the United States’ informal, sometimes clandestine, pressures in Afghanistan and Iraq). The official process cannot, and perhaps should not, try to encompass all these groups and activities, but some of them have the potential to undermine or delegitimize the fundamental principles, objectives, and procedures of the formal process, and point to the limits of national sovereignty in safeguarding the process.

1.3 Key components and issues of the constitution-making process

1.3.1 The importance of a design

The design of the process has a number of components. The principal focus is the method whereby the constitution is made and enacted, which includes the key actors and forms of representation and the mode of enactment. But it might also include interim arrangements intended to operate until the new constitution comes into effect, the objectives and principles determining the content of the constitution, the different stages of the process, and the management and funding of the process. The design also acts as a road map or timetable, setting out the sequence of and deadline for the activities and decisions leading to the adoption of the constitution. The precise scope of the design varies from one experience to another: some are minimalist (as in Cambodia [1993]) and others are quite detailed (as in Uganda [1995] and Kenya [2005]).

The design can take many forms. It usually involves an agreement among the key actors (principally political parties), legislation (standing alone or as part of an interim constitution), or an international agreement or treaty (in which case it is likely to be part of complex arrangements, including a cease-fire and the establishment of peace). The greater the consensus on the process, the higher the chances of success (although, as we have already noted, the process produces its own dynamics that can call into question aspects of the process).

Constitution-making processes have been designed in various ways. During decolonization, the colonial power sets up the process. A most elaborate process, in terms both of procedure and of substance, was imposed on India [1950] or the making of its independence constitution—to which India’s Congress Party reluctantly agreed. However, after the creation of Pakistan, Indians were able to simplify the process. In the post-Independence period, often the process is decided by the government, sometimes after discussions with relevant groups (e.g., in Tanzania in 1965 when it became a one-party state, in Zambia in 1991 when it moved

away from a one-party state, in Uganda in 1982, in Ghana in 1992 and lastly in Nigeria in 1979, 1989 and 1999. The Iraq process [2005] was designed essentially by the United States, which was an occupying force (although it made certain important concessions to local groups).

Frequently the process would be negotiated among political parties (as in South Africa [1996], Fiji [1997], and Kenya [2010]) or a larger range of interest groups (as in the francophone states in West Africa through national conferences). Increasingly, in conflict and postconflict situations, the decision on the design is part of a complex set of arrangements, including a cease-fire, disarmament, and integration of the armed forces.

The design is often made by parties engaged in conflict. Nepal in 2006 was unusual in that an agreement was made without outside intervention. Mostly, agreements on the process in these situations have involved the international community in significant ways. A prime (if somewhat unusual) example is Bosnia-Herzegovina [1995], where the constitution itself was made by the international community in an army barracks in the United States—there really was no process. Usually, the design (or at least its outline) is made at international conferences or through international negotiations (as in Afghanistan and Cambodia), or under intense mediation by the dominant interested states, mostly Western (as in Sudan, the states of the former Yugoslavia, and Kosovo). The Somalia process was agreed to through the mediation of the Intergovernmental Authority for Development with facilitation by the Kenyan government in 2004.

Not surprisingly, the principles and degree of detail vary depending on the context and the primary parties involved. The process is most detailed when it is negotiated locally, and is sparse when the international community is involved. (Sudan seems to be an exception.) A smaller role is played by experts when the international community is involved. The question of the ownership of the process is implicated in the mode of decision-making on the process, as is the degree of engagement of the people.

There are considerable advantages to a designed process. It is an important way to identify the key actors and to inform the public of the objectives and the road map, including their own role. It provides guidance on procedure and timing to those in charge of the management of the process. It can minimize disputes about the respective roles of actors. It can give an indication, at least, of the resources needed. The rules for the drafting and adoption of the constitution often influence the outcome of the process in terms of its legitimacy and of the orientation and content of the constitution. It may be the case, for example, that when political parties dominate, greater attention is paid to the system of government. And the more participatory the process, the more aspirational the constitution is likely to be.

1.4 Tasks and responsibilities in constitution-making

Constitution-making has thus become complex, involving a number of tasks and stages and

the proliferation of actors and institutions. An essential component in designing a process is to review the tasks and decide how to allocate them and obtain the resources needed to carry them out, and the sequence in which the tasks are undertaken. Subsequent sections discuss in some detail the options available for each of these issues, and some of the main tasks often undertaken as part of a process.

If the constitution is made in settled times, there are many options for the process, including a high degree of public participation. If the country is coming out of internal or external conflict, there may be an inclination toward a more controlled process, with limited or no public consultation. Increasingly, negotiations held during an ongoing conflict take the form of a constitutional settlement. In this case the process is confidential and often secret, and almost completely dominated by leaders of “warring factions,” with little room for wide public participation.

1.4.1 Resources

Constitution-making cannot, these days, be done on the cheap. The process as described below costs a great deal. Many countries that seek to make a new constitution and a new start have come through a long period of conflict, their resources depleted or appropriated by warlords, the economy shattered, facing pressing poverty and an empty exchequer. It is necessary at an early stage of planning the process to pay careful attention to the financial implications and the means of raising sufficient funds. All people are entitled to a fair, participatory, and effective process, but not every country can afford it. It is often possible to get external assistance in the form of money, equipment, and personnel, but that may be achieved at the loss of some national control of both the agenda and the process. Ways must be found to minimize costs whenever possible. Sometimes the ambitious goals of the process must be scaled down. However, if the design of the process is good and efforts are made to avoid wasteful expenditures, the international community is likely to assist. An early estimate of the costs should be made so that the process can be realistically planned and efforts to secure support from external sources can be initiated.

1.4.2 Sequencing the process

By “sequencing,” we mean how the different stages are organized and ordered, whether there are clear demarcations among them, and whether the commencement and the conclusion of the process depend on collateral processes and decisions. There are two distinct issues here. The first arises when constitution-making is part of a wider process of ending armed conflict and establishing a peaceful order. The question then is: at what stage does constitution-making become feasible and central? There may be important preliminary questions to be resolved first: a cease-fire, the control of weapons, other confidence-building measures, tentative understandings about truth and reconciliation processes, negotiations of impunity, and some interim arrangements (such as allowing rebels or excluded groups a role in day-to-day

government), before the parties negotiate the principles of the new constitutional order.

These considerations were critical in South Africa, and on the whole the sequencing that led to the adoption of the final constitution facilitated the constitution-making process. On the other hand, Nepal's recent experience (beginning in 2006) shows that unless these matters are first dealt with satisfactorily, the parties can get bogged down in the constitution-making process. However, some broad agreement on how the country is to be governed in the future (i.e., the principles of the new constitution) may be necessary to deal with the preliminary issues mentioned above. Sometimes a specific national situation governs the question of timing. It is said that the Philippines' Cory Aquino wanted a constitution urgently after her election and the overthrow of Marcos because she was afraid of a coup by the military and felt that a new constitution would minimize its power and deter it. There was no such urgency in Nepal; the king had been forced to give up his powers, and a preliminary agreement between the Maoists (just ending their insurgency) and the "democratic" parties had established a satisfactory basis that allowed them to set a more leisurely pace for a new constitution.

In a situation where conflict has not entirely ended, one relevant factor in the decision to proceed with constitution-making is the consideration of the stage at which maximum public participation might be possible, which may be well beyond the time of the cease-fire. It can sometimes happen that such participation broadens as the process moves on, as matters settle and people begin to feel more secure. We suggest below that one option, when significant public participation is not feasible, is to focus on interim arrangements, promoting as much public participation as possible but keeping the option of a more participatory process open for later. (See parts 2.1.9 and 2.2.2.)

Other tensions in conflict or postconflict constitution-making are the balance between peacebuilding, which may be favored by the international community, and local public pressures for a new constitution; incentives for the cessation of fighting versus trials for war and humanitarian crimes (raising difficult questions of impunity, compounded by the prohibition of amnesty under emerging international norms); and the choice between holding elections before the process and the imperative of confidence-building among the warring factions and between them and the public.

The second context in which the issue of sequencing arises is when the conditions for constitution-making exist, and the question is how best to organize the necessary tasks. The sequence depends on various factors, including the extent of public participation and the distribution of responsibilities for the different tasks. The sequence also depends on the purposes of the process, which can include national reconciliation, nation-building, and democratization. The first step is to agree on the need for constitutional reform, the principles underlying it, and the modalities of the process. The next is to engage the public in the process by providing civic education and information about the process and soliciting the views of the people on constitutional reform. There are different ways in which the people can be engaged; the choice may be to seek public opinion on the basis of a questionnaire or through an open-

ended process, or indeed on the basis of a draft constitution—or a combination of these. A central task is the drafting of the constitution, and here a critical issue is to determine who should have the principal responsibility for it. The debate on the draft constitution and its enactment are the next stages, which are often considered the final ones. But the adoption of a new constitution is only the beginning of the task of establishing a new political and social order, and it is extremely important to consider strategies for implementation as part of constitution-making.

A special issue in sequencing is whether constitution-making should follow or precede elections. Scheduling the process before regular legislative elections may be helpful, as delegates are less likely to know what their positions would be in subsequent electoral contests or in government. They are likely to take a longer view and attend to a range of interests broader than their narrow personal interests.

Another general sequencing issue is whether the people should be consulted before or after the preparation of a draft. Subsequent consultation gives the public a chance to comment on concrete proposals, but prior consultation provides greater scope for the expression of public views and the enhancement of people's initiatives. It is possible to have public consultation both before and after the draft is prepared, which is becoming the common practice (as in Kenya and Bolivia).

Throughout this constitution-making process many individuals, parties, communities, and interest groups play a part, give of their time and engage their passion, lobby for different values, institutions, and procedures, teach or learn about constitutions, deliberate, and decide. So when planning different stages, it is necessary to agree on the role of these actors: how they are to be represented, how they will express their views, and what part they will play in the actual decision-making.

1.4.3 Deadlines

It is useful to have deadlines for the different stages of the process; these are usually set out in legislation or in a founding document. But deadlines must be carefully considered, for too-short deadlines may limit public participation and may give the impression of the process being manipulated, while long deadlines may stretch the process unduly when the need is to provide closure and establish a new order. Processes tend to exceed original estimates or stipulated deadlines. There are various reasons for this: the complexity of the process, a slow start, a genuine underestimation of the time required, procuring financial and other resources, emergencies, and the selfish interests of delegates, commissioners, and the staff of associated institutions in prolonging the process.

Deadlines can be useful, but they require an enforcement mechanism—some way to penalize those who do not meet them. The reality is that deadlines are often missed because political will is lacking or some outstanding questions from the past have not been dealt with. (A good

example is the Nepal process.) Constitution-making processes are now quite complex, requiring consensus at different stages for them to move on, but it is easy to assume erroneously that the process will be smooth.

1.4.4 Agreeing on an agenda for constitutional reform

Sometimes the most difficult task in constitutional reform is building consensus about the need for reform, the type of reform, and the process for achieving reform. In some situations the need for reform is obvious to all—for example at the moment of independence, or after a revolution (e.g., as in Spain, Hungary, and Poland). Often reform is resisted by those in power, such as Marcos in the Philippines and Moi in Kenya from 1991 to 2000—they took office and attained power through the existing constitution. Sometimes a minority, excluded from government, wants reform but the majority resists it (if necessary by force of arms), as in Sri Lanka from the 1980s to 2009. In these situations the agreement to reform (or talk about reform) comes only after an intense conflict in which many lives may have been lost (as in South Africa, Sudan, and parts of India). These days it is not unusual that an agreement to consider or negotiate reform is the result of external pressure (as in Afghanistan, Cambodia, Kenya, Sudan, and Timor-Leste).

The agreement could be no more substantial than a decision to meet to consider reform, or it could be quite wide ranging, touching the areas of reform, the principles underlying reform, and the institutions for negotiation and the making and approving of reform measures. In conflict or postconflict situations, parties are unlikely to agree to talk about reform unless they feel that their critical interests will be protected. Thus, a prior agreement or understanding about the safeguarding of these interests, and about the fundamental constitutional principles to be incorporated in the final constitution, is often a precondition for negotiations. If the international community becomes engaged, then the incorporation of human rights as expressed in international treaties is likely to be mandatory.

1.4.5 The form of the agreement

An agreement on constitutional reform can take various forms, depending on the context. When the international community, especially the United Nations, becomes involved, there may be a multilateral treaty or a Security Council resolution (as in Cambodia and Timor-Leste). When the debate is among political parties—a common occurrence—there may be one or more agreements among the parties (as in Nepal and South Africa). Even in such cases, it may become necessary to have some legislation to give effect to the agreement, as it may affect the power of an existing institution (e.g., the legislature) or even the normal method of amending the constitution. Legislation (even entrenched) may also be required if there is little trust among the key parties, as was the case in Kenya [2010] following the undermining of the 2005 process, which was attributed in part to the lack of entrenchment. Legislation will also be required if new institutions are to be set up for the process (e.g., an independent

commission, although this may be done under an existing law authorizing the head of state or the government to set up such bodies administratively). Legislation, especially if entrenched, reduces flexibility, but adds security to the process (which is sometimes more important than flexibility). Under exceptional circumstances, the whole process, which entails fundamental constitutional changes, can be carried out purely on the basis of mutual understandings. (Hungary and Benin are good examples.)

1.4.6 Scope of reform: Interim, minimal, or complete?

One of the initial choices countries face is whether to engage in incremental constitutional change or to replace an existing constitution with a wholly new document that reflects a new order. In reality, however, countries that initially decide to embark on one approach often eventually change, and instead adopt the other—for example, when the incremental change required is found to be so extensive that a whole new constitution is required, or when major changes prove impossible to achieve but gradual change proves possible. (See part 2.1.2.) In the incremental approach, the drafters must confront outstanding problems, remove the most offensive passages of the existing constitution, and address glaring omissions, and at the same time generate momentum for continuing revision. Chile has pursued this strategy to some degree, as has Indonesia; Israel did so as it set about establishing a new state. An advantage of this approach is that it can lessen the drama surrounding the constitution. In some settings, creating a constitution *de novo* and using the constitution to solve a range of difficult problems can raise political stakes and may increase societal or political divisions. However, incremental approaches are most workable when there is significant trust among political representatives and between representatives and their constituents. The contexts in which the United Nations and others work generally do not display this characteristic. There is a belief that the incremental option may not be available outside stable, liberal democracies—although the case of Indonesia suggests otherwise.

An interim constitution has some resemblance to incremental change, but the former is clearly accepted as transitional, leading to full reform, while there is no such promise in the incremental approach. On the other hand, when supporters of reform settle for incremental change, they anticipate that the logic of the change will most likely lead to further reform (without prompting resistance from the existing regime).

1.4.7 Actors and public participation

A good process must balance the interests of different groups and communities. Sometimes the interests that dominate are those of the powerful, the urban population, or warring factions in conflict or postconflict situations. Frequently it is considered expedient to restrict public participation in order to ensure that interests critical to a settlement are privileged. By contrast, there are cases in which deliberate attempts are made to bring in groups that have been marginalized by political and economic forces. Indeed, the trend is toward the wide participation

of the public, as a manifestation of its “sovereignty,” to secure legitimacy, and—most important—to find out the expectations and wishes of the ordinary people. Today’s process is likely to involve political parties, religious groups, ethnic communities, professionals, business organizations, trade unions, women, the disabled, diasporas, regions, and parts of the international community. There are many forms of public participation, such as representation in the constituent assembly, acquiring a knowledge of civics, making recommendations to the assembly, lobbying, commenting on the draft constitution, and possibly voting in a referendum, in some cases at various points in the process.

Public participation may run throughout the process, though the forms may change, as may the intensity of popular engagement. The sequence of the forms of public participation is an important element in designing the process: determining the appropriate time for public debates and input from the general public, specialist groups, and contributions from experts, particularly constitutional experts; the time for negotiations; the time for drafting; and the time for enactment. At each of these stages different forms of public participation may be relevant.

It is important to disaggregate the forms of public participation, since such participation is now understood to be relevant to most aspects of constitution-making. Many critical elements of public participation are discussed in part 2.2.2; not all forms of participation may have an impact on what gets into the constitution. Indeed, the most public and intense forms of participation, such as public hearings throughout the country, may have a smaller impact on the content of the constitution than a quiet conversation between the government leader and a principal Western ambassador. So in designing the process, we should pay special attention to how much the form of public participation is likely to influence the outcome—and here the rules for making decisions on the content and for the enactment of the constitution are critical. (See part 2.1.4.)

Usually the most important actors are political parties, except in a conflict or postconflict situation, in which the armed factions may have greater, if temporary, dominance. Political parties are likely to promote greater public participation than militias—but how much greater will depend on the democratic and participatory nature of the parties themselves. In both South Africa and Nepal, political parties dominated the negotiations for reform and the process for making the constitution. But the former process was fairly participatory, and the latter much less so, for in Nepal each of the parties was dominated by one or two top leaders.

The increase in the number of groups participating in the processes has complicated them. The presence of many groups, with their different and often conflicting agendas, puts a premium on the negotiating skills of those entrusted with the management of the constitution-making process. There is real risk that instead of the process leading to a national consensus, it will sharpen differences and render impossible the adoption of a new constitution.

Public participation can set in motion competition. This is most evident in the competition between the people and the politicians, but also in that between men and women, traditionalists and “modernizers,” and the like. To some extent competition is regulated by the rules for

decision-making, especially with regard to which group is given the last say. (For example, if the final decision is to be made by the legislature, the earnest engagement of civil society and the development of a draft by a constitutional commission can come to naught if the legislature, driven by totally different considerations, vetoes it or amends it drastically.)

Therefore, while public participation is desirable, it comes with several dangers. It can degenerate into deception, promising people that their voices will be heard and then either twisting what they have said or just ignoring them. Neither inspires confidence in politicians, who are generally the ones responsible for such tricks. A second danger is that the role of experts may be minimized, or even denigrated, by the populism of participation. This may lead to an incoherent document. There is some evidence that public participation can lead to conservative, even intolerant, views when it comes to “moral” questions such as capital punishment, homosexuality, same-sex marriage, and abortion. Another danger is that social and ethnic divisions may become sharper as different groups fight for their interests. This leads either to conflict or to unwise or even unworkable compromises; both cases deny the objectives of “deliberative democracy” and of rational decision-making.

Public participation may not be restricted to domestic actors. In many conflict or postconflict situations, the international community (in different forms) may be an important actor in both planning and executing the process. Some parts of this public participation may be mandated by treaty or law, but a great deal of it may be informal or opaque, and sometimes it may entail plain intimidation. Equally, foreign involvement can be useful, and sometimes even critical to success. International involvement raises the questions of legitimacy and accountability: what is the moral justification for an international actor’s engagement in the affairs of another people, and to whom is it accountable? There are other ways in which a process may assume international aspects: the development of international norms governing the process and substance of constitutions; the ability to borrow from other constitutions, which has been facilitated by the Internet and the exchange of expert knowledge; the growth of an international class of constitution-makers and international nongovernmental organizations (NGOs). The varied participation of the international community is discussed in parts 2.3.12 and 4.2.

1.4.8 Deadlock-breaking mechanisms

It is possible that at some stages of the process described above, there may be a falling-out, and serious disagreements may appear. A disagreement can be procedural or it can involve principles or substance. For a procedural question, one possible solution is to seek a ruling from the courts. (The Kenya process [2005] stimulated numerous legal challenges to the authority of the commission and the constitutional conference, including one that questioned the validity of the whole process because there was no provision for a referendum; the court supported that challenge and thereby killed the process, even though a draft had already been successfully adopted by the conference, the equivalent of the constituent assembly.) The other kind of disagreement is less legal than political, and may make it difficult to arrive at a substantial

agreement, running the danger of a stalemate and deep social divisions. Here the courts may be less helpful; they may aggravate the problem by finding for one party when what is needed is a compromise. To avoid legal involvement when it merely sharpens differences, other mechanisms can be adopted. These include referring the disagreement to party leaders (as in Nepal); postponing the contentious issue for future resolution (as in Uganda and Iraq); coming to a resolution by a subsequent vote with a smaller majority; and engaging in mediation by a group of “elders.” These mechanisms are not always institutionalized—there is something to be said for informal, ad hoc arrangements. For a discussion of dealing with divisive issues, see part 2.5.2.

1.4.9 Drafting the constitution

When we talk of drafting here, we make a distinction between the process by which decisions are made on the content of the constitution and the process of writing it. For the first, there are several options. Traditionally the draft constitution was prepared by the legislature or the constituent assembly, usually through a committee. The assembly also debated and adopted the text of the draft. These days, many drafts have been prepared by a body other than the one that debates and approves the constitution. Such a body is generally called a commission; it is usually supposed to consist of experts (most in law, but also in economics, political science, and public administration). If the commission prepares the draft, it will normally be bound by certain predetermined goals and key elements of its procedure (often including consultation with the people). The assembly, being a representative body, has a greater degree of autonomy in determining both values and procedure. (See part 3.1.2 for more on commissions and assemblies.) The commission-based process has greater scope for experts, the other for politicians. How expert opinion is to be balanced by views that are more political or “populist” is decided in part by this kind of division of responsibilities.

The advantage of a commission is that this part of the process—the vital decisions on the draft constitution—can to some extent be distanced from political parties, tap expert knowledge, promote public participation, and formulate proposals oriented toward national rather than sectarian interests, and can consequently provide a fair basis for negotiations, facilitating a compromise. However, the composition of the commission is often affected by the appointment of people, not necessarily experts, as surrogates for other, usually political, interests.

Most countries have to make a choice between the normal legislature and a specially convened body to create the constitution. Two sorts of factors influence the decisions. One we may call political: historical tradition; the need for legal continuity (changes made in the way that is set out in the constitution); the legitimacy of the legislature (if widely respected, it could be entrusted with the changes); the dominance of political parties (which tend to favor the legislature); and the feasibility of fresh elections (whether before or after the process). The other factor is strategic: which body is more likely to be less selfishly interested in the outcome (the commission versus the legislature); the desirability of including representation from all sectors

of society (suggesting a specially convened constitutional assembly); a value placed upon civil society (leading to a participatory process); and the urgency with which the constitution must be completed (which would favor the legislature). (See part 3.1.2.)

The actual drafting (writing of the text) is normally, and should be, left to legal drafters, who will decide on the structure (architecture) of the constitution and the language of the text. The temptation to allow assembly members to draft the text should be resisted. The fixed and relatively well understood meaning of legal terms serves well the need for precision and consistency. Drafting is also not a suitable task for a large body of people. It is important to choose drafters who have experience drawing up constitutional instruments, which are in many respects different from ordinary legislation. As far as possible, simple language should be used. Drafters should be given the freedom to use their professional judgment on the architecture and text of the constitution, but they should respect the policy decisions made by the assembly. However, it is quite proper for them to draw to the attention of the assembly a decision that seems to be unworkable, or goes against fundamental constitutional values, and then seek fresh instructions. (See part 2.6.2.)

1.4.10 Debating the draft constitution

It is becoming common to allow time for public scrutiny and comments on the draft constitution before it is approved by the assembly. (“Assembly” here is used to refer to the body that makes the decision on adoption, even if the adoption is subject to a referendum.) The advantage of this practice is that the public can react to a concrete and comprehensive set of proposals, and assess with some confidence its significance for them and the state. If there has been opportunity for prior public consultation, they can now judge to what extent their views have been taken seriously. The period of public consultation can also be seen as a chance for “peer review,” an examination of the document’s strengths and weaknesses, and the opportunity to correct policy and drafting errors. (Some countries have invited experts to review the draft: Timor-Leste [2002], Afghanistan [2004], Nepal [ongoing process], and Zimbabwe [2000].) If political parties or the general public are divided on some issues, here is another chance to build consensus, although there is the danger that during this period fresh differences may emerge (as they did in Kenya [2010]).

It is important to ensure that the public is correctly informed about the contents of the draft and allowed to make an assessment of it. Here civil society and academics can play a vital part. It is surprising how ill-informed debates on draft constitutions and proposals can be; politicians, but not only politicians, have a tendency to make pronouncements without bothering to read the draft. (See the discussion of civic education in part 2.2.2.)

1.4.11 Enacting the constitution

The first decision to be made is about which body will have the primary responsibility for

approving or rejecting the draft constitution. Here the choice, as noted above, is frequently between the legislature and the constituent assembly. The second decision is whether there should be more than one stage of approval. The most common instance of more than one stage is when there is a referendum. Sometimes the draft can go straight from the drafter to the people for a referendum. This seems to have happened with the constitution of the European Union, and is stipulated in the Federal Transitional Charter of Somalia of 2004, but there are few other examples. The Kenyan process [2005] erred on the side of too many approvals—a national constitutional conference (broadly similar to a constituent assembly), a national assembly, and—a requirement imposed by the courts when the process was nearly finished—a referendum. It is important that there should be ample opportunity to consider the suitability of the draft, but too many approvals place hurdles in the way of enactment, give further opportunities to the spoilers to regroup, and perhaps need to be avoided. (See part 2.7.)

The other major decision regarding the design of the process concerns the rules for decision-making; different institutions have different levels where a decision to carry on with the process or to approve the draft will be made. Here the primary question is the majority required. A simple majority may not be seen to give enough protection to minorities. The constitution-making process is an opportunity to build consensus on fundamental national values. Sometimes this is taken to mean that there must be unanimity (as in Kenya, Nepal, South Africa, Uganda and Vanuatu). If this fails, there may be a formal (Nepal) or informal (Kenya) process to settle differences. But they both, like Uganda, provided for a two-thirds majority if no consensus was achieved. A large majority is preferable if the country is deeply divided, especially on regional or ethnic lines. But it increases the risk that no constitution may be adopted. So does a rule that states that a minimum degree of support in a minimum number of communities or regions should be required in addition to an overall national vote (as in Iraq, where the draft was nearly defeated by negative votes in three governorates). (See part 2.5.1.)

Many states provide for a referendum, but, contrary to what a Kenyan court thought, it is not indispensable under constitutional principles. Its use is less than universal and it is controversial. If the earlier stages of the process are participatory, with compromises to reach a consensus, then it may be unwise to put what has been achieved at risk. Referendums can be divisive, increasing tensions in society (as the experiences of Iraq [2005] and Kenya [2005; 2010] show). However, the Maldives (in 2008) made an interesting use of the referendum to determine only one issue, which had become extremely contentious—whether the executive should be parliamentary or presidential. Once that was resolved, the constituent assembly (the Special Majlis) proceeded quickly to adopt a new constitution. If the issue to be resolved touches on self-determination, a referendum can be a useful device to discover the people's preference (as has been proposed regarding secession in Canada, and carried out in Bougainville, New Caledonia, and South Sudan).

1.4.12 Implementing the constitution

Constitutions that are the product of long negotiations in which different interests are carefully balanced, or that seek to make fundamental changes in the organization of the state and society,

or that are agreed to under external pressure, are not easy to implement. Many provisions, particularly those dealing with values and ethical standards, or institutions aimed at accountability and the rule of law, may remain weak. Therefore special attention needs to be paid to the mechanism for a constitution's implementation and enforcement. This is seldom done as part of the constitution-making process. In some recent processes this matter has been addressed by a variety of measures: a schedule (an annex) in the constitution dealing with transitional matters; another containing a list of legislative and other steps necessary for implementation and deadlines for action; an independent commission with responsibility for supervision and implementation; a constitutional provision that principles should be implemented by executive authorities so far as possible, even if no legislation has been passed; a provision that courts should be able to give orders within the same framework; the empowering of civil society to participate in the implementation and mobilization of the constitution; and making the implementation of certain principles a condition, for example, for the assumption of specified powers by the executive or the legislature.

1.5 Assessing the impact of the constitution-making process

The processes of constitution-making described in this section are of recent origin, a response to the circumstances outlined above. There is not enough research on the impact of the processes in terms of reconciliation, permanence of peace, empowerment of the people, consolidation of democracy, growth of social solidarity, or economic prosperity. With the expansion in the scope of constitutions, especially those with ambitious social and economic agendas, the stakes in their orientation and content have increased and the processes can in these circumstances easily become contentious. There can also be tension for constitution-makers between pleasing the international community and pleasing local interest groups. There is little doubt that such processes introduce the people to a host of political and public issues and provide some education in the mechanisms of the state. But this knowledge is often fragmentary and subject to various interpretations, some clearly spurious and intended to mislead rather than inform. It is therefore necessary to have safeguards against blatant abuse, and oversight by watch bodies. Close attention should be paid to the dynamics of the processes. Correct information and honest analyses of the issues should be provided. The succeeding sections of this handbook address these matters.

1.6 Who does what? A table

Table 2 shows how the tasks that are carried out in a constitution-making process identified and discussed in part 2 may be performed by the variety of bodies and institutions identified and discussed in part 3. It is not necessary to have a particular body to perform a particular task. In the course of this handbook we may sometimes suggest that a certain body is often more suitable than another for a specific task. But we are conscious that national traditions, time and financial

pressures, and other factors may limit the choice in a given country. The table is not a prescription—it is merely meant to clarify the relationship between the tasks and the institutions.

To take a few examples from the top rows of table 2:

- Preparing a road map or timetable for a process could be done by a constituent assembly (if that assembly were in charge of the process). Where a constituent assembly does not exist, or comes late in the process, the road map may be prepared in a law or by the legislature, or it may have been specified in a peace agreement or a “roundtable” process or by the government. Often, civil society and political parties (and sometimes the international community) will have some input—though they do not have the power to make a legally binding road map.
- Generating ideas for the new constitution is something in which all sectors of society can participate.
- Developing guiding principles for the process and content of the constitution may be done in different ways. Sometimes a constituent assembly has done this near the beginning of the process. Sometimes principles are laid down in law, or through political agreement (in a peace process or by political parties); civil society again may participate.

Table 2: Who does what?

Tasks	Bodies														
	Constituent assembly	National conference	Legislature	Roundtable	Constitutional commission	Other bodies	Peace process parties	Special bodies	Experts	Electoral management bodies	Governments and their departments	Courts	Referendums	Civil society	Political parties
Starting the process							■				■			■	■
Road map	■	■	■				■		■		■			■	■
Generating ideas	■	■	■	■	■	■	■	■	■		■			■	■
Guiding principles	■	■	■	■	■		■		■		■			■	■
Civic education	■	■	■		■	■			■	■	■			■	■
Consultation on draft	■	■	■		■	■			■	■	■			■	■
Other forms of consultation		■	■		■	■	■								■
Making submissions							■				■			■	■
Receiving and processing views	■	■	■		■	■		■	■	■	■		■	■	
Resources management	■	■	■	■	■	■		■	■	■				■	
Managing media	■	■	■	■	■	■		■	■	■		■			
Managing international actors	■	■	■	■	■	■		■	■						
Making procedural rules	■	■	■	■	■	■		■			■				
Determining agenda of issues	■	■	■	■	■	■	■	■	■		■			■	■
Making choices on issues	■	■	■	■	■	■	■	■	■		■		■	■	
Dealing with divisive issues (special bodies)								■				■	■		■
Ensuring technical coherence									■						
Preparing concrete proposals	■	■	■	■	■	■			■		■				
Technical drafting of text									■						
Adoption of constitution	■	■	■	■								■	■		
Implementation			■						■		■	■		■	■
Dealing with problems								■			■	■		■	
Monitoring and evaluation	■	■	■		■				■		■				
Responding to failed processes			■	■	■						■			■	■

Part 2: Tasks in a constitution-making process

This book assumes that its readers are involved in, may expect to be involved in, or wish to understand the implications of the process of making a new constitution—especially a process that involves considerable consultation with and participation by the public. The structures by which this task may be performed vary according to legal and political traditions, backgrounds, contexts, local conditions, and other constraints.

In part 2 we focus on breaking down the larger task of “participatory constitution-making” into its various components. Each of these tasks will have to be carried out by someone, and here we examine what is involved in the tasks, leaving structures aside for the moment. We return to these structures in part 3. It is not possible to divorce studying a task entirely from the question of who will perform it, but we wanted to avoid confusing the reader by saying “the constituent assembly does this” or “the commission does that” because some readers might find that in their own national contexts, some body other than a constituent assembly or a commission was likely to carry out the task—indeed, their countries might not have embraced the idea of a constituent assembly or a commission at all. Our focus here is on the essence of the various tasks.

To visualize how a task might be carried out in a particular country, and what the constraints and opportunities are, it may be necessary to think at an early stage of who will carry out that task. We do not consider it our job to dictate who should carry out the various tasks—though we do not hesitate to comment on what experience seems to teach about this. It is for each country to decide, in the light of resources, context, and pressures, how best to get each task done. Table 2 indicates for a number of constitution-making processes who has done what task. And in part 3, when we discuss institutions and structures, we comment on what those structures have done, and might do.

Types of tasks

Constitution-making can be compared with designing a major public building. The authorities might think of their tasks as deciding what the building is for, why it is needed, where it should be situated, what facilities and spaces they want it to contain, what it should look like, and how it should be designed and built to achieve those results. They might want to consult the public, as users, about the design, layout, and location; questions of accessibility to certain users would arise, as would issues of time, scale, and cost.

Similarly, the constitution-making task will involve decisions about design, including who will use the product and how. There will be decisions about how to consult the public and how to use the resulting contributions. Municipal authorities do not have to educate their architects,

but someone may need to educate the constitution-makers, as well as the public, about what a constitution is and what it can and cannot do. And the constitution-making process will require complex administration. In this part, therefore, we offer sections about decision-making on policy and technical issues, on educating the decision-makers and the public, and on carrying out public consultation. There is a section on the specific task of drafting the words of the document, and a section on the administrative tasks involved in managing this sort of process.

Organization of this part

This part is organized to some extent chronologically; we begin with tasks to be performed at early stages, and the part ends with the procedures for adoption of a constitution and some details about its implementation. But many tasks are carried out more than once in the process—notably public consultation, which might take place early in the process for such questions as “Do we need a constitution-making process?” and “If so, how should we design it?” Later on, the public might be consulted again: “What do you want in your new constitution?” And even later on, “What do you think of the draft that has been prepared?” Other tasks are more or less continuous (such as monitoring and management) or are reiterated (such as drafting and redrafting). Therefore, we have put like with like: tasks of working with the public, such as civic education and public consultation, are grouped together, as are technical tasks about the substance of the constitution, and management tasks.

2.1 Tasks—starting a process

The tasks grouped in this part are all performed early in a constitution-making process, and are mostly concerned with questions of design or interim arrangements. Almost all involve issues about how to carry out a constitution-making or review process, or how to handle the transition period until there is a new constitution.

We begin, however, with the logical first task: “Do we need a new constitution?” That requires some consideration of where the country is now, in constitutional terms.

2.1.1 The constitutional starting point

A country that is contemplating a constitution-making process may:

- currently have no constitution at all;
- have no acceptable constitution;
- have a functioning constitution, but one that is expected to be replaced by a new constitution; or
- contemplate only amendment of an existing document.

Having no constitution at all is a rare situation, but it can occur if a new country is carved out of an existing one, or if a number of existing countries decide to form a new, perhaps federal,

state. Much more common is the situation in which conflict or radical political change has made the existing constitution unacceptable. Usually it is the institutions, the distribution of power, and the access to resources that are unacceptable, but sometimes even the existing document cannot be tolerated—perhaps because of who made it—even if the new institutions may not differ much from the old. Sometimes the existing situation is so unworkable or so unacceptable that constitution-making has to take place in two stages: first, an interim constitution is prepared; then, through processes established by the interim constitution, the final constitution is created.

The following examples indicate the variety of starting points and incentives that have affected constitution-making processes:

- **Timor-Leste**—was a totally new country carved out of Indonesia; for a while it operated on the basis of United Nations regulations, but it needed a constitution.
- **South Africa**—had a fully functioning constitution, but it was based on a racist rejection of any rights for the majority of the population; an interim constitution was adopted as the result of negotiations between the old regime and representatives of the majority. This was passed into law through the processes of the old constitution, and under its processes the final constitution was prepared.
- **Afghanistan**—had been controlled by the Taliban, who ruled in compliance with their view of Sharia (though they did say they used an existing constitution with its un-Islamic elements removed). After the Taliban were driven from power, the only constitution that seemed acceptable to the United States and the transitional Afghan leaders was that of 1964; shorn of its royalist elements, it was adopted as the interim constitution.
- **Switzerland**—had a constitution dating from 1874 that had been amended 140 times. Changing it was challenging, but it no longer reflected many accepted principles, including human rights; it was decided that a new document was needed.

2.1.2 Deciding if a process is needed

No constitution is perfect, but this does not mean that a country needs a whole new constitution. Sometimes it may be a mistake to rush into a commitment to such a new constitution. People may insist on this precisely because they have not analyzed what is wrong with the existing constitution. “Let’s start from scratch” is a way of avoiding, at least for the time being, such detailed analyses. Before embarking on a major exercise of constitutional design, the question should perhaps be asked: “Is our journey really necessary?”

A problem with the government does not necessarily demand a new constitution. The people of the Philippines have resorted on several occasions to “people power” to remove governments, but though there have been initiatives to implement a different constitutional system, it is not assumed that immediate change is needed. The Kriegler report on postelection violence in Kenya observed that:

it is important that Kenyans honestly assess all the activities related to the 2007 general

elections so as to distinguish between those that can be attributed to anomalies, failures, and malpractices traceable to gaps or provisions in the constitution and laws of Kenya from those that can be attributed to a bad culture encompassing impunity, disrespect for the rule of law, and institutional incompetence (Kriegler Commission 2008).

There are arguments against constitution-making, including:

- **Expense.** The costs of constitution-making in Africa have been estimated, in United States dollars, as the equivalent of \$30 million for South Africa, \$10 million for Uganda, \$6 million for Ethiopia, and \$4.5 million for Eritrea (or between 15 cents and \$1.50 per person in the country).
- **Divisiveness.** Constitution-making may be a great nation-building event, but if the wounds are too recent, or the process is not handled with extreme delicacy, the process may give rise to renewed or new conflicts.
- **Risk of failure.** A majority of constitution-making processes may be said to have failed, in the sense that they have not led to the enactment of a new constitution.
- **Constitutions should have some permanency.** A constitution that is changed frequently is not really a constitution at all, for it does not guide or regulate the affairs of government. Making a constitution work is not easy; it does not work unless politicians, citizens, courts, and other institutions take it seriously and take steps to make it work. A belief that problems can be solved by the mere adoption of a new constitution is a delusion.

None of this is intended to suggest that major constitution-making exercises are futile, but it is important to consider whether making a new constitution is necessary, or necessary immediately, or whether a more modest, incremental approach should be taken.

More modest enterprises

In some countries it may be enough to change a fundamental problem with the constitution, leaving the bulk of it unchanged. It might be more practical to have a simple process of review by a small group of experts given a limited task over a limited time, with the opportunity for public consultation, rather than a full-fledged process, which in some countries can be expensive, time-consuming, and even divisive.

There is a relationship between the complexity of the changes anticipated and the elaborate nature of the process that is set up. On the one hand, naturally, the more fundamental the changes, the more public input there should be. On the other hand, if an elaborate process is set up, it is quite likely that far-reaching proposals will be made, even if the initial mandate is limited. The original French constituent assembly was given the task of voting money for the king, but it seized the moment and became the government and the collective author of the constitution. Similar things have happened in West Africa, where national constitutional conferences have introduced changes that were more radical than had been anticipated.

Is a more modest approach feasible? Even in “no constitution” situations, it may not immediately be necessary to embark on a major constitution-making process; limited, temporary arrangements may be possible. Israel provides an interesting example. It became a separate

country in 1948 and planned to hold a constituent assembly. But it was immediately invaded and, since there was a feeling that 1948–49 was not the right moment because of the potential for disagreement (mainly over the connection between religion and the state), it abandoned the constituent assembly idea and, over the years, has enacted a constitution in bits. (It simply used the United Kingdom’s pattern of government as its basic framework.) Various efforts to produce agreement on a single constitutional document have not borne fruit. In Chile and in Indonesia, major efforts at constitutional reform have not been successful, but over a period of years various changes have been enacted to move each country away from autocracy.

The constitutional moment?

It is sometimes suggested that certain situations make it more likely that a country will be able to prepare and adopt a new constitution. Some people feel that a crisis, or the perception that there is a crisis, is a prerequisite—indeed, that a country at peace with itself will rarely be able to make a new constitution. The “crisis” argument holds that a sense that something serious will happen if there is no constitution creates an impetus for parties whose rivalry might otherwise prove an obstacle to agreement to work together. A sense of shared excitement about the future may serve a similar purpose, though it is rare for all sections of society to share that excitement, as the recent experience of Bolivia shows.

Some countries have, however, made constitutions, or carried out major reviews, while at peace. Canada, Finland, and Switzerland are recent examples.

It is not always easy to predict whether the circumstances will be right for adopting a whole new constitution. This is perhaps particularly so with a major review, which may take some years, and which may result in a radically different situation than existed at the beginning. This was what happened to the Kenyan process—especially because there was an election partway through the process, and the incoming government was unenthusiastic about the proposed changes.

Not all constitutional moments are suitable for the adoption of improved constitutions. In 2010, the president of Sri Lanka capitalized on his military victory over the Tamil rebels to introduce sweeping changes to the constitution—some of which enhanced the power of his office and his personal power.

2.1.3 Starting a process: The law and the politics

Here we explore briefly the matter of how constitutional processes are started. There are legal questions, but also political ones—how does a group within a society get constitution-making on the national agenda?

When there is no constitution

In the rare case of existing states agreeing to form a union, and thus having no constitution that governs their new entity, they can either continue to operate separately or devise some temporary cooperation agreement until their new document comes into existence. Their agreement will

Table 3: Constitutional review timetable

Country	Constitutional review
United States [1787]	Congress can pass amendments by two-thirds vote; two-thirds of the state legislatures can call a constitutional convention
Portugal [1974]	Normally there cannot be a review more frequently than every five years (but four-fifths of the legislature can vote to do reviews more frequently)
Papua New Guinea [1975]	There must be a review after three years
Fiji [1997]	There must be a review after seven years
Switzerland [1999]	The parliament, one chamber of parliament, or the people can initiate changes
Kenya [2010]	Any legislator can introduce amendments; one million citizens can initiate an amendment

probably set forth the process for making their new joint constitution.

Some recent examples of beginning with a constitutional “blank slate” have involved the international community—for example, Cambodia [1993], Timor-Leste [2002], Iraq [2005], and Somalia [ongoing process]. In Afghanistan in 2001, the 1964 constitution was revived on a temporary basis by the Bonn Agreement made among Afghan forces, with amendments because there was no functioning monarchy. In Iraq, the United States, which was an occupying power, essentially guided the drafting of a temporary constitution. In these situations there was no basis in existing national law for the constitution-making process, and no legal way to challenge it. After a coup, all or part of the constitution is usually suspended.

When there is an existing constitution

An existing constitution will include a provision for constitutional amendment. Rarely will it specify the entire process of amendment; often it will say only how the final adoption of a change will take place.

Some constitutions talk only of “altering” or “amending” the constitution or provisions thereof. A few constitutions specifically mention the possibility of enacting a whole new constitution. If this is not envisaged, sometimes there is doubt about whether the amendment process could be used to introduce a whole new constitution. In 2008 the Kenyan constitution was altered precisely to provide a mechanism for introducing a completely new document.

Some constitutions have several different amending procedures for different provisions—perhaps providing for different majorities in parliament, or requiring a referendum for some changes. (Canada’s constitution is a complex example.) This is one reason for not having a procedure for adopting a whole new constitution.

A few constitutions provide for a constitutional review. They may specify who can introduce amendments—the government, members of the legislature, the people—and they may have timetable requirements to prevent frequent amendments, or even to ensure periodic review. Table 3 shows a few constitutional provisions about starting review processes.

Some constitutions have provisions that cannot be amended at all, while the Indian Supreme Court has held that some aspects of the constitution (such as federalism, republicanism, and secularism) are so basic that they cannot be changed.

Some examples of initiation

Table 4 summarizes how constitution-making processes were initiated in a few countries where existing laws could not provide a mechanism, or even a starting point.

Table 4: Constitutional review initiation

	Country				
	Israel 1948	Bangladesh [1972]	Fiji [1997]	Afghanistan [2004]	Nepal [ongoing process]
What did existing law say?	Declaration of existence of state, adopted by Israel itself: new constitution was to be adopted by an elected constituent assembly	No law—because Bangladesh had been part of Pakistan	Constitution (itself a postcoup document) must be reviewed within seven years, but no mechanism was provided for this	Bonn Agreement—basic framework for process: constitutional commission and Constitutional Loya Jirga	Constitution: amendments required two-thirds majority of each house (but second house was not recalled when parliament was reconvened)
What steps were followed?	Assembly converted itself into an ordinary parliament and did not adopt a constitution; it used an institutional framework carried over from period of British mandate	Proclamation of independence declared the Bangladesh leader president with all powers—succeeded by war with Pakistan. After president released from detention by Pakistan he promulgated a provisional constitution and an order for a constituent assembly, and the assembly drafted constitution	Government (under internal and external pressure) set up, in consultation with the opposition, a review commission, which produced a draft that went to parliament under the existing constitution	Steps in Bonn Agreement were followed—though the president added (by decree) a constitution drafting committee to prepare a draft for the constitutional commission	Interim constitution was drafted by agreement between political parties and passed by one house

The political dimensions of starting a process

The impetus for changing a constitution may come from within the government. This may be the result of the realization that the existing document has become unworkable—either because it has been changed so often or because circumstances have changed so that the constitution is no longer appropriate. Switzerland is an example of the former, and a committee was set up in the 1970s to look at the possibility of changing the constitution. Finland is an example of the latter; pressure for reform came from the parliamentarians, who wanted a greater role for parliament.

Unfortunately, pressure from within the government is as likely to be self-interested as it is to be focused on the national interest. The eighteenth amendment to the constitution of Sri Lanka was passed at the urging of the president, and removes limits on the number of terms the president may serve, places the power of appointment to many important state offices (including the election commission) in the hands of the president, and in other ways weakens democracy. It was introduced at the insistence of the president, certified as “urgent,” and passed in one day.

Governments are often reluctant to embark on reviewing the constitution under which they got into power, so constitution-making processes are often generated by civil society or “informal” political networks. The tactics that get a process moving might include constitutional action, legal action, intellectual action, academic action, and people’s initiatives. A combination of strategies is often needed.

Constitutional action might be a citizen initiative (specifically provided for by some constitutions—see table 5) or a general petition process under the constitution. Many constitutions leave the initiation of reviews to parliament.

Legal action is expensive, time-consuming, and restricted in its scope—but sometimes it is a court case that shows that constitutional change is needed, though this is likely to focus on some fairly narrow point rather than on the constitution as a whole. A court may explicitly criticize a constitution, or the outcome of a court case may show the constitution’s weaknesses.

By “intellectual action” we mean reasoned efforts to argue for a new constitution, and thus to convince people and the government that something must be done. Again taking the Kenyan example, during the 1990s a number of organizations produced drafts of new constitutions designed to show not only that the existing constitution was weak but that a workable alternative was possible.

Box 1. Colombia’s popular movement for reform

A particularly interesting case arose in Colombia [1991], where a popular movement developed in favor of setting up a constituent assembly (though constitutional reform was the responsibility of the congress under the existing constitution). It was proposed that this motion should be put to the people in a general election. But the law prohibited popular initiatives on the ballot paper; nonetheless, a ballot paper containing the issue was printed in the press, and five million people used that to vote in favor of the proposition. The president used a decree under emergency powers to propose the same question formally on the forthcoming presidential ballot. This had to go to the constitutional court, which approved the decree, relying on the sovereignty of the people. A total of 88 percent of the people voted for the constitutional assembly.

“Academic action” in the sense of the sort of writing that may critique a constitution in books and journals is unlikely to have much impact. But it may provide ammunition for activists, for lawyers taking legal action, and for the more conscientious members of the media.

“People’s initiatives” have included people organizing for constitutional change by starting an unofficial commission and even consulting the public about its views.

2.1.4 Design

All sorts of factors will have an impact on these questions of design; our concern here is not so much the design as such, but the design process.

An important element is the history and culture of the particular country. Some countries—even some regions—start from assumptions about how the process will be done. Latin American countries often use constituent assemblies. French West African countries have often used constitutional conferences. Nigeria generally uses a commission followed by an assembly of some sort—a model used also in East Africa.

When most countries approach the matter of designing a constitution-making process, they are in crisis—or at least in a situation of some tension within society. A government department is not making decisions about the process in a detached, technical way. It is likely that the details of the process will have to be negotiated among political parties, or between previously warring groups (or even still-warring groups), which may be a long, drawn-out process. On the other hand, there may be such pressure to start the process, and such a sense that something serious will happen if there is delay, that decisions about the process are made in a hurry. It is impossible to dictate the right way to design the process; that depends on individual countries and their circumstances.

It may be useful to note how some countries have done this. In South Africa [1996] the process for making the final constitution was set out in the interim constitution. This was itself the product of negotiations among the main political parties, and it seems to have worked well for that country. The parties had great legitimacy in the eyes of the people. But in some countries, the parties may be an element of the dispute that generated the desire for a new constitution. In Kenya the outlines for a process were drawn up at a national conference that involved not only political parties but civil society. In Nepal the parties tried to keep hold of the design process. In these countries certain groups within society, especially ethnic groups, kept forcing their agendas upon the parties. Because the parties were not inclined to take these groups seriously, the groups resorted to violence or disruption. Then the government would reluctantly listen and perhaps make some agreement about the process—usually about the system of representation in the constituent assembly. This was a very flawed, and protracted, design process.

In many countries the occasion for reform has been a sense of exclusion on the part of some sections of society. If the constitution is thought of as a remedy for this problem, it naturally

makes sense for the constitution-making process to be inclusive. This is what many groups in Nepal were pressing for. There is now a good deal of writing about the need for peace negotiations to be inclusive. Similar arguments apply to negotiations over the constitution-making process—which may be part of the peace process as well. United Nations Security Council Resolution 1325 calls for women’s equal and full participation in peace processes. In many cases they have been excluded, even if they have been engaged in armed struggle. Many countries have other communities that tend to be excluded; in South Asia this is true of the Dalits. And just as article 25 of the International Covenant on Civil and Political Rights is now accepted as including the right to participate in constitution-making, so it should include, if possible, the right to be involved or at least consulted in designing that process.

Various factors may hamper the careful design of the process. Though people tend to understand that peace negotiations need careful planning—the chair will be carefully selected, as will the location, and even the seating will be considered—the same care may not be given to the design of the constitution-making process. Perhaps lawyers will take over and insist that it is a technical matter best left to them. Perhaps there will be a tendency to follow the same plan as the previous time—even though the constitution made by that process was flawed.

It may be helpful to reach a preliminary agreement on some basic principles that the constitution-making process must follow, and even on some of the elements of the new constitution—a topic to which we return later in this section.

The contents pages of this book—especially for part 3, on institutions and processes—should be a good indicator of the agenda that process designers should bear in mind. Broadly, that agenda includes:

- Who is to decide—including who is to be able to have input into the discussion, even if not to make the final decisions?
- Funding—how much will it cost, where is the money to come from, and who will be accountable?
- Timing—is there to be a timetable, and if so is it to be rigid or open to change? Is it to be tight or to allow a lot of time?
- Adoption—how is the new constitution to be passed into law—by the body that discusses and decides, by the president who usually signs laws, or by the approval of the people through a referendum? Are there to be any other prerequisites?
- Technical quality—how is the technical quality of the document to be assured?
- Openness—how will the public be involved, what parts of the official proceedings are to be open to the public, and what will be the role of the media?

Who designs?

Decisions on many of these issues may turn out to be highly political, and require a good deal

of hard bargaining. To take the case of Fiji: the makeup of the commission that drew up the draft constitution was fiercely debated by the government and the main political parties. How many members should the commission have (especially to be considered representative)? Should all the members be nationals or should some be foreigners? Should the chair be a local or a foreigner and, if the latter, from what country? Again in Fiji, the terms of reference for constitutional commissions have been much debated. In 1987 the original terms of reference included “proposing to the Governor-General amendments which will guarantee indigenous Fijian political interests and in so doing *bear in mind the best interests of other people in Fiji;*” when the opposition forces (largely “other people”) objected, the italicized words became “with full regard to the interests of other people in Fiji.” And in 1995 the government wanted to minimize changes to the 1990 constitution, and wanted the terms of reference to reflect the priority of ethnic Fijian interests, while the opposition wanted a full review and fairness for all communities.

Design may be at least in part carried out by negotiation in a peace process. In some countries it has involved public consultation or some body with popular legitimacy. In Ecuador in the mid-1990s, unusually, one element in the design was referred to a nonbinding popular referendum: whether the constituent assembly delegates were to be directly elected in the usual way for parliaments, or elected by social movements.

Sequencing

In any participatory process, certain tasks must be performed, but different constitution-making processes have ordered some of these tasks differently. While the logical order of some events is obvious, there is room for different opinions about the sequence in which others should be carried out. The most important area of difference is about the stage at which a draft constitution should be prepared. The issue appears in two forms:

- Should public consultation take place without there being any draft, or should the public be asked for its opinion on the basis of a draft or at least concrete proposals?
- Should a constituent assembly begin its discussion on the basis of a draft?

The underlying issue is to what extent the voice of the people—whether through direct public consultation or through a constituent assembly—should be sought on the basis of concrete proposals, or more in the abstract.

Where would a draft come from if it were to come into being before the voice of the people was sought? There are three major possible answers: from one or more political parties, from a commission or committee, or from a single expert.

The major arguments in favor of “draft later” are that the existence of a draft is likely to inhibit free discussion, and that the draft tends to shape the views the public has of the assembly. Fears will be rather different if the alternative is having a draft put forward by political parties than if

it is one put forward by an independent commission or committee, or if the alternative is a single technical expert's draft. Are discussions going to be inhibited by the views of one political party, or by a political compromise reached in a committee, or even by the conservatism of an individual lawyer?

On the other hand, there is a fear that if public consultation takes place without any structure being given to the discussion by the existence of concrete proposals the people will flounder, not understanding the nature of a constitution and how they can contribute to its formation. Some will worry that the people will expect too much of the constitution. This argument itself perhaps reflects particular views of the appropriate scope of a constitution, and may be linked to the question of whether a constitution should contain economic, social, and cultural rights.

In Brazil the idea of the constituent assembly starting its work on the basis of a draft was firmly rejected because it would be a “dangerous instrument of control over the assembly.” But in Timor-Leste the dominant party in the assembly, Fretilin, was able to shape much of the discussion by ensuring that it was primarily based on its own proposed draft constitution.

In Fiji, Kenya, and Uganda, public consultation preceded the drawing up of a first draft. In South Africa the interim constitution was the outcome of interparty negotiation. Public consultation took place on the drafting of the final constitution, which drew heavily on the interim constitution. That interim document therefore to some extent served as a draft for discussion.

Box 2. The Kenyan process [2010] and the Bougainville process [2004]

The Kenyan process did not specify how long the first stage (preparing a draft) should take, but it did specify rigid limits for later stages. Consequently the Committee of Experts was supposed to respond to public comments and amend its draft in a twenty-one-day period that began on December 17 and continued through Christmas and New Year's Day, when members and staff had already planned to be on holiday.

In Bougainville, major amendments to the Papua New Guinea constitution intended to give effect to the provisions of the Bougainville Peace Agreement 2001 were approved by the Papua New Guinea parliament in March 2002. The amendments did not come into operation, however, until Bougainville militias that had been involved in a complex secessionist conflict were certified by a United Nations observer mission as having completed agreed steps in the disposal of weapons. Only at that point (July 2003) could Bougainville take major steps provided for in the amended Papua New Guinea constitution toward adoption of a subnational constitution establishing the Autonomous Bougainville Government.

2.1.5 Timetables

A constitution-making process that is designed (as opposed to one of incremental constitutional change) will usually include a timetable and sequence of events. This is desirable for various reasons, including the need to seize a “constitutional moment” (see part 2.1.2), to control the costs of the process, and to ensure that narrow interests do not either rush the process or drag it on for too long. Getting the timetable wrong may mean that:

- the document produced lacks legitimacy in the eyes of the public;
- the document is of poor quality; or
- no document at all is produced—because enthusiasm fades and people learn to live with what they have got, or an interim constitution turns into (or is amended to become) a permanent one.

A road map may work in various ways. It may:

- have only a final date by which the new constitution must be adopted, giving no other indications of time periods or order of events (this is unusual, because if tasks are specified some intended sequence will usually be stated or implied, even if in general terms);
- specify tasks in some detail and the order in which they are to be carried out, but without any time periods being fixed at all, or with only an ending date being specified;
- specify tasks in very general terms, without a clear indication of when they are to be done (for example, a requirement might be “to consult the public” without an indication of whether this is to occur before any other work is done, only when a draft is prepared, or both);
- spell out the entire sequence of events with precise time periods attached;
- involve a mixture of these approaches; or
- schedule events by reference not to time but to the occurrence of other events, such as other elements of agreement in a peace process (as in Bougainville, Papua New Guinea—see appendix A.9).

How much detail should there be? It is impossible to anticipate exactly how long any stage of a process will take. Though it is possible to plan meetings for civic education and the collection of public views, the amount of public enthusiasm may affect how much time it will take to

Box 3. Damaging deadlines

Some processes dominated by the United Nations or foreign governments have been seriously affected by externally imposed deadlines (e.g., Afghanistan [2004] and Iraq [2005]). This outside pressure not only caused resentment, but prevented local processes from being worked out fully. In Iraq, important issues were left unresolved, and remain unresolved. (See part 4.2, appendix A.1, and appendix A.6.)

analyze the views. (See part 2.2.4.) More time or more resources may be needed. Each stage should ideally be planned to take some time. Otherwise there will be the risk of other stages being shortened, or extensions being sought.

Complex processes involving civic education and public consultation, the preparation of drafts, and discussions held by a constituent assembly or similar large-scale debating body typically take a few years.

Factors suggesting some urgency may include:

- the risk of a return to conflict;
- the risk of a coup (which is why the Philippines completed the process of drafting its 1987 constitution in six months);
- the desire to complete a process before an election (either because it is clear that a new government will resist change or because before an election it may be difficult for participants to calculate how particular provisions will work to their advantage); and
- foreign pressures (financial or other).

But the process must not be rushed. It is important to allow time to educate the public about what a constitution is, to educate the political actors, for people to formulate and submit views, for those views to be processed, and for consensus to be developed on difficult issues. In deciding what is “enough” time, the following might be relevant:

- how much knowledge the people already have, including how much civic education has occurred;
- terrain and communications—how people are to learn about the process and how they are to submit their views;
- allowing time for views to be processed (because otherwise they may simply be put in a cupboard and forgotten);
- whether it will be necessary to hold an election for a constituent assembly;
- whether participants in the process (commission or constituent assembly members, for example) are engaged full-time or part-time; and
- finances (which may determine whether a commission works full-time, or whether extra people can be hired to process submissions, for example).

Designers must take account of existing laws or constitutions prescribing some elements in a time frame (for example, that there must be a certain lapse of time between stages of deliberation in parliament).

Who should set the timetable?

Some people want a constitution quickly, some people want to extend the process, and some people may not want a constitution at all. Who sets the timetable may have serious consequences

for success or failure. Factors involved include the following:

- Politicians as a group may wish to enhance their electability by producing a constitution, regardless of its quality.
- Individual politicians may believe that a new constitution will give them a chance to return to office (as some presidents have argued: if there is a new constitution, the old limit on the number of terms one can serve does not apply!).
- Participants in a process who come from outside politics may find their role pleasurable, even financially rewarding, and wish it to last as long as possible.
- International actors often want to have a clear exit date, and may be prepared to sacrifice quality for speed. (See part 4.2.)

Rigid or flexible?

It is not uncommon to allow for extensions of time. This flexibility may be given to the constitution-making body itself; if the time is without restriction, however, this may make nonsense of any timetable. But perceptions of the need for speed may change according to political circumstances. In other cases the control over extensions is given to the same body that imposed the timetable originally: parties to a peace agreement, parliament, foreign interests, and the like.

In Nepal the interim constitution provided the possibility of a six-month extension, but only if a state of emergency caused delay. This extension would require only a resolution of the constituent assembly itself (largely controlled by the parties), passed by a majority of those members present and voting.

Factors likely to result in completion on time

A realistic timetable is more likely to be adhered to; in addition, the following factors may be important:

- effective chairing and management: the chair of any body, or, more broadly, the management structure, must develop a work ethic for participants, and generally promote the understanding that timing matters;
- political commitment, so the actors feel they will “lose face” by seeking an extension;
- making sure the public understands—and, ideally, supports—the timetable;
- mechanisms for resolving particularly difficult issues (see part 2.5.2);
- not making involvement in the process too lucrative;
- trying to ensure that financial support is sufficient; and
- generally managing the process effectively, including instituting measures to avoid corruption (see part 2.3).

What happens if a deadline simply expires?

This will depend, from a legal perspective, on the document that sets forth the deadline.

- If the result is that the whole process dies, the existing constitution may remain. This may be only an interim document and not suitable for long-term application, or it may be a full, if unsatisfactory, constitution.
- The document setting forth the deadline may require an election and then a revival of the process (as in Iraq).

How can a timetable be enforced?

Timetables imposed from outside, whether they purport to be legally binding or not, may be “enforceable” for the same reason that they were imposed in the first place: hard-nosed political or economic reality. If security will be withdrawn, if foreign aid may be released, pressures to finish may be real. States emerging from conflict are often vulnerable and divided.

Compromises are sometimes possible. In Timor-Leste the original timetable was completely unrealistic and had to be extended. But it remained unsatisfactory, and the constitution might well have been improved if additional time had been available.

In Iraq a constitution was produced according to a timetable largely dictated by the United States. But even the United States could not prevent the constituent assembly from amending the constitution five minutes before the expiration of the deadline under the interim constitution. A long extension was not practicable, and the result was an incomplete constitution, with certain issues not being properly resolved. Even before the constitution was adopted, a promise was made to certain sections of the community that it would be reviewed and finalized immediately after the elections.

If a constituent assembly is also the legislature, it may not be possible to prevent it from amending the constitutional or legislature framework (as in Nepal)—though this may have a political cost.

Some examples of timetables

The constitutional convention for the United States took nearly four months; ratification by the states took a further forty months. The Indian constituent assembly sat from 1946 to 1949 (though it was severely affected by Partition). The Eritrean process took thirty-eight months from the proclamation of the constitutional assembly to ratification of the constitution. The South African process took five years from the beginning of multiparty negotiations to the adoption of the final constitution.

The Ugandan commission took from 1989 to 1993 to prepare a draft constitution, and the final constitution was adopted in 1995. There were various reasons for the length of time the process took, including the time needed to carry out extensive public consultation as required by the

law establishing the commission, and lack of resources.

The Timor-Leste constituent assembly [2002] took five weeks to prepare its rules of procedure, and the Bolivian constituent assembly [2009] seven months. The Bangladesh assembly [1972] took only two days, because it used the existing parliamentary rules.

Public consultation early in the process took about four months in Kenya [2005], and nearly three months in Fiji [1997]; in Rwanda [2003], civic education and public consultation combined took about six months.

The drafting of a constitutional document to be submitted for public consultation took two months in Rwanda [2003] and about one month in Kenya [2005]—but considerable preliminary work had been done in the latter case, and perhaps in the former also.

Public consultation on a draft constitution or concrete proposals has taken from one week in Timor-Leste [2002] to about four months in Eritrea [1997]. The Timor-Leste period was recognized as too short, but that was the result of pressure to complete the process.

Debate on a draft constitution in a constituent assembly took two weeks in Afghanistan [2004], five months in Timor-Leste [2002], and eleven months in India [1950] and Kenya [2005]. The Afghan process was largely a rubber-stamp operation; the Timor-Leste assembly oversaw almost the entire process and there was no separate commission. In Afghanistan [2004] and Kenya [2005], a separate commission prepared the constitution. In India the constituent assembly was also the parliament, and in Kenya all members of parliament were members of the constituent assembly, which could not sit when the parliament was in session.

Referendum campaigns for and against a complete draft have taken less than four weeks in Albania, one month in Venezuela, five weeks in Spain, and three months in Kenya.

These figures will be of limited use to planners, and are intended just to show the range of times and some of the factors that may affect them.

2.1.6 Legal basis for the design

The program for the constitution-making process may have various legal bases, and many processes are based on a combination of documents and arrangements, some of them laws and some administrative or informal considerations.

Constitution-making processes may be designed in an atmosphere of some euphoria—especially if peace has only recently broken out. But the process has to work even when the euphoria has passed, when tensions reassert themselves. The implication is not only that the process should be well designed; the legal form the blueprint takes may become important. Few constitutions provide in detail for the process. It is important for designers of a process to study carefully the requirements that do exist, to make sure that the new document is validly adopted.

It may be necessary to pass a law to set out the process. An example is the Constitution of Kenya Review Act. Sometimes an executive order is used. This may be done under a general constitutional power or under a statute. In some countries a constitutional review has been carried out by a commission under an act that provides for the government (or just the president) to set up a commission of inquiry. In a truly revolutionary situation there may be no existing constitution. In such situations the design may have to be included in agreements between the parties. There may even be no existing way to make laws.

What are the implications of the form of the blueprint? Perhaps the most important is whether the process, once having started, can be stopped. An executive order can be “unmade.” A law can be repealed. An agreement between parties may have no legal force in a technical sense (for example, a court might well refuse to hear a case arguing that one side to such an intensely political agreement had reneged on it). In Kenya there was constant debate about whether the process ought to be “entrenched” in the existing constitution—because of fears that vested interests would interfere with it. Those fears turned out to be well founded. In Kenya even the courts have been used to slow down or stop a process.

There may be other significance attached to the form of the blueprint. Certain forms may have greater acceptance or legitimacy in the eyes of the previously disputing groups in society. The executive order of one person may lack the sense of national support that some people would wish to see.

There are many questions about the blueprint that require careful judgment. How detailed should it be? Should it be able to be changed? Should it be only a guideline, or should it be legally binding on the bodies that are to make the constitution?

There are aspects of this matter of legal form that lawyers may attach particular importance to, particularly the matter of legal continuity: should the new regime, whether interim or permanent, be legal in terms of the previous regime? In South Africa the regime that existed until the 1990s had no legitimacy in the eyes of most of the citizens, and had been the subject of international sanctions. One could say that it was illegal. Yet a decision was made to move step by step to a new constitution, always using the procedures of existing law. So the 1993 interim constitution was passed pursuant to the procedures set forth in the apartheid constitution. It was felt that this would give a solid legal foundation to the 1996 permanent constitution.

On the other hand, some countries have deliberately made a legal break with the past. They may insist that the foundation of the new constitution is not to be laid in the laws of the past (including perhaps the laws of a colonial power) but rather to come from the will of the people.

Sometimes, it must be said, legal continuity is something of a fig leaf. Where there has been a coup, and a military regime has come to power, clearly illegally, it sometimes insists that parts of the constitution remain in force. Yet parts that the regime does not like, or cannot operate because there is no parliament, for example, have to be abrogated or suspended. The regime may be using this approach to give itself some (rather spurious) legitimacy. The

significance of a constitution is that it binds people and authorities even when they do not like it. If you say that you are bound by only the bits of a constitution that suit you, there is in effect no constitution.

Some countries have no choice about the nature of the blueprint: it is prepared by the United Nations or other international actors, and takes the form of a Security Council resolution or international agreement. But it is rare for the international framework to give much detail about the process, though the timetable that may also be imposed may have inevitable effects on certain aspects of the process, such as the amount of public consultation.

If the idea of the constitutional moment has any significance, it is probable that the really key moment is when the process is being designed, rather than when the design is being applied. This may be the moment of greatest optimism; it may be the moment when concessions will be most readily made. This gives particular importance and responsibility to the designers. Yet they may not realize this, or they may focus only on certain aspects. In Nepal it was noticeable that everyone concentrated on the makeup of the constituent assembly—who was going to get how many members. Little attention was given to the issues of how the constituent assembly would work, or the participation of the public in the deliberations.

Peace agreements—which sometimes are wholly internal to a country and sometimes involve

Box 4. “Revolutionary legality” and “necessity”

After a military takeover, or some other crisis that makes ordinary processes of governing and constitution-making impossible (or so say those in power), courts will sometimes have to decide on the legality of a regime. They will usually find justification for the regime under which they are serving. They may do so on the basis of arguments of “necessity,” “revolutionary legality,” or both. The former expression was used in the Eastern European socialist republics—their legality was based on their revolution, and on the supposed will of the people. The phrase was also used by a famous Austrian legal theorist, Hans Kelsen, and has been used in a number of legal cases in nonsocialist contexts (Kelsen 2002). The key argument is usually framed in terms of coup leaders having formed a government that is effectively in control and accepted. (This is sometimes also known as the “successful coup” doctrine.) In 2000, Fiji’s Court of Appeals rejected such an argument because the military was unable to show that the people really did accept the situation.

The other argument is necessity—“the tyrant’s plea,” as the poet Milton described it in a different context (Milton 1968). Courts that have accepted this argument have said that the implication is that the government must as soon as possible return the country to constitutional rule; necessity is not a basis for a long-term, fundamentally illegal, regime.

the international community, including perhaps the United Nations and key interested international actors—have provided much of the framework for constitution-making in Afghanistan [2004] and Nepal [ongoing process].

What to do if it is hard, or impossible, to follow the existing procedures

Some constitutions make it so difficult to change the constitution that it is virtually impossible. Some, as we have seen, provide no mechanism for replacing the constitution—only for making amendments in a piecemeal fashion. For others, the circumstances may dictate that, although amendments or even new documents are widely believed to be necessary, certain groups will stand in the way of using the existing rules, or certain institutions will no longer exist. Especially in societies emerging from conflict, it is sometimes not possible to observe all the requirements.

Here are some examples of situations in which constitutions have been hard to change, or to replace, at least when change was called for:

- Australia requires a referendum that must receive a positive vote from half the population nationally and from a majority in each of more than half the states (four when there are six states, as is the case now); in some circumstances a majority in every state must approve.
- In some countries doubts have been expressed whether the power provided in a constitution for the legislature to “alter” the constitution includes the power to make radical changes or to replace the constitution.
- In South Africa, the legislature in 1990, which would have had the power to amend, was dominated by the white community; black South Africans did not have the vote or any members.
- In Nepal, the 1990 constitution could be amended by votes of the two houses, and signed by the king; after the People’s Movement of 2006, the Senate was not reinstated (and even the legal status of the House of Representatives was doubtful), and no one wanted to involve the king.

Techniques that have been, or might be, used have included:

- using as many of the existing provisions as possible (Nepal);
- by negotiation, using the existing mechanisms even if they are against the interests of those who must take the necessary steps (South Africa);
- accepting that the constitution is hard to change and working within the constraints (Australia); and
- acting outside the constitution entirely by calling a national conference or a constitutional convention or assembly.

In countries emerging from conflict, some departure from the letter of the law may be necessary. Once a new constitution is adopted, it is unlikely that it will be attacked for lack of legal validity. Courts rarely hold that the regime and the constitution under which they are serving are illegal, though it happened in Nigeria (in 1966) and Fiji (in 2000 and 2009). Courts often accept

arguments based on the principles of “necessity” or “revolutionary legality.” (See box 4.)

More detailed frameworks are usually provided in an interim constitution. (See part 2.1.9.) Often this is the primary purpose of such a constitution. Careful thought should, if possible, be given to how much detail is put into the constitution. Constitutions are hard to change—this is their strength, but sometimes their weakness as well. Constitution-making processes set up under an administrative procedure may be easily halted, and ordinary laws can be repealed or changed by a simple majority of parliament. Therefore to include the basic structure of the process of constitution-making in a document with constitutional force may be wise. But if all the details are included, problems may arise. The most common of these is: what happens if the deadline cannot be adhered to? If the document establishing the deadline does not allow for any extension, and an extension is essential, it may be necessary to change that document. In Nepal, the provisional legislature (the constituent assembly by another name) amended the interim constitution, and the president signed the amendment (although some people had argued that to allow such a change would defeat the whole purpose of a deadline—and even that it would be unconstitutional to use it, and the president ought to refuse to sign). But if the forces not wanting a new constitution had not been able to muster a two-thirds majority, the constitution-making process would presumably have ground to a halt.

Few countries will have an ordinary law on the books that provides for a fully participatory constitution-making process. So some countries establish their processes by means of a special law (perhaps setting out the membership of the constitution-making bodies, the processes for public consultation, and the timetable). For an example, see the case study of Uganda in appendix A.12. Although laws are easier to change if circumstances change (as they often do, especially in postconflict societies), it is not necessarily a simple matter to change a law. So the extent of detail to be included, especially concerning timing, should be considered carefully. But if there are no timetables or procedures with a legal basis, it is both harder for people to understand the process and easier for it to be subverted. Certain matters will be dealt with by existing laws, such as the auditing of the accounts of public bodies.

In American Samoa [2010] the constitutional review process was set up by a series of executive orders issued by the governor of the territory. This was under the existing constitution, which gave powers to “issue executive regulations not in conflict with laws of the United States applicable to American Samoa, laws of American Samoa, or with this Constitution.” Such an order could presumably be as easily unmade as made, and so it would give even less security to the process than an ordinary piece of legislation.

Less formal sets of rules, such as codes of conduct (see appendix C) and administrative arrangements, will also be necessary to fill in the details of the process. Even giving orders to the police to facilitate public meetings, or not to enforce existing laws banning such meetings, may be important in some processes.

In short, the details of the process may be found in any or all of the following documents or decisions:

- peace agreements (which are usually not legally enforceable, especially through a country’s courts);
- constitutions—previous or interim;
- existing laws;
- specially made laws (which might have to be made by extraordinary means in some situations—by military decree, for example);
- regulations made under laws;
- codes of practice (which may not have the status of law);
- informal agreements among political parties, or made through national conferences; or
- administrative instructions.

2.1.7 Preparing the constitution-makers

Most constitution-making exercises have included some form of education to prepare the constitution-makers for their role. Past efforts, however, have not always been well thought out or coordinated. Constitution-making bodies tend to be offered opportunities to travel or attend workshops organized by external groups rather than educational programs tailored to meet the constitution-makers’ specific needs.

It may be necessary to prepare the constitution-makers at several stages. For example, an overview of the rules of procedure and substantive constitutional issues may be needed at the start, with sessions about how to conduct civic education and public consultation efforts coming at a later stage. A process with several constitution-making bodies (e.g., a constitutional commission and then a constituent assembly) may require different educational programs for each.

As a result of conflict, many constitution-makers may have lost professional and educational opportunities, or they may not have experience in governance. Educational programs may therefore be welcomed and even requested. However, the offer of educational assistance can be a sensitive matter. Some constitution-makers may resent the suggestion that they do not know enough to do their job. Those who have served as parliamentarians in particular may feel that they have already mastered the issues—after all, they have been directly implementing the constitution. In the past, constitution-makers have even blocked attempts to create educational programs.

These barriers can potentially be overcome in the legal framework or rules of procedure by requiring all constitution-makers to attend officially organized educational programs. Sensitivity about the terminology used when organizing these programs can also be helpful. Terms used in the language of “education”—“study programs,” “orientation,” “initiation,” “induction,” “capacity-building,” “capacity enhancement,” and the like—can be viewed as condescending. The terms “seminars” and “workshops” are often considered the least offensive for those who feel they do not need an “education.” But for the sake of simplicity, in this section we use the

word “education.”

The objectives

Constitution-makers can ideally be prepared to:

- strategically plan for or manage the process (if this is required of members);
- understand the structure of the process and any existing mandates or legislation governing the process, as well as rules of procedure and codes of conduct;
- agree on principles that will guide their work and allow them to understand the mandate and principles set forth in the legal framework;
- serve the national interest as well as their particular groups, and learn how to use the process to build consensus or even engage in nation-building;
- communicate effectively with the public and other stakeholders;
- carry out a coordinated and effective civic education and public consultation program; and
- gain understanding about key substantive constitutional issues (such as human rights and decentralization).

The sections of this handbook on specific issues related to the process of constitution-making (such as rules of procedure and civic education) serve as a guide to the knowledge and skills that may be needed to carry out a task. This handbook does not discuss substantive constitutional issues (e.g., human rights, the judicial system), but we can provide some practical tips and points to consider for educating constitution-makers on these issues.

Developing a program for substantive constitutional issues

The content of an educational program on substantive constitutional issues could cover a wide range of topics. General topics that might be useful are:

- the nature and purpose of constitutions generally;
- the possible scope of constitutions and some of the arguments about what should and what should perhaps not go into a constitution;
- how constitutions are used—legally, politically, and in other ways;
- the language of constitutions—technical legal language and emotive language, and when these are used;
- the importance of the structure of a constitution—how one part may interact with another;
- the main elements of constitutions;
- the main variations and options for designing key elements of the constitution, such as systems of government or separation of powers among branches of government;
- international law and constitutions; and
- how the existing constitution functions, including its strengths and weaknesses.

The purpose of educating constitution-makers about these issues is not to turn them into constitutional lawyers. Some have been elected or selected because they are representatives of marginalized groups or special interests. The aim is to help them translate their goals and aspirations for their constituents into constitutional terms. To participate effectively, they will need an understanding of how a constitution can—and sometimes cannot—advance the interests or groups they represent. The constitution-makers will also need a basic understanding of the wider issues, because they not only represent their particular groups and interests but should also reflect on the national interest. For example, women representatives are present not only to represent the interests of women but to bring their perspectives and knowledge to all issues.

Most constitution-makers understand some of the constitutional issues at stake, but likely only those issues that affect them and their own communities. Members of parliament may understand the electoral system and the lawmaking process well; fewer will understand the national financial system, or human rights. Few will understand how the security forces work and how they are—or could be better—controlled. Few people—probably not even most lawyers—will have read an actual constitution from beginning to end.

Many constitution-makers will find themselves having to educate their constituents or the wider public; unless they are well prepared it will probably be a poor teaching experience. The very exercise of constitution-making, and there having been conflict or disagreement about constitutional matters, are factors likely to generate new ideas for the constitution. But unless the constitution-makers are familiar with the existing constitution they will not be well placed to evaluate those new ideas.

Similarly, while constitution-makers should be expected to understand the language of a constitution and its key concepts, they should not be expected to acquire the technical skills of someone who drafts the constitution. They should understand their own roles as well as the roles of the various other actors in the process, including the legal drafters.

Given these considerations, at a minimum, educational programs on substance should enable the constitution-makers to:

- participate fully in discussions on all issues and effectively draw on expert advice when they may require it, recognizing the limitations of their own knowledge;
- explain basic constitutional concepts to the public;
- understand suggestions that are offered for the draft constitution, and be able to ask questions of those who make submissions; and
- read and understand drafts of the constitution—in part to ensure that decisions made on constitutional issues are accurately reflected in the language of the constitution.

Constitution-makers are sometimes divided into thematic committees that are responsible for weighing options on particular substantive areas, such as the judicial system. These committees may require more extensive education on their particular topics.

Approaches to learning

Expectations for educational programs vary from one culture to another. Some cultures will be more open to participatory methods. Usually, something more than a simple lecture is needed; many constitution-makers are not used to absorbing large quantities of information through reading or listening to lectures. Experience suggests that for learning about procedures, role-playing and other participatory methods are likely to be both acceptable and more effective. Studies on university teaching show that student attention flags after about twenty minutes. Lectures should be combined with techniques such as short discussions among small groups as well as question-and-answer sessions. These may help stimulate interest and attention.

Public consultation should be held with constitution-makers to learn what they want to know in order to do their jobs effectively. Different members of the constitution-making body may have different learning needs. Some members may be illiterate or not understand the working language being used.

Whoever designs and manages the educational program for the constitution-makers should look for local adult educational resources before requesting assistance from foreign experts. Some international organizations or embassies may have expertise on particular topics, but careful coordination will be needed to ensure that any externally sourced educational programs meet the needs of the process.

The international community also may offer study tours. In late 1947 the constitutional advisor to the Indian constituent assembly visited Washington, Ottawa, New York, Dublin, and London, and met a galaxy of distinguished judges, politicians, and scholars. As a result of those discussions he proposed a number of changes to the draft constitution that he had already prepared on the basis of the various committee proposals. This was a visit by a person with intimate knowledge of what was being proposed, a lawyer who was fully able to hold his own in discussions and benefit from them.

Many constitution-makers hope that they will be able to visit other countries to learn about their systems. Relatively recent examples have included:

- visits by the members of the Fiji Constitution Review Commission to Malaysia, Mauritius, and South Africa (chosen because of the ethnic dimension in their politics and constitutional debates);
- visits by officials and civil society leaders from the South Kordofan and Blue Nile states of Sudan to Indonesia to learn about the latter's experience with secession (Timor-Leste) and autonomy (Aceh) because of the provision in the Sudan Comprehensive Peace Agreement about public consultation to be carried out by those Sudanese states over their future, in the light of the Southern Sudanese peace agreement;
- trips organized by the Swiss Agency for Development and Cooperation for various Nepali political parties, government, academics, and members of civil society to Switzerland to look

at the Swiss system, especially federalism;

- tours by members of the Indonesian People’s Consultative Assembly involved in constitutional amendment to Thailand and South Korea to look at constitutional courts; and
- visits by Ugandan constitution commissioners to the United States and various European and African countries.

Undoubtedly some of these visits have been of value. The members of the Reeves Commission in Fiji said, “We were able to form impressions that could not have been gathered from books or papers” (Fiji 1996: 61). But there is a big difference between a trip taken by members who are already knowledgeable about the situations in their own countries, and have some background in constitutional issues or political science, and one taken by nonexperts who may have been appointed for essentially political reasons.

The authors confess to a certain skepticism about the value of many of these tours. All too often they are viewed by the participants as chances to escape from the conditions at home, or as a rare opportunity for international travel or shopping expeditions. Ill-prepared participants may have no context into which to put what they see and hear. Many constitution-makers have been taken away on such tours when they are needed to perform key tasks in the constitution-making process at home. In Indonesia, a commentator said that although the ad hoc committee preparing a draft for one of the amendment processes for that country visited twenty-one other countries, this was something of a “picnic” because the committee members were not expected to prepare a detailed report.

Those who support or offer study tours seem to like them because they are high profile, please the participants, and redirect funds to the home country, as well as offering the rewarding opportunity for them to show off their own democratic wares.

Practical tips for ensuring that study tours meet the needs of the process include:

- try to ensure that study visits are planned in consultation with those who plan the constitution-making events at home, so that a committee does not lose members at a crucial moment;
- choose both the target country and the institutions to be visited carefully, to ensure that they really are relevant;
- ensure that members who go are not taken just to please important political figures, but will benefit from the experience;
- ensure that the language skills of the participants are sufficient (or that translations will be adequate);
- provide preparation before the trip so that the participants know where they are going and why, and how the experience might relate to their own situations at home—they should be going with a purpose, be looking for certain information, and be able to ask questions;
- hold a postvisit meeting to consolidate what the participants have learned;
- brief those who will make presentations so that they understand something of the background of the people they will be meeting;

- choose presenters carefully—it may be impressive to have the visitors meet the president or the chief justice, but they may not turn out to be the best resource persons; and
- arrange that the participants contribute what they have learned to the wider constitution-making process.

Resources

In addition to face-to-face educational approaches, it may be useful to provide constitution-makers with essential information before the first sitting of the constitution-making body (especially a constituent assembly or other large, nonexpert body). This can come in the form of a handbook and include practical logistical information about transportation, accommodations, security practices, remuneration, and the like. It can also describe what resources, if any, such as researchers or Internet access, will be available to the members.

Documentation provided should include the legal mandate, the steps in the process, the time allotted to the process, any rules of procedure or codes of conduct that will govern the conduct of the members, and any other relevant materials. Ideally, background papers on basic constitutionalism, the key features of the existing constitution, a historical analysis of constitutionalism in the country, and an introduction to some of the key constitutional issues can also be provided. In Afghanistan [2004] the secretariat to the Constitutional Loya Jirga, a kind of constituent assembly, prepared these materials with assistance from a foreign advisor.

2.1.8 Guiding principles for the process

Agreeing on guiding principles: An increasingly important task

In developing a constitution-making process, it is important for the main groups involved to reach agreement on a set of principles intended to guide the process. These are often referred to as “guiding principles” (and sometimes as “constitutional principles,” or—in a few cases—“immutable principles”).

Such principles can address both how the process is to be conducted (for example, requiring that it should be consultative and participatory) and the content of the constitution that it is expected will result. Guiding principles tend to reflect key aspects of the historical context in which the particular process is taking place, and also the broader international norms, standards, and precedents outlined below.

Agreeing on guiding principles can have a number of important benefits, particularly in a situation of conflict or transition. Such principles can help ensure that the process is transparent and has legitimacy in the eyes of the public. All groups with interests in the process will likely be better prepared and more aware of how they can participate in and monitor the progress of the process. Agreed-upon principles regarding the contents of the constitution can be particularly

important in conflict, postconflict, and transitional situations where there has been a history of abuse by the state and other actors; principles can provide a shared vision of a better future. They can also provide assurance to minority groups facing the prospect of a loss of powers or privileges in a majority-dominated constitution-making process.

It is not always necessary to have guiding principles—for example, where constitution-making processes develop gradually, without the parties necessarily agreeing on the details. There are cases in which attempting to agree on principles in advance may prove to be divisive.

The nature of guiding principles

In most cases, guiding principles are terms of reference for the process as a whole. They are intended to provide guidance for the process without being unduly restrictive. They are usually regarded as political obligations rather than binding and enforceable legal principles. For that reason, they are usually expressed in general terms rather than in precise and directive language.

In a few cases, mainly involving processes intended to resolve serious conflict, the principles are extended to provide detailed provisions about the process and about what must be included in the constitution, with verification required before the proposed constitution can be brought into operation. In the process in South Africa [1996], for example, the main parties involved in negotiating the transition from the apartheid regime agreed to an elected constitutional assembly that would consult the people on the final constitution, and also to thirty-four constitutional principles giving detailed directions on the content of the new constitution to be developed by the constitutional assembly. They included the form and structures of government; relationships among national and subnational governments intended to ensure local autonomy; protection of the interests of significant minorities; protection of human rights; creation of independent public institutions; and the entrenchment of the constitution through amendment processes, which were to include roles for the provinces in the case of amendments affecting their interests. All of this was included in an interim constitution, which also created a constitutional court that had the task of verifying whether or not the thirty-four principles were reflected in the final constitution.

Principles in documents that establish constitution-making processes

Such principles are usually stated in the foundation documents for a process, such as the legislation establishing a constitutional commission or constituent assembly, the terms of reference for a parliamentary committee on constitutional development, or a peace agreement or interim constitution providing for a constitution-making process intended to contribute to conflict resolution. They may also be found (in varying degrees of detail) in international agreements that provide for constitution-making processes (as in the Bonn Agreement in relation to Afghanistan and the Paris Agreement for Cambodia) and in United Nations decisions and mission directives about processes in which it plays a significant role, for example in Namibia and Timor-Leste.

Guiding principles: A common phenomenon

There has been widespread interest in guiding constitutional principles since they were used in the South African process—so much so that some people have the impression that it was the first case in which they were used. But guiding principles of various kinds have been used in many processes, both before and since the South African experience. It is true, however, that they are seldom so rigorously enforceable as they were in South Africa. Earlier examples include the terms of reference that the British government set for the Indian independence constitution-making process that began late in 1946; the constitutional conferences involved in making some other decolonizing constitutions in the 1950s and 1960s; the terms of reference that Papua New Guinea’s colonial legislature provided to its constitutional planning committee in 1972; and Namibia’s “Constitutional Principles,” agreed to by Namibian freedom fighters (the South West Africa People’s Organization) and international community actors in 1982, seven years before the Namibian constituent assembly began meeting. The Indian process provided its own principles, in the form of the “Objectives Resolution” moved by Nehru early in the life of the constituent assembly. There have also been many examples of guiding principles being used since the South African case, including the Bougainville process [2004], the Burundi process [2005], the two Kenya processes [2005; 2010], and the Nepal process [ongoing] (wherein the interim constitution of 2007 provides for a number of important principles, though they are not clearly related to the constitution-making process, as opposed to functions of the state generally). The Bolivian constituent assembly included a committee on the “Vision of the Nation,” which developed principles for the rest of the process.

Sources of principles for constitution-making processes

The design and the operation of both national and subnational constitution-making processes are increasingly influenced, and even determined, by a wide range of norms, standards, and precedents (including precedents provided by other constitution-making processes), and inevitably they are also a source for guiding constitutional principles. Human rights norms are having an increasing influence on the design of processes, in particular the emerging right to “democratic participation” based on the United Nations Declaration of Human Rights (1948, article 21) and the International Covenant on Civil and Political Rights (article 25), as well as various other United Nations conventions and declarations. Similarly, a number of United Nations and regional conventions and declarations on various aspects of human rights are having significant effects on the contents of constitutions, and so also on guiding principles intended to influence the process of making decisions on constitutions. There are also less formal sources of influence, such as international community concerns about good governance, independent accountability institutions, transitional justice, and so on—all of which have an impact on the framing of options for constitutions, and so on the content of guiding principles.

Who decides on the guiding principles?

Decisions on guiding principles can be made by a wide range of actors. In the case of

decolonizing constitutions, the colonial government, or the local legislature established by the colonial government, has tended to frame terms of reference meant to keep processes within limits acceptable to the colonizers. In many postconflict situations, these principles are negotiated among the parties, and are included in peace agreements and—increasingly—in interim constitutions. In many instances where the international community is involved in a peace process, it plays a major part in the negotiation or even the determination of the principles. In other conflict and postconflict situations, the parties to the peace process agree on them. In still other cases, the government in power includes them in legislation establishing the process. Sometimes the government has consulted other parties with a view to ensuring that the process is as free and open as possible. In other cases, the government may be aiming to control or restrict what other parties can do during the process.

In many cases, however, those most interested in the development of guiding principles will not be involved in, or will not be controlling, the constitution-making process the principles are intended to guide. They often seek to use the principles to reduce the likelihood of their interests being adversely affected by choices made in the process. In conflict and postconflict situations, it will usually be important to have the widest possible range of interest groups involved in the process of agreeing on any guiding principles.

Verifiable principles in conflict situations involving entrenched minorities

Sets of principles that are intended to be verified—sometimes called “immutable principles”—are not common. They are developed mainly in situations of deep conflict, such as in South Africa and Burundi, with the aim of providing assurances to a party (or parties) with deep concerns about their future (in relation to security, power, and similar issues). This is achieved by the immutable principles determining aspects of the contents of the ultimate constitution. As a result, they are often quite long and detailed, as in South Africa’s interim constitution in 1994, and in the Arusha Peace and Reconciliation Agreement for Burundi in 2000. The remarkably detailed principles in the Burundi case appeared in a protocol to the Peace and

Box 5. South Africa: The certification judgments

Many groups challenged particular aspects of the draft of the final constitution on the basis that they were inconsistent with the guiding principles for the final constitution stated in the interim constitution. According to the court, there were “47 advocates representing 29 political parties, organisations and individuals.” The case was fully argued, like any other litigation, and the court gave a reasoned 296-page decision in which it held that nine aspects of the draft constitution indeed did not meet the principles. Most important were the provisions on local government. The constitutional assembly had to revise these aspects, and when the constitution came back to the court it was certified as meeting the principles.

Reconciliation Agreement titled Democracy and Good Governance, which contained long and detailed “Constitutional Principles of the Post-Transition Constitution” that came close to being a complete constitution. In both cases, constitutional courts were given the task of verifying that the principles had been adhered to. A similar approach was used in Angola in 2010; the constitutional court certified that the constitution newly adopted by the parliament largely complied with principles laid down in the existing constitution.

An important reason for the detailed and verifiable principles in these cases was that they accommodated concerns of minority parties who had previously dominated the state and who could see that their interests were likely to be adversely affected by a new constitution produced by a process dominated by the previously excluded majority. By agreeing in advance on the detailed principles that the final constitution must adhere to, the minority groups were given strong assurances that their interests would be protected. That encouraged them to join rather than stay outside the process, reducing the risk that they would undermine the process. On the other hand, because the principles were agreed on by the parties to the conflict, and were intended to be verifiable (or enforceable), they were intended as limits on what could be decided in the course of the consultative and participatory constitution-making processes that followed the agreement on the principles.

In Burundi [2005], the draft constitution was withdrawn from the constitutional court when it failed to give a ruling in the limited time provided for by the Arusha agreement, and was instead submitted to popular judgment by referendum (the next step in the agreed-on process), where it was overwhelmingly approved. Perhaps because the principles in the agreement had come close to representing a complete constitution, the approval of the draft constitution by referendum was seen as providing sufficient verification that the principles had been adhered to.

While a careful and skilled analysis of a constitution such as the one in the South African certification case may be valuable, the results of court involvement are not necessarily beneficial. Six of the seven judges of the constitutional court of Angola had been appointed by President dos Santos; they largely approved the new constitution, which has been described as tailor-made for allowing dos Santos to remain in power.

Other cases of verifiable principles

In Namibia, the international community played a role in both making and verifying guiding principles, which were first agreed to in 1982 by the South West Africa People’s Organization, the Organization of African Unity, states adjacent to Namibia, and the United States, subsequently approved (indirectly) by the United Nations Security Council, and then adopted in 1989 by the Namibian constituent assembly. While no enforcement body was provided for in the principles, their having been approved by the United Nations was regarded as giving that body an enforcement role. In July 1990 the United Nations Secretary-General reported to the Security Council that the new constitution complied with the principles.

In Bougainville, Papua New Guinea, a 2001 constitutional settlement to a separatist conflict provided Bougainville with both the right to hold a referendum on independence, deferred for

ten to fifteen years, and a high degree of autonomy in the meantime. Autonomy included the power to make a subnational constitution providing for the structures and processes of a Bougainville government. It had to be made by a participatory process, include various democratic features, and adhere to “internationally accepted standards of good governance as they are applicable to and implemented in the circumstances of Bougainville and Papua New Guinea.” Concerns on the part of the Papua New Guinea government that the Bougainville constitution might go further than agreed or might unfairly favor particular groups were dealt with by specifying that the constitution would not come into operation until it was endorsed by Papua New Guinea, while at the same time limiting its grounds for refusing endorsement to a situation wherein it judged that the requirements of the constitutional settlement had not been met. To minimize the risk of endorsement being refused, the constitutional settlement required the Bougainville constitution-makers to consult extensively with the Papua New Guinea government in the process of developing the draft constitution.

There are other possible, less formal ways of trying to guarantee compliance with principles. They could be made the basis for the civic education of the public. They could—if brief enough—be printed on banners displayed in the venue of the constituent assembly. And they could be built into the oath of office of formally appointed or elected constitution-makers.

How are principles used?

Where principles are verifiable, there is a strong incentive for those involved in the process to take care at every stage that proposals for the constitution are taking full account of the principles. This will be important not just in the process of drafting the constitution, but also when proposals are being made during public participation efforts, or being debated in a constitutional commission, constituent assembly, or other deliberative body. In practice it may be important for a particular institution or body within the process to have responsibility for checking that the principles are being met. For example, in a constitutional commission or a constituent assembly, a particular committee could be given that task. In processes where the principles are more in the nature of political obligations or terms of reference, it will still usually be important, for the legitimacy of the process, that the principles are seen to be adhered to, and so a similar allocation of responsibilities for internal verification by those involved in the process will often be required.

Must guiding principles be followed?

In most cases guiding principles are expressed in general terms that are intended to guide rather than to restrict. Where a process is highly participatory, it would often be difficult to use guiding principles to limit choices being made as part of the process. The terms of the principles sometimes even highlight a dilemma that could arise if they were to be enforced. For example, the laws that have provided for Kenya’s two processes [2005; 2010] have required that the institutions established to undertake the processes give effect to generally laudable principles

(such as accountability, accommodation of diversity, and respect for universal principles of human rights) while also ensuring “that the final outcome of the review process faithfully reflects the wishes of the people of Kenya,” with no guidance about handling situations where the people’s wishes might be contrary to the principles.

Comments

The experience of South Africa has perhaps imparted a rose-tinted hue to the question of guiding principles. While it is not necessarily a bad thing that principles be reached during a time when careful thought is possible, or that important political negotiations should shape the future constitution-making process, there is an antidemocratic quality to such principles. They are devised by those in a position of power at point A in the process in order to limit the possibilities of those who are making decisions at a later point. Those in power at point A may have their own interests in mind, and even if they are acting in the interests of the nation, their perspectives on those interests may be narrow. In Egypt [1971], President Sadat gave certain guidelines to the national assembly on the constitution, including the statement that 50 percent of the elected bodies were to comprise fellahin and workers. In Nigeria in 1988 the military president told the constituent assembly that there were certain “no-go areas”—including the federal system, the presidential system of government, and having no state religion.

Often there is no choice on the matter of principles. But if there is a possibility but not an inevitability of developing principles, the following points might be helpful:

- principles may protect the interests of minorities who may not have much sympathy from the population at large;
- discussion and decisions on principles may have value when developed by the constitution-makers themselves, to focus discussion on broad issues rather than getting prematurely into detail;
- sometimes interest at a later stage focuses on “moral issues” such as abortion, and it may be helpful to have established early agreement on certain fundamentals;
- similarly, political manipulation may come more to the fore at later stages and interest in fundamentals may diminish; and
- it may sound antidemocratic to say so, but using principles to avoid what may turn out to be the dictatorship of the majority is not necessarily a bad thing—a major purpose of the modern constitution is precisely to limit that dictatorship once the constitution has been adopted.

On the other hand, the following may also be true:

- principles may hold back a genuine process of reform, especially if they are determined by an outgoing regime;
- developing principles may be time-consuming; and
- to avoid the risks of the process being “straitjacketed,” the principles may have to be so general as not to be very helpful.

2.1.9 Interim constitutional arrangements

It has been estimated that one third of all constitutional design processes from 1975 to 2003 involved interim documents. If the meaning of the word “document” extends beyond constitutions, then the number of interim arrangements would be even larger, as some of them are based on understandings, treaties, or peace arrangements that affect the way state power is to be exercised, but are not constitutions. Several terms can be used to refer to what we call here “interim arrangements”: provisional, temporary, interim, and transitional constitutions. In many cases it is impossible to understand the design of a constitution-making process without knowledge of the interim arrangements, which are indeed part of its overall objectives, strategy, and design.

Interim and incremental: Connected but different

Incremental reforms are different from interim arrangements. They are sometimes called “minimum reforms,” though this can be a misleading term in some instances of incremental reform, such as in Indonesia, where the changes made were far from minimal. Incremental reforms are contrasted with grand reform; unlike the latter, they are piecemeal, but, unlike interim arrangements, they are not necessarily a prelude to broader reforms. They are often the best reforms that are possible in difficult circumstances, and the hard decision is whether to reject them, recognizing that this may prevent further reforms, or to accept them in the hope that they will lead to broader reforms later, perhaps as a result of the dynamics of small but strategic early reforms. Chile, Hungary, and Indonesia offer significant examples of incremental processes that resulted in significant changes to the structure of the states in question. (For some arguments against a full-blown constitution-making process, to which incremental change might be an alternative, see part 2.1.2.)

Reasons for interim arrangements

When negotiating for peace, it is important that an agreement on a cease-fire be concluded speedily, but a long-term settlement, often seen as a new constitution, dealing with the underlying causes of conflict, would need considerably more time (as in South Africa). It may be premature to start negotiations on a new political order when myriad issues normally dealt with in a peace agreement have not been satisfactorily resolved (such as disarmament, demilitarization, exchange of prisoners, demobilization or integration of armies, and resettlement of the displaced). Depending on the sequence of events, if elections are to be held before the adoption of the final constitution, considerable time would be required to establish political, administrative, and security arrangements (as in Cambodia, Iraq, and Nepal), including decisions on who is entitled to vote—perhaps involving “lustration” (in this context, exclusion of those associated with past regimes), as in Iraq, or inclusion of communities hitherto excluded from citizenship and the franchise, as in Nepal.

A constitution-making process bedevilled by mistrust is unlikely to deliver a good, or any, constitution. Trust is a general condition for the success of any process, but it is particularly important when the negotiating parties have waged war against one another until recently. It has been argued that the difficulties in the Iraqi process arose because it was rushed; there was no time to build trust or develop a vision of the country.

It is desirable to use the “transitional” peaceful period to establish trust among the previous antagonists. At this stage a consociational approach may be important (where all key groups are represented), even if it is not the intention to retain this approach for the permanent constitution (as in Iraq, South Africa, and Sudan). Interim arrangements are sometimes a way to postpone difficult issues, which are hard to resolve in the aftermath of conflict but may be easier to tackle in the future with the goodwill that may have been established in the interim period.

The overall record of such arrangements is not impressive. But in many conflict and postconflict situations, some form of power sharing seems inevitable (as in Kenya in 2007, Cambodia, Iraq, South Africa, Sudan, and Zimbabwe). Consequently, more attention needs to be given to the modalities of the partnership arrangements. (In Fiji, Indo-Fijian parties declined the prime minister’s invitation to join the government, preferring to fight the next election without the “stigma” of participation in that government, before or after the 1997 constitution was agreed to. Perhaps unwisely, the basis of that constitution was a “government of national unity,” and a partnership between its two leading architects before the elections had laid a political foundation for it that did not hold when, contrary to their expectations, their parties performed poorly in the first election under the new constitution.)

A transitional constitution may be thought necessary to provide the legal framework for the running of the country when old institutions have collapsed or the old parties have disappeared or been greatly weakened (as in Somalia). In Afghanistan, for example, the arrangements were called “emergency interim arrangements” and justified due to “the unstable situation,” in view of the time it would take to re-create the state of Afghanistan. Crucial state institutions may have to be rehabilitated urgently while negotiations on a long-term settlement proceed (as in Afghanistan, Cambodia, and Iraq). Sometimes the old constitution may be considered unacceptable, for historical or ideological reasons, to one or more previously excluded groups, even if, through amendments, political understandings, or administrative measures, these groups could be given a share in governing the country (as in Nepal with the Maoists). In some countries, one or more key institutions involved in amendment procedures may have collapsed, making it impossible to amend the constitution, as can also happen if one key institution refuses to give consent to amendment. This might well have happened in Nepal, where the consent of the king, who had been sidelined by political parties, would have been necessary.

An important reason for interim arrangements is to provide a framework within which previous enemies can share state power, to facilitate the conclusion of the peace process, and to negotiate for a new constitution. They can promote stability in what could otherwise be a period of turmoil. Such arrangements can, however, give rise to their own problems, as the parties may

see them merely as a truce, before political “war” (competition for state power) starts again. This happened in Nepal and Sudan, where turmoil and suspicions continued well after the cease-fire and the peace agreement. Moreover, decision-making under interim power-sharing arrangements tends to be cumbersome and slow, and often requires consensus.

Another reason for interim arrangements is that in the immediate period following the cease-fire, previously warring parties dominate the political scene. Most of them have probably committed crimes against humanity, and may enjoy little public legitimacy. If the country were to move quickly to the permanent constitution, chances are that these warring parties would monopolize the process (as was the tendency in the Norwegian-sponsored process in Sri Lanka). It may therefore be better that the deals they make should be temporary, so that the process for the permanent constitution commences when conditions for greater public participation and the consideration of a wider range of social issues arise. On the other hand, it has been argued that the temporary nature of the arrangements makes it possible to find more imaginative solutions and cover issues that might not be dealt with in a permanent constitution.

A new use of transitional arrangements can be found in Kenya, Madagascar, and Zimbabwe following elections the results of which have been strongly contested. (The arrangements in these cases probably involve some modifications of the existing constitutions, especially concerning the structure of the executive; the ultimate aim may be a new constitution or a full return to the existing constitution. Kenya and Zimbabwe belong to the former category.)

The negative side of interim arrangements

Interim arrangements can be used to hijack the reform process. In Kenya in the mid-1990s, politicians used interim, and essentially minor, reform to forestall more fundamental change, taking the steam out of the civil society reform movement and holding up reform for at least a decade. Nepal in 1951 was under considerable pressure to democratize the political system through constitutional reform; the king promulgated an interim constitution as a prelude to reforms by a constituent assembly. Instead the interim arrangement lasted for eight years (and was changed to return to the king his old powers). It was not until 1990 that constitutional reform got back on track.

There are dangers in a long transition: momentum may dissipate, and agreement among the parties may disintegrate. If the focus is on the long-term democratic system, interim arrangements have to be dynamic, leading gradually to more inclusive forms and more accountability.

There is also a danger that if some reforms are instituted, the movement for radical change will lose momentum. The trick is to institute reforms whose logic is further reform, thus promoting the irreversibility of reform. (This could, for example, be done by inclusion of hitherto marginalized communities in the process.)

A transitional constitution may give opposing forces time to regroup and consolidate, which

may put the objectives of peace at risk.

Interim constitutions have in some instances become the broad copy for the permanent constitution. In Iraq the earnest and prolonged nature of the negotiations on some issues in the Transitional Administration Law was such that the parties must have intended them to be the ultimate solutions (especially on issues such as federalism, language, and the future of the Kurdish forces, the peshmerga).

An interim constitution may exclude particular groups or issues. Both in the way it structures the process for the permanent constitution and if it becomes the model for the permanent constitution, this may have serious consequences for the country, and for the durability of the peace and the constitution.

Interim arrangements as road maps to a new constitution

To overcome the risk that change will lose momentum, it is essential that the interim arrangements include a road map to the new constitution. Indeed, some interim arrangements are largely about the road map, especially those negotiated under international auspices (as in Afghanistan, Cambodia, Kenya, and Sudan).

When the focus is the road map, it is not unusual to find more than one set of transitional provisions, sequentially. Both Afghanistan and Iraq demonstrate this: an initial bureaucratic procedure yields to a more consultative and representative administration, which has the basic responsibility of

Box 6. Negotiating interim arrangements in Nepal

After the People's Movement of 2006 led to the end of the king's absolute power, and in accordance with the agreement between the Maoists and seven "democratic" parties, decisions were made by consensus, and this is how the interim arrangements were decided. (The king, though nominally still present, was left out of the negotiations.) The initial decision on transitional arrangements (involving the removal of articles dealing with the monarchy and the recall of parliament with its immediate past members) was made nominally by seven parties, in reality by fewer. This happened in the face of Maoist opposition, but increasingly it was seen as a prelude to the next set of interim arrangements, in the making of which the Maoists would play a full role. Already the parties had conceded to the Maoists' demands that the constitution would be made by a constituent assembly. Although an expert committee, under a much-respected Supreme Court judge, was appointed to draft the interim constitution, in practice the key decisions were made by nominees of the eight parties. Nearly five thousand submissions were made by the people, but there is little evidence that much heed was paid to them. The interim constitution was enacted nearly ten months after the recall of the ad hoc parliament.

leading the nation to a new constitution or to elections for a constitution-making body.

The scope of the interim arrangements depends on factors such as the anticipated length of time before the ultimate constitution is in place (the longer that time, the more detailed the interim arrangements must be); the feasibility of using the existing constitution for the time being; the discretion to be left to constitution-makers (the less the discretion, the longer the interim arrangements); and whether the interim arrangements are under the administration of the international community (in which case they will be brief—as in Cambodia and Timor-Leste).

The orientation and scope of the interim arrangements

It is clear, then, that the orientation and scope of interim arrangements depend on the context and strategies for establishing the new political order. Hence there is great variety in such arrangements. Some are brief, largely concerned with the road map, adjusting state institutions toward that objective. Some would even lack various institutions of government. Others are as detailed as a final constitution would probably be. The Nepal 1951 constitution had no provision for a legislature, but only for an advisory assembly for the king. The 2007 interim constitution of Nepal made no provision for elections. But the South African interim constitution of 1993 was complete and detailed.

Expert opinion seems to waver between those who favor a short and businesslike document with a bare minimum of content and those who argue that the interim constitution should offer considerable detail and be as democratic as the final constitution should be (in part to cultivate democratic practices and habits). The latter is not so easy given the difficulties in transition that we have mentioned. It might also introduce rigidity when flexibility is needed (particularly in volatile contexts, as Nepal discovered). It is perhaps more important to make the process itself inclusive and principled than to attempt to set forth democratic rules for the interim administration. But much depends on the context, and it is hard to be dogmatic about these matters.

Who negotiates the interim arrangements

As with other aspects of interim arrangements, there is great variety concerning their negotiation. In general they are negotiated, but in some instances they can be prescribed by one party when it is in general control of the state. The Ethiopian and Ugandan arrangements were the decisions of the governments that had captured state power. A unilateral decision is also the practice of military authorities on the execution of a coup d'état.

In South Africa the interim arrangements were negotiated almost exclusively among several political parties. Most of the negotiations at this stage were held behind closed doors. If there were disagreements among the parties, decisions would be made by the two major protagonists, the African National Congress and the National Party, concurrence between which was described as “sufficient consensus.”

If the interim constitution is to be negotiated by internal forces, there is an obvious dilemma: if circumstances are not right for deciding on the final constitution, how much detail will it be possible to decide on—other than the actual process for producing the final constitution? For this reason, interim constitutions sometimes bear considerable resemblance to a previous constitution, perhaps with the most obviously offensive provisions removed. This was notably true in Nepal. If, on the other hand, full negotiations for the interim constitution are possible, won't the same considerations effectively continue? And why should the final constitution be different? This was largely the case in South Africa [1996], where the detailed negotiations over the interim constitution produced provisions that were substantially reflected in the final constitution.

In recent years, the international community has played a key role in devising interim arrangements. This was true in Afghanistan [2004]. In Iraq [2005], major decisions were initially made by the United States, but the intervention of the United Nations was instrumental in reaching agreement on crucial aspects of the interim arrangements, including the road map. In the case of Cambodia [1993], major decisions were made in Paris at a conference that included key Cambodian groups, several interested states, and the United Nations. In both Sudan and Somalia Western states have played an important role.

On the whole, little space has been found for public participation by civil society. Where political parties are dominant, they may have influence on the negotiating parties (as in South Africa [1996]), but even then, the role is limited. In Nepal [ongoing process], groups that were excluded from decision-making were able to secure amendments to the arrangements after considerable agitation, accompanied by violence.

Forms of interim arrangements

There is considerable variety in the ways in which interim arrangements—meaning how affairs of the state are to be managed during the period when negotiations begin and the final settlement is implemented—have been organized. In many cases it is possible to use existing mechanisms (suitably modified, as in many transitions in Eastern Europe), while in others new arrangements may have to be created (which can consume time and energy). One factor is whether the new forces agitating for recognition can be accommodated within existing arrangements. Generalizations are hard, because much depends on the context.

A particular dilemma in structuring interim arrangements is whether to try to stick to the existing, even if discredited, constitution or adopt an interim constitution. The arrangements in South Africa [1996] illustrate several of the issues mentioned above. Although the African National Congress had fundamental moral and political objections to the apartheid constitution, it agreed to work within it for an initial phase. Its decision was motivated by at least two considerations. The first was to reassure the members of the white community that changes would not be abrupt and would not be imposed on them (since they were in charge of the amendment procedures). The second reason was to lay the foundation for the rule of law by

accepting the principle of legal continuity. (See part 2.1.6.) The “interim arrangements” dimension was part of the agreement among the parties engaged in negotiations that the government and the legislature would act in accordance with the instructions of an unofficial interparty executive council. (During this period the main legal pillars of the apartheid system were repealed by the apartheid legislature.) But even with this concession, the supporters of the African National Congress would not have accepted the extension of the apartheid constitutional and legal system. The initial interim period was therefore used to agree on new arrangements for the next phase. The new arrangements, in the form of an interim constitution, were fundamentally different from the apartheid constitution and were decisive in the move to a nonracial democratic system. They included elections to a constituent assembly, which changed the power configuration of South Africa. Interim arrangements played an important, constructive role in South Africa (in contrast, for example, to Sri Lanka, where few attempts at interim arrangements as defined here have been made other than the proposals by the Tamil Tigers—the Liberation Tigers of Tamil Eelam—which seemed designed to entrench their preferred system ahead of negotiations).

It may sometimes be possible to use the existing constitution either in slightly amended form (e.g., in Kenya in 2007) or without any amendment but with an understanding that authority under it would be exercised through joint decisions of competing groups (as in Hungary as it gradually moved away from communism). In Afghanistan an older constitution, deemed the most democratic of all previous constitutions, was adopted, but with so many modifications that it imposed little in the form of an effective framework for key decisions made during the interim constitution or on the road map.

Legality of interim arrangements

The question of the legality of the interim arrangements is likely to arise. Those opposed to the forces that come into power may challenge the legality of their actions. The safest course therefore might seem to be to operate through the existing constitution. As we have seen, often this is not possible. Others insist that new arrangements can be justified under the concept of “revolutionary legality.” (See box 4.) Unless revolutionary legality is bounded by clear principles and rules, it can easily degenerate into arbitrariness and even anarchy. The mandate of the people, which is frequently referred to these days, is too imprecise and its contents too contested to serve as the foundation for revolutionary legality.

If it is essential to establish interim arrangements outside the framework of the existing constitution, it is important for their legality that they be based on broad consensus. This consensus could perhaps be achieved through a roundtable with key groups.

Managing the transition period

We now turn to how interim arrangements may deal with managing the period of transition until the new constitution is prepared. A key factor is whether the process is driven by local or

Box 7. “Incremental” change in Chile

Chile is an example: after the military rule, General Pinochet lost a plebiscite in 1998 on his future as a presidential candidate, and the country moved gradually to a democratic system. Between 1989 and 2005 the constitution was amended seventeen times, until two commentators said that if the latest batch of reforms was adopted, “institutions will finally catch up with the democratic process” (Esteban and Vial 2005).

external factors. If external, there are two possibilities: (a) the country is taken into international care and the United Nations or a regional organization takes over management of state affairs (as in Cambodia, Kosovo, and Timor-Leste), or (b) there is massive international involvement (as in Afghanistan, Bosnia-Herzegovina, Iraq, and Namibia). In the former case, power is restored to the country only after the dispute has been “resolved,” law and order established (including possible disarmament), a new constitution adopted, and elections held. In the second case the international group works closely with the national authorities (which are often of an “interim” nature) and keeps open the “seats of power” for a competitive electoral process. In Namibia [1990], for example, authority was vested in a South African administrator (sympathetic to the white-dominated faction) but his powers were exercised in close consultation with the United Nations representative, who was ultimately responsible to the Security Council through the Secretary-General. In Afghanistan [2004], the Bonn Agreement provided for an interim government that was to be endorsed by a partially elected Emergency Loya Jirga, and the United Nations was asked to provide assistance to it. In practice, the United Nations advised Hamid Karzai and provided a considerable measure of administrative support.

Cambodia’s [1996] and Iraq’s [2005] arrangements were in between complete external control and complete local control. In Cambodia, certain functions were discharged by the United Nations, particularly the organization of elections to the constituent assembly and the protection and promotion of human rights. The day-to-day administration was carried out in accordance with the decisions of the Cambodian cabinet, which consisted of various local political groups.

In Iraq the administration was at first completely under the authority of the United States, represented by Paul Bremer, an appointee of the United States president, under the general authority of the Coalition Provisional Authority, which consisted of the United States and the United Kingdom. In July 2003, Bremer appointed twenty-five Iraqis to the Iraqi Governing Council to assist him in this task. The council appointed a council of ministers and a constitutional preparatory committee. Bremer’s initiative was intended to speed up the process for the adoption of the final constitution, as Iraqi politicians were reluctant to move fast, considering that they needed time for public consultation and to establish trust among themselves.

Bremer’s plan was torpedoed by the Grand Ayatollah Ali al-Sistani, the most influential Shia

cleric in Iraq, who insisted that only an elected body should draft the constitution. The interim constitution (the Transitional Administration Law) was drafted by a committee of the Iraqi Governing Council and adopted by it. An interim government (consisting mostly of members of the former council) was set up; it took responsibility for elections and the operations of the constituent assembly. The constitution was adopted largely in accordance with the time limit, and fresh elections produced a new government and parliament.

The transitional phase was dominated by the concerns of the United States, and the Transitional Administration Law was in part a document negotiated between the Iraqis and the United States, touching on matters of special economic and political interest to the latter.

Internally managed interim arrangements

Since the start and the progress of negotiations often have a dynamic effect on the relations among the parties, it is not unusual that interim arrangements tend to be modified over a period of time. South Africa provides a good illustration. It passed through two distinct stages of interim arrangements. At first it continued with the system and government set up under the old (and disputed) constitution. Nelson Mandela was anxious to maintain legal continuity. But the old system was infused with a decision-making process in which all key parties to the negotiations participated. An executive committee of these parties was set up under the peace process. The cabinet agreed to exercise the powers of the government and, to the extent necessary, of the legislature, in accordance with the advice of the committee. Using this mechanism, some apartheid laws were repealed, and considerable progress was made toward a new constitutional settlement. The second stage was reached with the settlement on an interim constitution (which was adopted under the old constitution) and the holding, under the interim constitution, of the country's first nonracial general elections. During this second stage, there was a government of national unity in which all major political groups were represented in the cabinet. A principal mandate of the newly elected parliament was to draft and adopt the final constitution. On the dissolution of parliament, elections were held under the new constitution—and a government was formed to usher in the end of the transitional period.

2.1.10 Starting over when a process has “failed”

Failure—in the sense of not leading to a new constitution—seems to be the fate of perhaps half of all constitution-making processes in the world. Failure—in the sense of not producing a workable constitution—probably occurs in another significant proportion. And in others the process may be a failure in the eyes of some because it did not produce the constitution that they wanted. But a process that has not led to a new constitution is not necessarily a failed process. Much may have been achieved—even a realization that the country can live with its current constitution.

Beyond these rather general statements, we note elsewhere (see part 2.3.14) that failure may occur for different reasons, in different ways, and at different stages. Here we explore some of

the factors, and the strategies, that may be relevant when deciding whether or how to try to remedy a “failure.”

An important warning: things are never the same at two different points in a country’s history. The people involved will have changed. The state of politics, peace and security issues, and the economy will affect the attitude of the people toward the need for a new constitution. It is likely to be particularly important who is in power. Sometimes pressure for a new constitution is really pressure to get rid of a certain ruler or a certain generation of politicians. When this is done, there may be, at least for a while, much less concern with constitutional change. And if the new rulers are the people who used to press for constitutional change, they may have discovered a fresh enthusiasm for the once-despised constitution—now that it has put them, and maintains them, in power. Finally, the earlier, even if “failed,” process will have had an impact: it will have shaped what people know about constitutions, and their hopes and expectations. They may be less interested in participating because of cynicism flowing from the failure; they may be more knowledgeable—or think they are more knowledgeable; they may be even more desperate for and committed to change; they may be so keen to have change that they overlook flaws in the proposed new constitution.

Back to square one

After a significant lapse of time, the failure of a process may be largely irrelevant—and the issues for those who have an interest in moving, or an obligation to move, toward a new constitution are essentially the same as if the country were starting constitution-making from scratch.

Even if the lapse of time is not so great, a country may decide that the best lesson from the past is to try completely afresh—either by the same sort of process or by a different process. In other words, no effort is made to salvage anything of the failed process.

Giving up

At the opposite end of the spectrum would be a decision to abandon the effort to change the constitution. Assuming that the country is not abandoning the aspiration of constitutionalism, the option would be to try to make the existing constitution work. As noted in part 2.1.2, this may well be a sensible option in many cases. No constitution is ever fully implemented, and the history of many countries would have been quite different if the government and the people had tried seriously to make what they had (in constitutional terms) work. Deciding to give up the search is unlikely to quiet demands for a new constitution unless the people have been involved in the decision or at least have acquiesced in it, and a serious and visible effort is made to use the institutions that the existing constitution presents.

What about the “no constitution” countries?

A particularly difficult variant of this situation will face a country that “does not have a

constitution.” In reality, there are virtually no countries like this. Even a new country such as Timor-Leste could have adopted a set of institutions based on the constitution of Indonesia. There are people who would suggest that Somalia is putting its priorities in the wrong order by trying to proceed with constitution-making when even the extent of the government’s control over the capital city is contested. Either that country could build on local institutions and gradually build up a state, or it could use one of the earlier constitutions (or make its interim charter more permanent). The last course—relying for an extended time on an interim constitution—has been used in various countries, including Nepal and Sudan.

Gradual change

Another possible response is to give up the idea of a formal process of constitutional revision and to try to change the existing document incrementally, in the hope that over a period of time the country might be able to move toward a document that works and is legitimate in the eyes of the people. The Israeli parliament adopted a series of laws that laid down the constitutional framework, anticipating that this would ultimately lead to a unified constitution.

There are questions about such processes: is the result coherent? Is the process transparent and participatory? And some existing constitutions make change so difficult as to be impossible.

Starting from where you left off

Other countries have tried to retain what are seen as the gains of the “failed” process while moving ahead to translate them into a new constitution.

Lessons from the Kenyan process—which are likely to be true of other countries, too—include:

- old, contentious issues that are of concern to politicians (mainly about power) have not been resolved, and they threaten the new process as they did the old;

Box 8. Options for “starting over” in Kenya

This has been the approach taken by Kenya since the rejection of the government-mutilated draft in a referendum in 2005. Various suggestions were considered for restarting the process. These included different combinations of a constituent assembly, a panel of constitutional experts, and a referendum (the last being required by a court decision); or a multisectoral forum plus a committee of experts and a referendum; or electing the next parliament to act also as a constituent assembly; or an interim constitution, a constituent assembly, and a referendum; or abandoning the attempt to produce a whole new constitution. Eventually a committee of “experts”—six local and three foreign—was mandated to prepare a draft drawing on the various phases of the failed process. (See the case study on Kenya, appendix A.7.)

- agreeing on what issues are “contentious” is hard, because additional issues constantly emerge;
- errors of design that were made in the previous process, including some deliberately created to defeat the old process, remain to affect the new; and
- people, including members of the press, have remarkably short memories about the details of the constitution (hailing as “new” provisions that have appeared in several drafts).

The “political will” question

The mechanics of restarting are one thing; generating the will to start again is another. It is important to understand why a first process failed, to rekindle interest and recapture momentum if a major review process is to work the second time around. In Kenya an agreement effectively forced on the country by the international community after an outbreak of ethnic violence compelled fresh movement on the constitution.

On not rushing to change the new document

Some people will not be satisfied with the new constitution; some will have lost some aspect of the argument, and others will have lost power. And some people who were spoilers during the process will continue to raise points (which are not necessarily their real objections to the new document). Once a country has a new constitution, it should, ideally, move on. Implementation will itself be a big task, and continued debate about the contents will only hold up implementation. There is a risk that constitutional amendment will replace the old constitution-making debate. Clearly, essential amendments—such as if some provision turns out to be quite unworkable—ought to be made, but in principle the effort in the first years of a constitution’s existence should be toward making it work as it was drafted.

Box 9. Who should participate—and how? (Sometimes known as “actor mapping”)

When a constitution-making process is begun, it is important to identify all the sections of society that need to be involved—to create a sort of picture of society, with all its divisions and institutions, to ensure that the constitution-making is a truly national event and everyone has a voice.

Certain groups often dominate—including, in postconflict societies, the parties to the conflict, who often seem to think that taking up arms gives them an exclusive right to participate.

Certain groups are often excluded:

- women, either because they are generally disregarded in society or because organizers ignore the issues of culture and role that make it hard for women to participate in the same ways as men do;
- ethnic or religious minorities;
- marginalized caste or ethnic groups, because they are excluded from meetings, live in remote areas, belong to small language groups, or do not understand constitutional issues;
- noncitizens—even if they are long-term residents;
- the elderly, who may have to stay at home; and
- immigrants, who, even if citizens, may be victims of exclusion.

Especially in a society emerging from conflict, there may be no institutions that really represent the people.

Parliament, political parties, and local government may have collapsed, or they may simply be ineffective or unrepresentative. (Such issues may have been the cause of the conflict.) Parties and formal institutions that do exist should not be ignored; their cooperation may be essential for the success of the project.

Formal organizations should be identified, including trade unions and farmers' associations; civil society networks and organizations; chambers of commerce; professional associations (e.g., teachers, nurses, and lawyers); and bodies representing "traditional authorities." But in most societies there will be many other organizations: informal sector workers, squatters, victims of conflict, savings groups. Many of these may be largely invisible, especially to foreigners, but even to nationals focused on the capital city. In many countries, churches, temples, and mosques may be the principal organizations in communities' lives, and the local schools may also be an important focus of life and locus of communication.

Formal groups are not the only way of thinking about the people and how they may be involved. Many people will not be organized at all, but they have equal rights to be involved. Women especially may not be organized; persons with disabilities may be concealed; marginalized communities may not be linked into the national structures.

Groups are important for helping to get a sense of the population and its divisions. But it should not be assumed that people will want to be involved only through organizations to which they are affiliated. A person may have interests other than that of being a farmer (represented by the farmers' association), a woman (represented by the women's self-help association), or a Christian (represented by a church). That person may want to be involved as a person directly. This section of the book addresses these questions of how people can participate and have their voices heard. Ensuring the participation of all key groups, and even of those who may not be formally associated with groups, may also promote greater transparency and ownership of the process.

2.2 Public participation

In this section we discuss the role of public participation in constitution-making, how to facilitate an inclusive process (see box 9) as well as the risks and opportunities related to a highly participatory process. We then focus on the tasks undertaken by constitution-making bodies to promote public participation in the official process. They include preparing the public to participate through civic education and public information campaigns, as well as consulting the public on issues such as whether a process should take place (and how) and what should be in the constitution itself.

Some aspects of public participation in constitution-making processes are not discussed in this section, but are instead considered elsewhere in this handbook. We discuss the referendum procedure in part 3.5. Issues about how civil society and the media participate in the official process are discussed in part 4.1. Representation of the diversity of the nation as a whole in constitution-making bodies is discussed in various sections related to establishing the institutions of constitution-making in part 3.

2.2.1 Introduction to public participation issues

Changing modes of making the constitution

Focusing on public participation helps us understand the complexity and dynamics of constitution-making. It alerts us to the variety of interests and groups that often become involved, or may want to become involved, in making a constitution. It points to the degree of inclusion in a process. It may give some guidance about the kinds of issues likely to dominate the constitution-making process. It draws attention to the relative strength of the participating groups, often pointing to the dominance of one or more groups. It can help lift the veil from the official process by giving insights into the actual negotiating and decision-making processes, where the key decisions are really made. It can also show the influence of outside forces (which on the whole do not feature in the design of the formal process), often away from the glare of publicity, and give some indication of how nationally autonomous the process has been. (See part 4.2 on the role of the international community.)

The importance of broad popular participation in constitution-making processes has varied historically and regionally. In a country where there is a tradition of interest-group organization and representation, even if that has suffered interruption, direct popular participation in the process usually receives low priority. The greater level of media activity and the stronger tradition of representation help ensure that people have a chance to hear debates on constitutional issues without necessarily having direct involvement in the official process. They may also be able to convey their views through established channels, rather than through special participatory arrangements established as part of the constitution-making process. By contrast, where civic

groups, unions, media outlets, and political parties are few, less established, or of limited reach, establishing special arrangements for direct involvement of the citizens is usually more necessary as a way to convey and obtain information, enhance the public orientation toward law, and build constitutionalism. For these reasons, popular political participation attracts a higher priority in Africa, Latin America, Asia, and the island Pacific.

Other significant factors in the increasing focus on public participation in constitution-making processes include the restoration of democracy in many parts of the world since the late 1980s and the increasing recognition of people's sovereignty, the constitution being the basis of the organization and functioning of the state. The right to participate is provided for by several international norms, particularly the right to take part in public affairs (article 25 of the International Covenant on Civil and Political Rights), the right of minorities to self-rule (the United Nations declarations on minorities and on indigenous peoples), and the right to self-determination (the charter of the United Nations, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights). Some authorities regard these and other human rights instruments as perhaps a basis for a right to participate in constitution-making. Despite these normative and practical reasons, there is considerable controversy over the desirability of public participation. Before we consider the controversy, let us describe what we mean by "public participation," major participants, and principal methods of public participation.

Meanings and aspects of public participation

Public participation has many aspects. The distinctions we may draw are: (a) direct versus indirect participation or representation (indirect raises questions of method of election or appointment and of accountability, or reporting back); (b) participation in discussions, lobbying, and the like versus participation in decision-making; (c) participation as part of an official process versus informal participation, with people taking their own initiative.

Public participation covers a broad spectrum of activities, including voting and standing for elections; being part of decision-making (in various state institutions, particularly the legislature and the executive), perhaps with a veto on some matters; opportunities to influence official policies; forms of self-government, such as autonomy; and consultative bodies. Public participation in constitution-making processes is more specific, directed as it is toward influencing the final outcome of the process, the constitution. However, even here public participation takes a variety of forms. It includes much more than formal procedures for receiving people's views, and extends to private initiatives to mobilize support and lobby constitution-making bodies, which often take place even if there is no such formal procedure.

There is no set pattern; the extent and form of public participation depend on the overall design of the process. Sometimes there may be a deliberate attempt to limit public participation. The reason may be a distrust of the people in general, perhaps because of their lack of understanding

of constitutional matters or of moral judgment, the fear of a populist constitution, or a wide reform agenda with major implications for the allocation of resources. It is sometimes said that after World War II, the lack of trust in mass politics led to restrictions on public participation in the constitution-making process (especially in Germany and Japan, although in the latter case the fear was that public pressure might prevent the political reform that the Allied powers deemed necessary).

Public participation can occur at many stages of constitution-making, and can take several forms. It may be more intensive in some stages than in others. The preprocess stages may be undemocratic; the prior principles may have been negotiated between closed groups or factions. The eighteenth-century process to develop the United States constitution became more open and participatory as it progressed, after the constitution had been drafted. But in some cases, the earlier stages may be the most democratic and participatory: massive protests and engagement by thousands of people may have been instrumental in getting the process started (as in the Philippines [1987] and Kenya [2005]). At some stages public consultation may be wide-ranging, with several opportunities for the public to express views before the draft is prepared. And even when an initial draft has been prepared, there may be ample opportunities to comment on it before final decisions are made. There is nothing like getting your teeth into a concrete set of recommendations after what might have been a bewildering array of proposals and counterproposals. Sometimes both the initial and the concluding stages might restrict public participation, as decision-making is often facilitated by some degree of secrecy.

The process may sometimes begin with initial discussions about the parameters and guidelines for future talks. This has been characterized as talks about talks. (Proceedings 2007). (See part 2.1.9 on interim constitutions.) This is usually an elite affair, often undertaken in private (as in Iraq, in Nepal, and in the failed Sri Lanka talks)—although in South Africa and Spain voters were allowed to ratify the outcomes of such initial processes through elections. Often interim arrangements themselves restrict public participation (as in Afghanistan and Nepal).

The degree of public participation in the actual preparation of the draft constitution varies. There is often considerable public participation when the draft is prepared by an independent commission (in Kenya and Uganda, the commission was required to promote public participation and to follow public recommendations in drafting the constitution). Preparation of a draft by a separate commission is a common pattern. When the draft is prepared by a committee of the legislature or of the constituent assembly itself (a rather less common arrangement) both public participation and transparency are less evident.

When the draft is being debated and enacted, public participation decreases, as the members of the relevant body (usually the legislature or the constituent assembly or an equivalent body) focus on the draft—adopting, rejecting, or amending it. But even here, public participation can continue through lobbying, petitions, public demonstrations, and the like. Some processes provide for referral to the people by referendum to resolve outstanding issues, but the use of this device has been limited. (See part 2.5.2 on dealing with divisive issues.) A more common

use of referendums is to determine whether the draft constitution produced by another body (such as the legislature) should be adopted, and that provides a further opportunity for the public to review the merits of the draft. Often, the final decision on the adoption of the constitution as a whole lies with the legislature or with the constituent assembly. But when the draft is put to a referendum, the final decision rests with the people—the highest form of public participation.

The impact of public participation

The impact of public participation does not depend only on formal provisions about how the constitution-making process and participation in it are structured. Much depends on the persuasiveness of the public submissions, or the political clout of the lobby (e.g., how closely it is connected to powerful interests), or the zeal with which organizations carry on their campaign. The submissions may be addressed to the constitution-making body, but they also seek to mobilize the people and win their support, to put pressure on the decision-makers.

Impact also depends on the approach of the decision-making body to the collection and analysis of the public's views and the importance it attaches to them. The manner in which official bodies (constitutional commissions, constituent assemblies) process the oral or written submissions made to them is critical. (See part 2.2.4.) The submissions can be manipulated, or analyzed with a bias, or some views may even be suppressed.

Public consultations can come from the top down or the bottom up. They mostly come from the top down (when initiated by political or civil society elites), but sometimes there are attempts at public consultation that arise from the bottom up, as in Kenya and Uganda. In Nepal they primarily came from the top.

How people are instructed in constitution-making tasks and their sequencing, the manner in which they can address the commission or the assembly, who provides civil education, and the monitoring of the process for impartiality are all crucial elements in the effectiveness of public participation.

The transparency and authenticity of the analysis of views are fundamental to the credibility of the entire process. In Kenya the decision-making bodies engaged in extensive public consultation, painstakingly analyzed public views, and reflected them in the draft and final constitutions. In Afghanistan, the decision-makers were essentially political leaders; the commission was not an independent body, and the views that had been collated and analyzed by the research section and the Afghan secretariat were ignored. The importance of careful analysis of public views is crucial when the institutions for constitution-making are enjoined to incorporate the people's recommendations. (See part 2.2.4.)

The relevance of decision-making bodies

The focus of the literature on public participation is often on the interaction of the people with

the decision-making bodies. Equally important can be the composition of these bodies and the rules whereby decisions on the constitution are made. It is often said that a constitutional commission should be independent and consist of experts, and that constitutional assemblies should be elected through proportional rather than majoritarian voting systems. But little has been written about the independence of the members of the assembly. (In Nepal they were all elected under the auspices of political parties and were subject to party whips.) And how the people interact with the assembly once it has embarked on the decision-making stage is also important. This bears on the rules of procedure, which determine the openness and transparency of its committees, public hearings, and the like. All too often these rules are taken from the standing orders of legislative bodies—which may be quite inappropriate for a body charged with making a constitution. This seems to be an under-researched issue. In participation by delegates, the extent and quality of public participation depends heavily on the rules of procedure and the autonomy of the assembly. Participation by citizens depends on the political, consultative, and lobbying activities of the people and their organizations.

Participants

The concept of “the people” (or “the public”) is more complex than is usually realized. A proper assessment of the impact of popular participation cannot be made if the concept of “the people” is not disaggregated. There is no such thing as “the people.” Rather, there are religious groups, ethnic groups, the disabled, women, youth, forest people, pastoralists, “indigenous peoples,” farmers, peasants, capitalists and workers, lawyers, doctors, auctioneers, and practicing, failed, or aspiring politicians, each pursuing his or her own agenda. They bring different levels of understanding and skills to the process. The key players in the international community pursue their own objectives. Sometimes the composition or procedure of bodies with decision-making roles in the constitution-making process may privilege one or another of these groups. Unless one believes in the invisible hand of the political marketplace, not all such groups can be counted on to contribute to producing a “good” constitution. The proper and fair management of public participation is essential for a good process. (Despite the complexity involved, we cannot avoid sometimes using the terms “the people” and “the public,” but where we do, the considerations just discussed may need to be borne in mind.)

An agreement may be easier if the parties to the process are limited and the talks are confidential (but sometimes bringing in new groups may help—bipolar disputes are difficult to resolve). However, even when successful, these agreements and the ensuing constitution may depend excessively on the goodwill of the negotiators and may fail to respond to the concerns of the people. They may lack firm social foundations.

Particularly problematic is the participation of groups that have used violence to pursue their objectives (especially in postconflict situations). They have demonstrated a lack of commitment to human rights and the peaceful resolution of differences. Often they demand preconditions for peace talks and constitution-making, including amnesty for violations of the

rights of others and the disruption of the peace. Such amnesties are controversial and make others feel that the perpetrators of violence or abuse will simply reassert their power and undermine the security and well-being of others. On the other hand, the refusal to make some accommodation with them can complicate the peace process (as Iraq discovered with the “lustration”—exclusion from holding public office—of thousands deemed to be part of the Saddam Hussein regime). Giving amnesty for past offenses on the condition that no fresh violations will take place may be an incentive to stop violence. Sometimes the solution may be to postpone the question of accountability.

In some countries where there is deep mistrust of politicians, the predominance they normally enjoy in the constitution-making process has been questioned. It may be said that they have narrow personal or party interests, closely connected to their access to and exploitation of the state and its resources, which they try to advance or preserve through the process. They may also have an interest in fomenting ethnic differences to maintain their leadership positions, regardless of the national interest, and thus their role can be deeply divisive. Since in one sense the politicians can be the principal beneficiaries of the resources of the state, it can be argued that their influence on the making of the constitution of the state should be limited. However, attempts to reduce that influence are seldom successful, and in practice a constitution can seldom be made without their full participation, as they control the state and the institutions of the constitution-making process.

Assessing the impact of public participation

It is not easy to evaluate the impact of public participation. It is easier to assess the role of rules and procedures in the official process. Traditionally, public participation and the concept of constituent power have been examined in the context of the primary procedure for decision-making: for example, either the referendum or the constituent assembly. Studies on constitution-making focus primarily on the decision-making bodies, and for the most part ignore the pressures that might be brought on the decision-makers. For a complete picture, it is necessary also to look at the informal processes, the mobilizing of the support of groups and communities, and the contribution of civil society in terms of ideas and organization. Partly with the help of emerging regional or international norms, many groups (women, the elderly, the disabled, indigenous peoples) are able to mount impressive campaigns of their own making. Moreover, the efforts and influence of some groups are evident or transparent, but some (e.g., international actors, key embassies, and international agencies) shape the process behind closed doors.

Another difficulty in making this evaluation is the lack of agreement on the criteria for assessment of the impact of public participation. Sometimes the focus is almost exclusively on whether a new constitution was achieved, regardless of its quality. At other times the focus may be the reverse: whether a bad constitution was prevented. Or the focus may go beyond the actual document to the dynamics of the process and the wider outcome from societal or political viewpoints: whether the process was healing, whether it stimulated constructive public debate,

whether it led to a more informed and activist citizenry. It is not difficult to imagine how different groups may choose to place their own emphases in their assessments.

The impact of public participation may be examined by reference to various factors, including the following:

- its effect on the outcome, i.e., the content of the constitution;
- the resolution or creation of conflict, particularly national unity or disunity;
- the broadening of the political reform agenda;
- the responsiveness of the constitution to national aspirations and issues;
- the legitimacy of the constitution;
- its effect on people's consciousness—understanding the machinery of government and enabling people to evaluate the policies and pretensions of politicians;
- its effect on people's empowerment, and their willingness to participate in public affairs; and
- the promotion of understanding and support for constitutionalism.

On these and other issues there has been limited research, and as yet few well-informed judgments; these factors have contributed to a range of competing views. More research, particularly of an empirical kind, is necessary. Here we present the main arguments or assertions of the proponents and critics of general public participation.

Potential opportunities in public participation

In addition to the normative principles mentioned at the beginning of this section, there are practical justifications for public participation. In some countries, especially in Asia, the island Pacific, and Africa, political parties are not mass based and do not represent sections of the people with some degree of common interest (as parties often do in Western countries). Nor are there many intermediate bodies that can speak for the people. Often the only alternative, if it is considered desirable to engage the people, is their direct participation, in slums, villages, and small towns.

Public participation is deemed to strengthen national unity through an inclusive process, reflecting religious and linguistic diversity, by resolving national differences and striking a balance between national identity and values and those of regional or cultural communities. The involvement of the people in the constitution-making process has the potential to reconcile conflicting groups. Public participation empowers the people by acknowledging their sovereignty, by increasing their knowledge and capacity, and by preparing them for participation in public affairs and the exercise and protection of their rights.

People's participation is important to expand the agenda of constitutional (and social) reform. Generally the agenda is defined by elites, largely urban based. When invited to give their views, members of rural communities and workers are likely to present new perspectives on issues

such as public participation, decentralization, land, basic needs, and the accountability of members of parliament and local officials; these perspectives are firmly rooted in local realities. Popular engagement can bring to the dialogue different social forces, interrogating the assumptions of the elites and officials, and to some extent setting up a counterbalance to politicians. Until recently, almost everywhere politicians have played a decisive, and sometimes the exclusive, role in constitution-making. But worldwide, there now appears to be cynicism and suspicion about the motivations of politicians and political parties; they are seen as serving their own narrow, partisan interests. The broadening of the reform agenda that comes from popular participation is an important corrective. Public participation often leads to an emphasis on values and morals, the responsibility of the state, and the integrity of officials, while politicians focus on state powers and institutions.

Public participation can seldom be effective without civic education, which enhances understanding by “the people” of the structures and mechanisms of the state and its obligations to its citizens, which are often protected through fundamental rights. The people learn about the ways to monitor state institutions and about accountability. They may thus acquire knowledge and respect for the principles of constitutionalism. Possibilities for public participation, together with the possibility of funding, may help create and develop civil society, not merely reflect it.

A broad consultative process may also reduce the risk of bad surprises that sometimes occur during a process, such as the sudden discovery that support for an agreement has disappeared because a disaffected, unrepresented party has mounted a public campaign and has swayed popular opinion—or that at a late stage, politicians have made a deal to sabotage the process or have agreed on constitutional provisions unfavorable to the public interest. Bringing the public into the process makes it less likely that deals will be struck that will be undone immediately.

Some say that a constitution produced through a widely participatory process will be more stable, with prospects for longevity; it represents a considerable consensus and is responsive in that there will be fewer demands for renegotiation down the road. There is also a widely held belief that public participation endows the constitution with considerable legitimacy and leads to a feeling of ownership by the people and a corresponding resolve to defend it against sabotage.

Potential risks of public participation

Supporters of public participation have been criticized for romanticizing “the people.” The reality, the critics say, is much less edifying. People may not be generous or willing to enter into serious discussions with others. They may seek only self-interested positions that can continue to fuel rather than resolve conflicts. A significant part of the reason for such problems with public participation is that “the people,” and even leaders of significant social groups, often have a limited understanding of the proper role and scope of the constitution. Whether they are conservative or populist, people may be intolerant, prone to manipulation by fundamentalists, contemptuous of experts, and long-winded, and their participation may

unreasonably prolong the process.

One fear about public participation is that in a divided society the debate may revolve around ethnic axes rather than the national axis. Politicians with an interest in the mobilization of ethnicity will push the interests of their communities. This not only obscures the national interests but also leads to fragmentation and competing claims based on ethnicity. When the distinction is based on religion, the discourse becomes increasingly religious, forcing religious values on the whole country. When the basis is ethnicity, cultural differences may lead to serious disagreements on issues such as choice of national language and protection of minority rights. In either case, those who are not well placed in the religious or ethnic order may find that their voices are silenced and that their lowly position is unlikely to be remedied. Concessions to cultural norms and hierarchies may devalue the rights of individual citizens, by the constitutional recognition of the community as an important bearer of rights.

The constant emphasis on culture may result in constitutions that are no longer congruent with dominant international economic and social forces. In the process the gap between the constitution and social and economic realities widens, often increasing the risk of future conflict.

On the other hand, public participation opens up the process to external influences. In constitution-making processes in many parts of the world (especially Africa, Asia, and the island Pacific), most resources for civic education (an essential precondition for public consultation) come from Western governments, either directly or through a few international agencies. Materials used for civic education are heavily influenced by international norms and the practices of Western states. Insufficient attention is paid to national history or culture (which may be seen as inconsistent with human rights norms). Young college graduates from the West are normally sent in to assist local nongovernmental organizations (NGOs), which in most cases are totally dependent on external funds.

Those NGOs, responsible mostly for civic education and sometimes for the collection of public

Box 10. Veil of ignorance

The philosopher John Rawls suggests that the best way to design a society would be for everyone to operate in a rational, self-interested way, but behind a “veil of ignorance” that conceals from everyone his or her own characteristics: male or female, with a disability or without, language, tribe, religion, and age. Negotiations between such rational but ignorant people would produce a system fair to all (Rawls 1971). In the real world it is not possible to ensure such beneficially ignorant constitution-makers. There may be moments in a country’s history when groups are ignorant—“How many of us are there in this group?” “Are we likely to win the next election?” Those may be good moments to produce a fair constitution—and if the moment passes, attitudes may harden and fairness fade.

views, have also come under attack as promoters of public participation. The bases for the critiques include claims that such bodies are dependent on outside, often international, sources; responsive to economic opportunities (“fundraising”); urban based; nondemocratic (not membership organizations); bureaucratic; competing for money and roles; not particularly knowledgeable about constitutions; and often allied to political (including ethnic) parties.

A participatory process tends to be the opposite of “the veil of ignorance.” John Rawls’s theory of the veil of ignorance is based on the assumption that decision-makers do not realize who they are (black/white, male/female, high caste/low caste) and so vote not for a particular interest but for the general interest (Rawls 1971). In the participatory process, the purpose is to engage with individuals and groups with differing interests so that they can advance those interests (not the general interests of all groups and citizens). Particular interests are often pursued with vigor and sometimes intimidation.

The variety of interests (frequently conflicting) usually involved in a highly participatory process makes it hard to find reasonable agreement. The difficulties are compounded when there is an emphasis on achieving consensus on major constitutional issues. A great deal of time and effort may then be devoted to trying to build a consensus, with complex bargaining. Sometimes a small group may end up effectively having a veto. Although processes often provide a mechanism for coming to a decision in the absence of a consensus (see part 2.5.2 on dealing with divisive issues), the process becomes lengthy (well beyond the point when the public can make any further useful contribution). The constitution itself may also tend to be lengthy, as a settlement may be possible only with the acknowledgment of the claims of many interests.

Sometimes the consequence of a participatory process in a deeply divided society is that decisions are made not in accordance with the participatory and transparent manner of the formal process but secretly, by a small group of influential members or even nonmembers.

So the process of decision-making may be driven less by “deliberation” (i.e., the fair consideration of all positions, guided by values of democracy and the general welfare) than by populism and crude bargaining. Some say that this defeats the objective of a constitution, which should be to provide a general set of provisions addressing national interests in a rational manner.

A participatory process can sometimes generate a feeling (especially among minority groups) that this is their one opportunity to achieve their objectives, even if those objectives have no particular constitutional significance. And influential groups, distrustful of politicians, may seek to constitutionalize what are essentially matters of policy, not a framework for decision-making. Both these factors may work against “deliberation.”

The prospects of a deliberative approach may also suffer from the holding of a referendum. The reason is that in the hope of encouraging a “yes” vote in the referendum, decision-makers may be influenced to include provisions in the draft constitution that they believe are most likely to be accepted by the people or even by some particularly troublesome group (often religiously or

ethnically oriented). In doing so they may dispense with what is rational and feasible. (See part 3.5 for a discussion of the use of the referendum in constitution-making processes.)

The role of experts (see part 3.4.1) is often marginalized in participatory processes. Once the people get into the tempo and spirit of constitution-making, and gain a sense of ownership of the process, they tend to disregard, even disdain, professional advice (which is often rooted in more conservative traditions). This may also lead to the neglect of what some regard as the “cautious” rules for the method and scope of constitutions. The form of bargaining that attends a participatory process may lead not only to a lengthy document but also to a constitution lacking internal coherence. A particular casualty may be the workability of the constitution, due to the burden placed on it to accommodate a variety of interests. The ambitiousness of the constitution may then exceed the capacity of the state, and may in due course lead to the delegitimization of the constitution.

Conclusion

Views on the consequences of a participatory process are sharply divided between its supporters and its opponents. The differences are based partly on ideological factors, partly on practical grounds. Hitherto there has been relatively little scholarly attention paid to this debate, making generalization difficult. Greater attention needs to be given to the dynamics of public participation, the phases where such participation is appropriate, and the methods of public participation.

There are clear advantages to public participation, both for the process and for the long-term prospects of constitutionalism. Most of the objectives of a constitution-making process, such as promoting reconciliation, strengthening national unity, or broadening the social agenda, cannot be achieved in the absence of public participation. There is also now consensus that certain norms, based on the principles of self-determination and political rights, should be incorporated into the design of the process.

But the dangers of public participation are also real. The challenge is to avoid the perils of manipulation of the people by interest groups, ethnicization of opinion, populism, and so forth. Otherwise the constitution-making process will become just another form of politics and not a deliberative process that generates consensus-building and reconciliation. It should promote conversations not only between the people and the constitution-makers (constitutional commissions, constituent assemblies, and the like) but also among the people themselves. This can make them aware of the histories, contributions, anxieties, and aspirations of others, and deepen the understanding that is so critical to developing national unity, conflict resolution, and peacebuilding.

A deliberative process requires public participation opportunities that are not isolated but instead provide ongoing chances to discuss and engage with the design of the process, the key issues, the development of the draft, and the implementation of the final constitution. The next sections focus on the practical and other key aspects of preparing the members of the public to participate

through civic education efforts and consulting them at various stages of the process.

2.2.2 Preparing the public to participate: Civic education

Making a constitution involves multiple choices about issues of great complexity; those responsible for making the choices usually need a significant level of information about the issues involved beforehand. (See the discussion in part 1.1.) In a highly participatory process, the people of the country in question are asked to contribute to the making of choices, which can extend to issues that could be quite difficult for the majority of people to understand—issues such as the numerous tasks and institutions involved in a constitution-making process, and the reasons for and steps involved in making a constitution more difficult to change than an ordinary law (entrenchment). Without access to information about the process or knowledge about constitutional choices being considered, as well as basic civic knowledge, most members of the public will have little opportunity to participate meaningfully in the process.

As a result, civic education is at the heart of a participatory process. For the purposes of this handbook, we define “civic education” in a constitution-making process to be any activity that helps prepare the public to participate, both before and after the constitution is prepared and adopted. Before the constitution is adopted, preparing the people involves enhancing their knowledge of not only the constitution-making process (so as to improve understanding of the nature and extent of opportunities to participate), but also the roles of a constitution and the choices in relation to content that are available when making a new constitution. After the constitution is adopted, preparing the people means developing their capacities and knowledge to engage in public affairs and to exercise and protect the rights that the constitution extends to them. It is important to note that participation in the process is also a form of civic education and if the participatory process is credible it can transform attitudes and beliefs as well as educate.

Civic education is widely recognized as an important part of constitution-making processes, especially highly participatory processes. It is referred to in the official mandates of some constitution-making bodies, one example being the Uganda Constitutional Commission, in respect of which the Uganda Constitutional Commission Statute of 1988 provided a power to “stimulate public discussions and awareness of constitutional issues.”

Any civic education program should be inclusive, open, and credible. Because the constitution has an impact on all people in the country, it should represent everyone—all age groups (from schoolchildren to the elderly), and every possible significant group within the society, whether defined by class, culture, ethnicity, religion, or on any other basis. It should prioritize reaching those who seldom participate in the political life of the country (such as minorities and marginalized groups). Successfully preparing the people in this regard is not just a matter of holding an isolated event or workshop, but an ongoing process of cultivating a culture of public participation and democratic values and practices as well as constitutionalism.

This section provides an overview of civic education objectives, a discussion of which bodies

or actors should carry out this task, and a description of some of the methods that have been used in past processes. It also includes an analysis of some of the common problems associated with implementing more formal civic education efforts in constitution-making processes. It concludes with some practical tips for improving civic education workshops.

Key stages of civic education

The key stages of a constitution-making process at which civic education efforts are often carried out, and the main likely objectives of civic education at each such stage, include the following:

- **Before the first main steps in the process begin**, when the main goals of civic education relate to informing people about the process, including alerting people to the opportunities for public participation and the manner in which they may be able to participate in the process, and (depending on the nature of the process in question) could involve efforts to prepare the people for their views to be sought in the early stages of the process on issues such as:

- how later stages of the process should be designed; and
- the agenda of issues to be considered during the process.

- **Prior to the constitution-makers reaching decisions about the constitution**, when the goals of civic education would include helping inform people about issues related to the process, such as:

- how the process is being structured and conducted;
- the objectives of the constitution-making process and the principles that will guide the work of the constitution-making body, if any; and
- roles the public can play in the process and how they can participate.

Civic education at this stage would also inform them about issues concerning the nature of a constitution and the kinds of choices that can be made when deciding on a new constitution, including such issues as:

- what a constitution is and what it can and cannot do;

Box 11. Civic education in Rwanda prior to the referendum [2003]

Two years of civic education preceded Rwanda's referendum. Copies of the draft constitution were distributed and intensive efforts were made to reach marginalized groups, including those who could not read or write, to inform them about the contents and help them decide whether to vote for the draft. These efforts seem to have led to high voter turnout and an overwhelming vote in favor of the constitution.

- the constitutional history of the country and why a process of constitutional reform is necessary;
- democratic principles, institutions, and practices to promote more democratic behaviors and attitudes; and

Box 12. South Africa [1996]: Preparing the public to participate

The leaders of South Africa's constituent assembly were not legally mandated to carry out civic education. They announced that they would engage the members of the public and consult them about the constitution because it would create a sense of ownership and legitimacy for both the process and the constitution. The administrative management body of the assembly established a community liaison department, which took four months to plan the participatory process. Emphasis was placed on reaching as many citizens as possible, including illiterate and disadvantaged citizens, using open constitutional public meetings, meetings with civil society organizations on specific issues, an advertising and media campaign, and civic education workshops.

The community liaison department worked in close coordination with the constitutional assembly's media department to develop a campaign to raise awareness that a process was happening (many other governmental reforms were also competing for attention) and to encourage the public to participate. The media campaign emphasized the role of the public in the process, the advertisements including messages such as "It's your right to decide your constitutional rights" and "You've made your mark" (meaning "You voted; now have your say"). The first month was a pilot phase. External groups were contracted to evaluate whether their messages were effective, enabling them to be revised along the way.

The community liaison department also provided civic education on the process and on constitutional issues through the use of posters, brochures, leaflets, a biweekly constitutional newsletter called "Constitutional Talk" (160,000 copies were distributed each week), booklets such as "You and Building the New Constitution," comic books, and an official website (developed with the University of Capetown). A weekly TV program, Constitutional Talk, promoted debates on constitutional issues such as the death penalty. An hour-long radio talk show was organized in eight languages and reached upwards of ten million South Africans each week. Ten thousand people also made use of a telephone "Constitutional Talk Line" to call in and leave submissions or receive information. The talk line was available in five languages. (See, generally, Skjelton 2006.)

Although this was not initially planned for, the community liaison department established a constitutional education program, which linked with hundreds of civil society organizations. The 486 face-to-face workshops targeted the country's disadvantaged communities. Civic educators were hired and trained, and a manual was created to ensure that the messages and the methodology were consistent. The three-hour workshops used participatory methods such as role-playing. The objectives were to educate disadvantaged citizens about the process, South Africa's constitutional history, and human rights, and also to encourage participants to provide input. The workshops did not educate people about specific constitutional issues or options or the draft constitution. Most of the workshops were held after the constitutional public meetings were conducted.

The meetings were held with multiparty panels of constituent assembly members in attendance and were conducted in all nine provinces. These were used both to educate (citizens asked questions of members and learned about the process) and to gather views on constitutional issues before the draft constitution was prepared. The public saw for the first time previously warring factions sitting peacefully together discussing constitutional issues. The process was also precedent-setting in that black South Africans were included in politics as they had never been before.

Four and a half million copies of the draft constitution (in a simplified format) and twelve million copies of the final constitution were sent through the mail for free, as well as being distributed in taxis, newspapers, and schools. Copies of the final constitution in particular were sent to the members of the official security forces. Braille versions and recordings of the final constitution were also made, as were comic-book versions of the bill of rights. Teaching aids on the final constitution were distributed to schools. These materials were distributed during "National Constitution Week," which was created to promote constitutionalism and ownership of South Africa's new constitution. To carry out these postadoption tasks, the community liaison department remained in operation for a few months after the constituent assembly concluded its work.

An external evaluation determined that three-quarters of the South African people—about thirty million—had heard about the process, and nearly twenty million knew that they could make a submission on constitutional issues. It is unclear what these numbers mean in terms of preparing citizens to make decisions on constitutional options—a stated goal of the civic education program. Nonetheless, the depth and creativity of South Africa's participatory process has inspired numerous other constitution-makers to commit to preparing the public to participate.

- key constitutional issues so that the public can provide thoughtful input during any public consultation.
- **After the preparation of a draft constitution**, when the goal of civic education may be to inform the people about the contents of the draft (and if public consultation beforehand was conducted to inform them about how their views were taken into consideration in the draft) and to prepare the public to provide input on the draft.
- **Before any referendum on constitutional reform**, when the goal of civic education would be to inform people about both the referendum process and the content of the proposed new constitution.
- **After the adoption of the constitution**, when the goal of civic education would include informing the people about:
 - the contents of the constitution (a discussion directed to all audiences, including schoolchildren);
 - how key provisions of interest to particular groups or communities affect their lives and how specific rights can be accessed or enjoyed through the constitution;
 - civic responsibilities under the constitution; and
 - what responsibilities key government actors and others have to implement the constitution (for example, educating the judiciary about any new duties or institutional changes that will occur as a result of the constitution).

To provide readers with an idea of how these educational objectives are carried out at different stages, we outline in box 12 South Africa's efforts to prepare the public to participate.

Who conducts civic education programs?

Constitution-making bodies are sometimes mandated to undertake civic education. But even when they are not officially given such a role, some such bodies may still take on the role, usually as a result of a commitment to ensuring that the process is “people-driven.” (South Africa provides an example of such a situation.)

The tasks required to prepare the people to participate can seem daunting. However, constitution-makers rarely undertake this task on their own. If they are required to do it, some form of an administrative management body (see part 3.3) or governmental department will assist. In addition, media and civil society (including women's groups, human rights organizations, trade unions, religious organizations, and minority groups) often play significant roles.

In some processes, a national curriculum is created; civil society and local leaders agree to follow the national program and are trained to use it. Sufficient time must be allocated to train educators to effectively deliver the program, particularly in the use of participatory methodologies. To clearly define responsibilities and relationships, the constitution-makers may enter into memoranda of understanding with civic education providers, who may also be required to sign

a code of conduct. (See appendix C.2.) Mechanisms are also sometimes established to monitor whether a civic education program is being implemented effectively and as agreed.

A constitution-making body that develops good working relationships with civil society and the media in presenting an effective and helpful civic education program will often establish a precedent for open and democratic participation in governance in the future. It may lead the constitution-making body and the process itself to be viewed as more credible, accessible, and transparent.

Civil society may sometimes take its own initiative in relation to civic education. Ideally there will be some coordination with the official process. However, at times, the constitution-making body may be conducting a “top-down” approach and have little interest in engaging the public. Civil society may then act on its own to promote a participatory process. (See part 4.1.)

Planning civic education

Part 2.3.2 discusses preparation of strategic and operational plans for constitution-making processes, plans that should normally include arrangements for civic education programs, and box 23 provides specific ideas about how to plan such programs. If resources are limited, the constitution-making body may be able to tap into existing channels for civic education. Examples may include community organizations, academic institutions, schools, churches, popular TV, blogs, websites or radio programs, as well as government programs.

Practical planning tips

- Ensure that there is sufficient time to plan. In South Africa (see box 12) the planners took four months to plan for civic education and public consultation efforts.
- Some initial research may be needed to determine the level of civic knowledge about democratic practices and constitutions as well as attitudes, beliefs, etc. A plan should consider what level of civic and constitutional knowledge is necessary to participate effectively or what should be prioritized.
- In a highly participatory process, the constitution-making body should aim to ensure that accurate information and effective civic or educational messages reach a wide and inclusive audience—in particular, groups in the society that have historically been marginalized (see box 9 to ensure program is inclusive).
- Most constitution-making bodies do not have unlimited time and resources and as a result they need to determine what is feasible and cost-effective. For example, it may be appealing to develop a sophisticated website, but if only a small percentage of the public uses the Internet, resources may be better spent elsewhere.
- Evaluations of the impact of civic education efforts should be conducted to measure whether they are achieving the intended results. Some constitution-makers have hired experts in civic

education or advertising to conduct research as well as develop and test methods.

Methods of civic education

Most civic education programs use a combination of methods to reach different groups and communities. The experience of South Africa (described in box 12 above) provides a useful example. In contexts where there is an independent media, it is common to rely heavily on the media. (See part 2.3.11 for a discussion about linking with the media.) This may involve either linking with reliable newspapers or radio and television stations, or the constitution-making body developing the capacity needed to produce its own media programs, including using social media tools.

Research may be needed to determine which medium or method is most effective in reaching which groups best, and at what times, to convey information in a manner that is most trusted and credible. International NGOs may often fund such studies. Conveying information and educational messages effectively to a particular audience is highly context- and culture-specific. What has worked in one place may fail in another. It is usually necessary to take into account differences between audiences in the same country (for example, women, illiterate citizens, and minorities). This section provides examples of various approaches to civic education that have been used at different stages of constitution-making processes.

Television and radio

Research in sixty districts of Nepal showed that 90 percent of the people listened to the radio for up to two hours a day and that this was the most trusted source of information. In most developing countries, radio tends to have the widest reach. In many countries FM technology has made it possible to have a variety of radio stations catering to the needs of most linguistic groups. In countries without good supplies of electricity, battery-operated radios can be used. Where batteries have been too expensive, donors have sometimes distributed wind-up or solar-powered radios (e.g., in the Democratic Republic of the Congo, Liberia, and Malawi).

Radio and television offer a variety of creative possibilities to convey information and to educate. Dramas, including single performances of plays and long-running serials, and discussion programs, interviews, and even traditional storytelling and songs can all be used to convey information or educational messages. In Afghanistan and Nepal, material about constitutional issues was integrated into existing popular radio soap opera programs.

Call-in shows and debates can serve as a way for people to ask questions, and can spur debate and dialogue on constitutional issues. Television, radio, and the constitution-making body's official website can broadcast live sessions of a constituent assembly. In Nauru, radio was used to broadcast the constitution-making committee's debates on every single clause of the draft constitution. A surprising number of people followed those proceedings closely, and the public found it interesting to see the complexities of the debate. Broadcasts of concerts and sporting

events have been organized around the constitutional process. Repeating programs at different times of the day may enable them to reach different groups (i.e., women may listen or watch at different times than men), or may allow people to hear information more than once.

Brazil's constitution-making body is one that supplemented the use of existing mass-communication media with the production of in-house media. Its own media center produced 716 television programs and 700 radio programs that were distributed to multiple stations, with segments aired daily (Rosenn 2010: 445).

Print materials

In the small South Pacific island country of Nauru, half of which did not receive a radio or television signal, three large billboards were placed in highly visible areas. One read: "The Constitution is for the people. The review will help us learn more about the Constitution and be more active citizens of Nauru," and another stated, "The Constitution belongs to the people of Nauru. The review is our chance to make the Constitution more truly Nauruan. Your views and opinions will be needed in step 2—public consultation." The third listed the six steps in the review process (Le Roy 2010).

Newspapers, magazines, and popular Internet sites can be paid or encouraged to include:

- copies of the draft constitution, the final constitution, or any other important document;
- requests for submissions of constitutional options and directions on where to send them;
- information about important constitution-making process events and activities or deadlines;
- regular columns that answer readers' questions about the constitutional process or constitutional issues; and
- stories or comic books about the process.

In-house efforts can supplement the effort as well. Newsletters, brochures, posters, leaflets, and booklets can all be developed, ranging from in-depth discussions of complex issues to comic books about the process or the constitution. In Afghanistan and other countries, biweekly or monthly magazines have been distributed to more than a hundred thousand readers. Disseminating such publications can be assisted by use of websites, Facebook, Twitter, etc. Some countries have used the regional or district field offices of their constitution-making bodies to assist with disseminating materials to remote areas. New technologies, such as digital books, could also be distributed to every community with key civic education materials loaded onto them.

To prepare the people to provide their views, Uganda circulated the existing constitution along with a booklet titled "Guiding Questions on Constitutional Issues" and one explaining how to prepare memoranda containing submissions on constitutional issues. In various countries, after a draft constitution has been produced, or after the eventual adoption of a new constitution, constitution-making bodies have developed booklets explaining the constitutional document

Box 13. Examples of official websites of constitution-making bodies

Bolivian Constituent Assembly (in Spanish): <http://www.laconstituyente.org/>

Ecuador Constituent Assembly (in Spanish):
<http://constituyente.asambleanacional.gob.ec/>

Ghana Constitution Review Commission: <http://www.crc.gov.gh/>

Kenya: Committee of Experts: <http://www.coekenya.go.ke/>

Malawi Law Commission—Constitutional Review:
<http://www.lawcom.mw/index.php/constitutionreview>

Nepal Constituent Assembly (in Nepali and English): <http://www.can.gov.np/en>

Somalia Independent Federal Constitution Commission (Somali and English):
<http://www.dastuur.org/eng/>

Zambia: National Constitutional Conference: <http://www.ncczambia.org/index.php>

and why certain choices were made. In some cases comic books have also been developed for people with low literacy levels.

In Ecuador, a constitutional glossary was created to familiarize the public with terms related to the upcoming constitutional referendum. In Kenya, a snakes-and-ladders-like game was created in order to teach people about human rights (though this was in fact produced prior to the constitution-making process). Such materials can bolster face-to-face civic education efforts. For example, in Nepal a large poster was designed to illustrate the journey involved in the constitution-making process; it was used to start discussions about the process.

Cultural and sporting events, games, and competitions

In Fiji, art competitions on the theme of the new constitution were held. Other countries have held poetry, song, and essay competitions to encourage public engagement in the process. These competitions have been for both adults and students. Sports events can also be an effective way to introduce youth to the constitution-making process.

Official website of the constitution-making body

Many recent constitution-making processes have benefited from establishing an official website. The constitution-making body can thereby communicate and consult directly with the public. This is especially useful if the media are biased or inexperienced and untrained and cannot be relied upon to report information accurately; the Internet gives the public another way to receive information.

The public can also be encouraged to send questions, comments, and suggestions directly to the website or through links to social media tools. However, the constitution-making body must have the resources to respond and manage the flow of information effectively. If five thousand questions are asked, ideally each should receive a response. A section on the website of frequently asked questions can help with basic questions.

An official website can be a valuable resource for the general public, journalists, members of civil society, advisors to the process, government actors, international actors, and especially members of the diaspora. The constitution-making body's willingness to post its budget, drafts of the constitution, and other key documents can vastly improve the transparency and openness of the process and add to its overall credibility. The following list of potential components for an official website draws upon the experience of a number of processes:

- **Introductory page**

- An overview of the role and structure of the constitution-making body
- An overview of why the constitution-making process is taking place

- **Information about how the public can participate in or learn more about the process**

- A schedule for the constitution-making process (including the main steps involved and an estimated timetable)
- Information about constitutions, constitution-making, and constitutional issues
- Upcoming events, activities, or public sessions
- The times and purposes of events or activities

- **Biographical data on leaders and members of the constitution-making body**

- Including information not only about their backgrounds, but also about how they were selected or elected and their functions and powers

- **List of committees or other working groups of the constitution-making body**

- Description of the mandate and names of members of the committees
- Information on upcoming meetings and agendas
- Working drafts or final reports from relevant committees

- **Copies of key documents related to the process**

- Copies of the current and any past constitution of the country in question and all relevant legislation or other legal instruments relevant to the establishment of the constitution-making process
- All relevant educational material

- Public surveys, questionnaires, and calls for submissions
- Press releases and any reports from the constitution-making body
- Rules of procedure, budgets, working drafts of the proposed constitution, the final constitution, and any report of the constitution-making body
- Codes of conduct for constitution-makers or other relevant actors

- **Online video or audio recordings**

- Proceedings, sessions, public consultation meetings, and other events in real time

- **Questions and answers**

- Can provide list of frequently asked questions about the process
- Mechanism for members of the public to get answers to questions about either the process or constitutional issues

- **Getting public views**

- A platform for the public to submit its views about the constitution (see part 2.2.3 on public consultation)

- **External hyperlinks (including to social media tools) and search tools**

Mobile messaging services and social media

The constitution-making body can use mobile messaging services or social media such as Facebook and Twitter to send out critical pieces of information, such as the results of a vote on a key provision of the constitution, the opening of the polls for a referendum, or the final adoption of the constitution. Texting and social media can also be an effective way to communicate with youth. South Africa set up a phone line for the public to use to ask questions or give suggestions. (See box 22 for an example of how Iceland is using social media to prepare its constitution.)

Civic education workshops

Face-to-face workshops are a common method for delivery of civic education programs. Usually they will be planned to supplement messages (about the constitution-making process and how people can participate) being delivered through other channels (e.g., television, radio, and print media). However, face-to-face workshops often play important roles in such programs. They provide publicity for the constitution-making process, and they can bring constitution-makers in direct contact with the people, enabling the constitution-makers to gauge for themselves such things as the extent to which “the people,” or particular social groups, understand constitutional issues.

Most importantly, face-to-face workshops may often be the only effective way to reach disadvantaged or hard to reach groups who do not have much access to media, are illiterate, or do not speak the dominant language. It will often be important to make special efforts to reach such groups. By way of example of the difficulties sometimes involved, a woman villager in Zimbabwe recently reported that people may “tune out” information and educational messages about the process because they feel such information does not concern them or that it is for lawyers.

There is no particular correct method for conducting such workshops. Relevant experience distilled from largely practitioner experience and advice is included in the discussion under the next heading in this part (“Practical tips for conducting civic education programs”). Some of the points made about organizing face-to-face meetings as part of public consultation apply here as well. (See in particular part 2.2.3, under the heading “Practical tips for organizing all types of face-to-face meetings.”)

There has been much debate in the democratization field about the efficacy of civic education workshops. A key question is whether participation in them does result in improved democratic knowledge, beliefs, and behavior. Studies suggest that it can—but only if the workshops are carefully planned, have sufficient resources and time, use participatory methodologies that link the subject matter to the real lives of the participants, and offer follow-up sessions (e.g., Finkel 2003). Designers of civic education in constitution-making processes need to consider carefully how these lessons can improve their plans and strategies. It may mean that more consideration is given to reaching marginalized groups on an ongoing basis than to holding isolated workshops for vast numbers of participants. Each program will have to assess what is realistic.

As noted above, in a participatory constitution-making process, a key goal of civic education will normally be to help to prepare people to give their views—both about the process of constitution-making and on constitutional issues. If face-to-face workshops are to be held as part of civic education programs in such a process, it will be necessary to plan for and structure the workshops with these goals in mind. Where civic education programs are developed in a rush, sometimes such goals are neglected. For example, one of the goals of South Africa’s civic education workshops was to prepare disadvantaged groups to make submissions or share views during the public consultation phase. (See box 12.) Yet the individual workshops did not cover constitutional concepts, nor were follow-up workshops held to help workshop participants provide input to the constitution-makers. The workshops were also held after the first draft was prepared. Ideally, time would have been allocated to this task prior to preparation of the draft (as has been done in Kenya, Nauru, Papua New Guinea, Thailand, and Uganda).

Those planning and implementing civic education programs are often up against tight deadlines. This may be because of poor planning, or a lack of understanding of the complex nature of this task, or because once a civic education process gets under way, there are demands from the public for a more extensive program. There can also be pressures from those in control of the constitution-making process to complete civic education as quickly as possible so as not to

delay the overall process. As a result of these and similar pressures, it may be difficult to conduct even basic research on the levels of civic knowledge and common beliefs and attitudes. Further, when a program is under way, there is often little or no attempt to test out the approach and or to evaluate the impact of the workshops. Instead, success is often measured by the number of workshops and participants rather than by knowledge gained or transformation in democratic practice, beliefs or attitudes.

It is vital to the success of civic education generally, and in particular face-to-face workshops, that the material presented should be accessible to the audience. Sometimes the approach taken in the design and presentation of formal workshops reduces the chance of success. For example, in Nepal [ongoing process], lawyers prepared dense educational materials and civic educators lectured from these materials on topics such as the difference between a parliamentary system and a presidential system. However, many of the educators did not understand what a constitution was or how it worked. This is not uncommon and probably does not prepare the public to any significant degree to participate in a way that is meaningful and has an impact.

Civic education workshops have sometimes been conducted largely “for show.” The trend toward more participatory constitution-making processes has resulted in some authorities feeling pressure to have the process at least appear participatory or “people driven.” Such pressures can include external demands (e.g., from the media, civil society, international actors, etc.) for public participation, including workshops directed toward encouraging such participation. In Timor-Leste [2002], civil society demanded a participatory process. The official civic education workshops and initial public consultation meetings were conducted on the same day. Participants had no time to reflect on the civic education to provide thoughtful views and suggestions on the constitution.

Civil society members protested to the United Nations Security Council that citizens were not being given the opportunity to participate meaningfully and reflect on the constitutional decisions before them. While there have been few empirical evaluations of civic education in constitution-making processes, we can assume that few positive results are gained from programs that do not adequately prepare the people to participate and they could even discredit or weaken the process.

Practical tips for conducting civic education programs

Some practical tips about implementing civic education programs can be drawn from lessons learned through the experiences of dozens of practitioners in both the democratization field and constitution-making processes. While many of these tips involve a particular focus on civic education workshops, others extend to issues about civic education programs more generally.

- **Plan carefully and dedicate sufficient resources.** A nationwide civic education program will

require time to conduct some basic research, plan, train staff, test approaches, and implement. Strong planning and management skills are required to coordinate dozens or hundreds of civic education partners (usually NGOs, local leaders, or government departments or bodies), as well as for preparation of media campaigns, workshops, public meetings, activities such as sporting events and song contests, printed materials, radio and TV programs, websites, links to social media tools, and so on. Civil society or other partners are usually needed. Ideally they should be selected on the basis of such criteria as established reputations, experience in design or conduct of civic education programs, or use of participatory methodologies. So a constitution-making body may require considerable expertise (perhaps through use of short-term consultants) even in its selection of partners.

- **Identify groups and communities that have been historically disadvantaged and may require special attention to ensure their participation.** (See box 9) This may require translation of printed materials, radio and TV programs, and workshop presentations into minority languages. When delivering face-to-face workshops, it may require providing childcare, holding workshops at night or early in the morning when women or farmers in a particular area are available, or providing food or accommodations if groups are nomadic or populations are spread out. There may be a need to train members of particular groups or communities to be resource persons on constitutional issues and to have them serve as liaisons with the constitution-making body.
- **Use a participatory methodology in face-to-face workshops.** There should be a focus on the use of role-playing, mock political debates or discussions, small-group activities, and the like to achieve the learning objectives of the program. Examples include holding mock constituent assembly sessions or debates with women or students. In Nepal, representatives of marginalized groups were brought together to discuss constitutional issues in much the same way as the constituent assembly might do. Street-theater performances and short plays can also be effective ways to educate people about rights.
- **Train workshop facilitators.** Facilitators should receive training in the participatory methodologies and also in basic constitutional knowledge. Depending on the objectives and skill levels of the civic educators, training may require a few weeks.
- **Start workshop discussions with issues that concern participants.** Participants may be especially concerned with issues such as land rights, health services, or political rights. The facilitator should design participatory exercises to help explain how a constitution or democracy relates to those concerns and how the group can get involved in the constitutional and democratic process to better address those specific concerns.
- **Hold at least three workshops or sessions with each group or community.** Studies show that holding fewer than three workshops for any particular group has little impact on levels of

knowledge of such things as democratic principles, values, or practices (Finkel 2003).

- **Develop realistic learning objectives and test approaches in advance.** Some core constitutional concepts can be explained, but this may require a combination of civic education methods (e.g., printed materials of various kinds, TV and radio programs, cultural events, and workshops). Where face-to-face workshops are used, if multiple workshops can be held for particular groups, there should be careful testing to determine if the approach is in fact working. If evaluations indicate that certain audiences still lack the knowledge and tools to make choices among constitutional options—often a key objective—then either objectives or methodology may need to be revised. Raising awareness about how a constitution relates to the lives of the participants and clarifying some basic democratic values may end up being more realistic objectives where a remote population has such limited levels of formal education as to make it difficult for choices to be made on constitutional issues.
- **Stress neutrality and develop a code of conduct that describes what this entails.** The designers and facilitators of all aspects of civic education must understand that they cannot use the process to promote a particular form of government or any other personal agenda in relation to the process or constitutional issues. The process should be monitored to ensure that those implementing an official civic education program of the constitution-making body are doing it in an ethical manner and according to a code of conduct.
- **Do not mislead people about what democracy or a new constitution can change in participants' lives.** When any part of a civic education program (printed materials, radio or TV programs, websites, or facilitators of workshops) is encouraging the public to provide input for the process, the material presented should be accurate about how views may or may not be used and what a constitution can and cannot do.
- **Give the official process a logo.** An official logo will identify the civic education materials and activities as those conducted or approved by the constitution-making body. The logo should be advertised as widely as possible to ensure that citizens can distinguish the official civic education program from those conducted by unofficial actors who may not have accurate information or who may even intend to misinform the public.
- **Monitor and evaluate.** Evaluation both of civic education activities and of their overall results is important. This is especially true when a program is operating over an extended period, for monitoring and evaluation can then enable the constitution-making body to adapt and improve the program whenever problems are revealed. There may be advantages in monitoring and evaluation being conducted by an outside group that may be more objective.

Some challenges of implementing civic education programs

Most civic education programs are conducted with good intentions. The problem lies in their

implementation, including unrealistic objectives given time and resource constraints and sometimes a lack of awareness about what the task entails. As a result, it is helpful to highlight some of the main implementation challenges experienced in other processes.

Civic education is rarely neutral. Civic education programs are often funded by foreign donors and use foreign-developed materials that promote a particular type of system, such as federalism. In several countries, foreign actors have tried to “sell” their system of governance as the best form. Such efforts often ignore specific cultural contexts and the social mores of the country where the constitution-making process occurs, and may limit the extent of local analysis of the problems as well as consideration of locally derived solutions. Similarly, civic educators have signed codes of conduct that obligate them to deliver the official curriculum in a neutral way (e.g., in South Africa [1996] and in Kenya [2005]). Yet civil society members, political parties, government agencies, and even the constitution-makers themselves have used civic education to promote their own agendas.

While it will often be necessary for constitution-makers to partner with civil society in the development and presentation of civic education programs, it must also be noted that NGOs are often established mainly to access donor funds, which can include funds for civic education. Donors may issue calls for proposals in English and only in urban areas; this often excludes rural organizations which may be more closely linked with marginalized groups and even some longstanding organizations with poor English or proposal writing skills. Donors should make efforts to map the civil society organizations that are experienced and help those that need it to prepare proposals. Some funds for organizational development may be needed.

Some organizations may be more interested in the money than in achieving the goals of the civic education program. Because of pressure on donors to spend money allocated to support a constitution-making process, donors may not monitor the effectiveness of NGO civic education programs or even whether they were held. (Afghanistan [2004] is one example.)

Few civic education programs have had the time, resources, and commitment to reach disadvantaged groups effectively. Just to make contact with certain groups may pose significant challenges. In Eritrea [1997], the constitution-making body struggled to communicate with nomads. It went to great lengths to organize meetings and provided food and water for weeks so that the nomads could stay in one place and talk with constitution-makers in their own language.

Because the resources necessary to reach marginalized groups and minorities, especially in poor countries, are seldom available, even a “neutral” civic education campaign may contribute to increased inequalities in a society by further empowering those who already have access to some level of social networks or resources. The most disadvantaged and isolated citizens will rarely have time to participate or to translate civic education into political, economic, or social gains without sustained engagement and targeted resources.

Box 14. Evaluations of civic education workshops: Some observations

It is common to pass around evaluation forms at the end of civic education workshops. They tend to ask questions such as:

- Were the objectives clear and were they achieved?
- Did you understand the presentations?
- Did you have adequate opportunity to ask questions and/or contribute to discussions?
- Would you come again to a workshop organized by this organization?

There are problems with evaluations of this sort. The questionnaire is completed at the end of the workshop, when everyone is anxious to leave and get home; many people will answer positively because they have enjoyed the event, but this gives the organizers absolutely no idea whether it has achieved its objectives.

An event that is designed to affect attitudes can be measured by questioning people at the beginning and again at the end, using questions designed to reveal attitudes, though not simply by asking “How has your attitude changed?” If an objective is to encourage people to respond to the opportunity to have input into a constitution-making process, this can be measured. Tests of recognition should be carried out ideally before the event and again after some time has passed: for example, it is hoped that more people will have heard of the constitution or the concept of federalism than had before the event.

Testing for knowledge is much more difficult. Asking whether people feel they have a better understanding elicits an attitude and not a measure of knowledge. People who already have some knowledge may be able to judge whether they now have more. It is far harder in the case of those who know nothing about the issue at the beginning. Members of the public do not expect to be given an examination as the price of attending a workshop. And unless the evaluator was present and knowledgeable, it may be impossible to know whether what was learned was accurate.

There are many creative means for evaluating results. For example, more or different things may be learned about participants’ reactions by having a space where people can write their reactions (e.g., a wall papered with plain paper with pens provided; a pile of shapes on which people can write, which are then hung on a “comment tree”).

Finally, we emphasize that such challenges are discussed not with a view to discouraging constitution-makers from carrying out this task, but rather to stress that ambitious civic education objectives can be hard to achieve. This task in particular requires careful consideration of what are realistic objectives and how to achieve them with the time and resources available. (See part 2.3.2 on strategic planning.) Constitution-makers may not have the time or skill to do this, and as a result they may need to set up arrangements under which they only oversee this task rather than implement it themselves, provided of course that the task is allocated to competent partners,

and that their performance is subject to ongoing critical monitoring and evaluation.

2.2.3 Public consultation

For our readers interested in designing a participatory constitution-making process, the decision will usually not be whether to hold public consultation but, rather, how best to do so. While there are contexts where public consultation does not occur, or does so to a limited extent, there is no doubt that public consultation has increasingly become a feature of modern constitution-making. It is held on issues related to how the process is conducted and even on whether a process should take place, as well as about the content of the constitution.

In a divided society, the constitution can be much more than a set of rules for the structure of government. The constitution-making process is a unique moment—an opportunity to build consensus, a shared sense of identity, values, and purpose, and to resolve major differences. To have any realistic hope of achieving such outcomes, constitution-makers must be committed to a credible and transparent process where the concerns of the people are central and where the people know that choices on constitutional issues take account of their views. Such a process involves the constitution-makers actively listening to, accurately capturing and analyzing, and seriously considering the views of the people. It also includes providing feedback about how decisions were made and (in particular) how views from the people were considered.

In the following discussion we first outline the types of issues about constitution-making processes and the contents of the constitution about which public consultation often occurs, the legal basis for public consultation, and people's views as one source among many for making decisions during a constitution-making process. We then identify the bodies that typically conduct public consultation, key reasons for doing so, and some guiding principles for conducting a public consultation process. We also discuss the various methods that can be used to consult, and how constitution-making bodies analyze and report on the views gathered.

In doing so we seek to assist those wishing to engage in public consultation by considering a number of key questions, such as:

- What will be the goals and objectives of the public consultation?
- Which body will conduct the public consultation?
- What should be consulted about, at what stage of the process, and why?
- What are the potential risks (e.g. security of public sharing views) and benefits of public consultation (e.g., increased ownership of the process and constitution)?
- Who should be consulted (see box 9)?
- What kind of information is needed or desired (e.g., all of the views of the public, views on specific issues or a draft proposal, the views of particular groups on specific topics (perhaps groups that have been historically marginalized and may not be adequately represented in the official body) what are divisive issues in society, or whether the views of elites agree with

those of the public)?

- What methods will obtain the information needed or achieve the result desired?
- What are the guiding principles that will facilitate meaningful public participation in the process?
- How will views be gathered, received, analyzed, and used?
- How will feedback be provided to those consulted about what the constitution-makers learned and how the views were considered, and if so when will this be done?
- What resources will be needed, and are they available, or should a more limited process of public consultation be conducted?

Public consultation on both the constitution-making process and the contents of the constitution

It is sometimes assumed that public consultation in a constitution-making process relates only to issues about choices of the contents of a new constitution. While in most cases the main allocation of effort toward public consultation does relate to such issues, there can also be significant efforts made in relation to issues of process—so much so that it is helpful to discuss public consultation on process separately from that on contents of the constitution.

Public consultation on issues about the constitution-making process

Public consultation on process issues most often occurs before a constitution-making process begins, but can also be held at various points during a process (as discussed below). Involving the people in discussions and decision-making about the process, including how it is to be structured, can be especially important in a divided society. In such cases, not only can perceptions that such an important process involving decisions about the future of the state might be structured to benefit particular groups (especially those in power) be divisive, but they can destroy the credibility of a process and any constitution resulting from it. More generally, public consultation in advance of a process can help decision-makers determine whether a process is needed or wanted and how it should be carried out, and can be used to encourage key stakeholders or political actors to commit themselves to the process. Public consultation on process may well be demanded by dissident groups or by civil society (e.g., in Colombia—see box 1).

Public consultation on process issues can help prevent a backlash against an unpopular procedure or approach. In Timor-Leste, the United Nations Transitional Administration did not consult with civil society about its plans for civic education, and it boycotted the official civic education program. Because civil society actors were key partners for implementing the program, the United Nations had to delay the program until an agreement could be reached with civil society about how to move forward.

There are several main categories of constitution-making process issues about which public consultation most often occurs, and varying ways in which such public consultation may be conducted, ranging from a referendum to meetings with civil society:

- **Whether there should be a constitution-making process.** The public consultation may first be about whether constitutional reform is needed and if so whether a new constitution-making process should be established. Public consultation on such issues is sometimes conducted through a referendum (e.g., as in Colombia, Spain, and Venezuela). In Colombia, an election in 1990 was used also to hold a referendum about whether to form a constituent assembly to develop a new constitution. The public voted overwhelmingly to establish the body. (See box 1.) Such a decision may also be made through negotiations with key stakeholders or some form of general consultation with the public.
- **How the process should be structured.** It is not unusual to engage in public consultation in advance of a process about how the process should be structured, inclusive of such things as what types of institution should be used, selection or election of members of such institutions, mechanisms for public participation, the timetable for the process, and so on. In some cases it will be necessary for warring factions to agree that a constitution-making process is required; indeed, such agreement is often an issue dealt with as part of a peace process and a “comprehensive” peace agreement. Issues about constitutional arrangements (perhaps involving exclusion of significant minority groups from power) may have been a factor in the original conflict, in which case it can be vital to the prospects of a peace agreement not just that there is acceptance that the constitution will change, but also that those previously excluded will have a role in the process that determines the changes. There can, of course, also be public consultation about constitution-making processes in many other circumstances as well, and such public consultation can take many forms. In Afghanistan [2004], women’s groups were consulted about how their representatives should be selected. Sometimes such public consultation has been limited to elite stakeholders. In Timor-Leste [2002], the transitional legislature invited key stakeholders to hearings about how to make the constitution.
- **How to conduct next steps in an already established process.** The people are sometimes consulted about the process even after it has started, in particular when questions arise about the next step in either a continuing process or one that has stalled. Public consultation on next steps can extend to questions on whether there should be changes in previously agreed steps in the process; Uganda [1995] is one example. As discussed in more detail in the case study on Uganda in appendix A.12, consultation with the people by the Uganda Constitutional Commission resulted in a recommendation to the government to remove responsibility from the legislature for the debate and adoption of the draft constitution prepared by the commission, and instead a constituent assembly was established to undertake those tasks.
- **How to conduct civic education or public consultation.** In South Africa, the community liaison department engaged in public consultation with civil society and community leaders

about how to conduct legitimate and credible public consultations. Public views on this can also be gathered through a website, social media tools, or other cost-effective methods. To reach marginalized groups, public consultations can be held with them directly.

Public consultation on issues about the contents of the constitution

The most intensive and time-consuming public consultation is commonly that held on the substantive issues of constitutional reform—those about the contents of the proposed new constitution. Although the following list of situations where public consultation on constitutional issues has been held is not exhaustive, we can say that such public consultation most often occurs at the following stages of constitution-making processes for the following purposes:

- **Before a process begins, or in its early stages**, when the purpose of public consultation is to determine or assist in developing the agenda of issues to be considered as part of the constitutional reform agenda. Public consultation at this early stage is often seen as likely to cause unnecessary delays in the process, and so does not occur in many cases. One example is Uganda [1995], where an initial round of public consultation to identify the agenda involved conducting about 140 seminars attended by almost a hundred thousand people. Subsequently, public consultation about the views of the people on substantive reform issues was conducted largely by reference to the agenda of issues identified in the initial rounds of public consultation. (Determining the agenda of issues is discussed in more detail in part 2.4.1.)
- **Before a draft constitution is prepared**, to receive views about issues of concern, the options for constitutional reform, or both. Increasingly, public opinion is sought before a draft is prepared. (See table 5.) This is commonly the main consultative stage of a process, and may sometimes cover an extended period. Among the main reasons for consultation at this stage, two require particular mention. First, as few processes have the early special phase of public consultation on the reform agenda that occurred in Uganda, the constitution-makers are able to ensure that their agenda for reform takes account of the needs and aspirations expressed by the people. Second, the receipt of views from the people is usually intended by constitution-makers to assist them in making decisions on what (if anything) the new constitution will provide in relation to the main issues.
- **After either a detailed proposal for a draft constitution or an actual draft has been prepared, and before any draft is finally debated and adopted**, to receive views on the proposal or draft of the constitution. Public consultation at this stage is not so common as it is in advance of a draft being prepared. One reason for this is the significant organizational and resource issues that can be involved. Copies of the draft will need to be printed and distributed widely, or at least adequate explanatory materials (providing enough information for meaningful public consultation) will need to be produced. All such materials may need to be translated into local languages. In South Africa [1996], 4.5 million copies of the draft were distributed in eleven languages. In Bougainville [2004] there was public consultation on two

main drafts that were quite widely circulated.

- **Before constitution-makers reach decisions on potentially divisive issues**, to help them both identify and make decisions on such issues. Constitution-making processes often have difficulties in dealing with divisive issues. (See part 2.5.2.) The people's views are quite often used to identify and resolve divisive or contentious issues, but are seldom highlighted as the key source. Uganda is an unusual case in that statistical analyses of views submitted were identified by the constitutional commission as one of the main sources it used to reach a decision on the divisive issues.

Constitution-makers may choose to consult at some or all of the points and for the purposes noted, but we are not aware of any recent process where there has been public consultation on all of them. (See table 5.) Many different methods are used in undertaking such public consultation, as discussed later in this part.

There is debate about whether the views of the people should be obtained before preparing a draft constitution, after a draft is ready, or at both times. In some countries public views are sought only about the provisions of a draft constitution. If the set of constitutional issues being dealt with is narrow this can quickly focus the public consultation on specific proposals. The potential dilemma is that other issues about which members of the public have concerns may be excluded from debates. There may be frustration on the part of groups that feel that the draft does not reflect their concerns or that the issues have been decided prematurely. The constitution-makers may also be less inclined to change a draft that took time to negotiate and prepare. Ideally, the people's views should be obtained both in advance of a draft being prepared (to assist in its development) and after it has been completed (to test whether it meets the people's concerns).

Table 5 illustrates the use of public consultation on the contents of the constitution in twenty constitution-making processes. The table illustrates that public views are often sought before a draft is prepared, and again afterward. Holding public consultation prior to the drafting of the constitution often broadens the issues that will be considered because the people share views and aspirations that go beyond the initial reform agenda (which is usually developed mainly by the constitution-makers). If the concerns of the public extend to the development of the constitutional reform agenda, the possibility of the public consultation leading to a long and unwieldy text may increase. However, a process with no public consultation can lead to the same result (e.g., Venezuela [1999]).

Legally mandated public consultation, and public views as one source among others

Increasingly, legal instruments establishing or regulating constitution-making processes (e.g., an interim constitution, statute, presidential decree, parliamentary act, or rules of procedure for

Table 5: Stages of a constitution-making process where public consultation took place on the content of the constitution

Constitution-making process	Public consultation on agenda of issues to be considered	Public consultation on the content of the constitution before drafting	Deciding changes to drafts of the constitution
Papua New Guinea [1975]		■	
Peru [1979]		■	
Nicaragua [1987]		■	■
Brazil [1988]		■	
Benin [1990]		■	
Colombia [1991]		■	
Ghana [1992]			■
Tanzania [1992]		■	
Uganda [1995]	■	■	
South Africa [1996]		■	■
Eritrea [1997]		■	■
Fiji [1997]		■	
Albania [1998]		■	■
Rwanda [2003]		■	
Bougainville [2004]		■	■ In a succession
Kenya [2005]	■	■	
Thailand [2007]	■	■	■
Bolivia [2009]		■	
Kenya [2010]	■		■
Nepal [ongoing process]		■	■

a constituent assembly) mandate a process of public consultation. They may go further and require the constitution-making body to take into account the public's views when preparing the constitution and list the tasks that must be carried out, including analyzing the views and when and how to provide feedback to the public. (See box 14.)

In most such cases there has been a prior history of violent conflict in the country in question, usually conflict related to issues of constitutional significance. As a result, the constitution-making process has been seen as an opportunity to resolve such conflict. Of course, merely requiring public consultation in the terms of the legal mandate does not of itself ensure that a process will in fact result in conflict resolution, for the underlying causes of violent conflict are

Box 15. Examples of legal mandates to conduct public consultations

In Afghanistan, a presidential decree mandated the constitutional commission to:

- facilitate and promote public information on the constitution-making process during the entire period of its work;
- conduct public consultations in each province of Afghanistan, and among Afghan refugees in Iran and Pakistan and, where possible, other countries, to solicit the views of Afghans regarding their national aspirations;
- receive written submissions from individuals and groups of Afghans within and outside the country wishing to contribute to the constitutional process;
- conduct or commission studies concerning options for the draft constitution;
- prepare a report analyzing the views of Afghans gathered during public consultations and make the report available to the public; and
- disseminate, and educate the public about, the draft constitution.

The Constitution of Kenya Review Act (2001) mandated that, within two years, the Constitution of Kenya Review Commission would:

- conduct and facilitate civic education in order to stimulate public discussion and awareness on constitutional issues;
- collect and collate the views of the people of Kenya on proposals to alter the constitution and on the basis thereof, to draft a bill to alter the constitution for presentation to the national assembly (parliament); and
- carry out or cause to be carried out such studies, researches and evaluations concerning the constitution and other constitutions and constitutional systems as, in the commission's opinion, may inform the commission and the people of Kenya on the state of the constitution of Kenya.

Section 18 of the act required the commission to:

- visit every constituency in Kenya to receive the views of the people on the constitution;
- without let or hindrance, receive memoranda, hold public or private hearings throughout Kenya and in any other manner collect and collate the views and opinions of Kenyans, whether resident in or outside Kenya, and for that purpose the commission may summon public meetings of the inhabitants of any area for the discussion of any matter relevant to the functions of the commission.

The Uganda Constitutional Commission Statute (1988) recognized “the need to involve the people of Uganda in the determination and promulgation of a national

Constitution that will be respected and upheld by the people of Uganda” and required the constitutional commission to work toward “achieving a national consensus on the most suitable constitutional arrangements for their country,” and empowered the commission to:

- “seek the views of the general public through the holding of public meetings and debates, seminars, workshops and any other form of collecting public views”; and
- “stimulate public discussions and awareness of constitutional issues.”

seldom readily resolved. Indeed, the constitution-making process itself may heighten tension and contribute to the risk of further conflict.

Stipulating a requirement for public consultation in the legal mandate may often be important in postconflict situations, as it could be expected to put pressure on constitution-makers to find constructive ways of consulting previously opposing groups. On the other hand, in some processes that have not had a detailed legal mandate or detailed plan there has been disagreement among constitution-makers about whether to conduct public consultation, to what degree, and at what stages; how to analyze and consider the public’s views, and for what purpose; and whether to report back to the public on such matters (e.g., as in Timor-Leste [2002], Nepal [ongoing process], Iraq [2005], and Ghana [ongoing process]).

Even when the legal mandate of a constitution-making body requires it to use public views as a source in making decisions on constitutional issues (as in Uganda [1995], Fiji [1997], and

Box 16. Uganda: The use of views

In Uganda [1995], while the law establishing the constitutional commission directed the commission to achieve “a national consensus” on constitutional issues, and required it to “seek the views of the general public through the holding of public meetings and debates, seminars, workshops and any other form of collecting public views,” it also required the commission “to study and review the [then existing] Constitution” in order to make proposals for a new constitution that would, among other things, “establish a free and democratic system of government that will guarantee the fundamental rights and freedoms of Ugandans.” As a result of such diverse directives, the commission stated in its final report that it used four main sources in framing its recommendations for a new constitution. They were: the people’s views; the commission’s own study of “our cultures, common history, problems and people’s aspirations”; its “mandatory review of the [then] current Constitution”; and “comparative study of constitutional arrangements of other countries.”

Kenya [2005; 2010], other sources are stated or implied in the legal instrument providing the mandate. Such sources may include principles of democracy, international human rights law, and so on. While the people's views may be important, constitution-makers, using other sources, will allocate their research and analysis efforts in other ways. That can result in developing views on constitutional issues that are different from, and even contrary to, the main thrust of views submitted by the people. The diverse sources made available by such legal mandates are almost always reflected in the reports that some constitution-making bodies make. (Such reports are discussed in part 2.2.4.) These reports generally make it clear that the views of the people are not determinative of all issues. For example, few constitution-making bodies have placed heavier reliance on people's views than the Uganda Constitutional Commission, which made extensive use of them in resolving divisive issues. But in its final report it stated that although people's views were its "primary and most important source," it also used three other sources. They were the commission's own "observations and analysis of society"; its review of Uganda's previous constitutions; and a comparative study of constitutional and political arrangements in other countries.

Constitution-making should aim to balance conflicting views, work toward consensus and compromise, and protect minority rights. Although many countries have statistically analyzed the views gathered, the predominant public view or opinion does not necessarily prevail. It is normal for constitution-makers to need to balance a number of competing considerations when reaching decisions on major issues, and they would not normally seek to derive answers from a public opinion poll. For example, in South Africa the public overwhelmingly demanded the death penalty in the constitution. The constituent assembly weighed this against international human rights standards and the need to break with a violent past, and excluded this demand from the final text (leaving it to the courts to decide the issue by reference to the human rights provisions of the new constitution, which they soon did, deciding to declare the penalty unconstitutional).

Finally, a note of caution in relation to the consideration that consultation with the public may raise high expectations about what the constitution will provide. A draft that has overlooked something people viewed as important may disillusion the public about the process and the constitution. It may be important to provide a mechanism to monitor the translation of people's views into a constitution-maker's draft. For example, if a commission is consulting and preparing the draft, the legal instrument providing its mandate could require it to transmit to the main deliberative body both the draft text and a record of the views received.

Which body conducts public consultation

A constitutional commission established to prepare a draft constitution for submission to a constituent assembly or a parliament is often asked to consult the public. But where a larger body such as a constituent assembly is responsible for most steps in the process, including

preparing the initial draft, it may establish its own special committees (e.g., Bolivia in 2009 and Nepal in 2010) to consult the public.

Governments have also set up special bodies mandated not only to consult the people before creation of the constitution-making body but also to provide it with a report on the public consultation (e.g., Colombia [1991] and Timor-Leste [2002]). This may help speed up the process because views can be collected while preparations for electing the main constitution-making body are made. The disadvantages of this approach are that the constitution-makers:

- may have fewer opportunities to hear the concerns and aspirations of the public firsthand or to engage them in a discussion on the key issues and also build trust in the credibility of the process; and
- may tend to ignore or mistrust public consultation reports in which they were not involved firsthand.

Both international and local civil society organizations have conducted public consultations to try to open up the process and engage the public. If the civil society actors are highly respected and credible, their public consultation reports may gain the attention of the constitution-makers. In Timor-Leste, the United Nations' official reports were ignored because they were seen as a foreign product, but members of the constituent assembly did read public consultation reports prepared by the respected local human rights group Yayasan Hak.

Reasons for, and claims about the impacts of, public consultation

Justice Benjamin Odoki, the chair of the Uganda Constitutional Commission, stated:

The manner in which a constitution is finally adopted by the people is very important in demonstrating the legitimacy, popularity and acceptability of the constitution. . . . To command loyalty, obedience, respect, and confidence, the people must identify themselves with it through involvement and a sense of attachment. . . . The involvement of the people in constitution-making is therefore important in conferring legitimacy and acceptability to the constitution (Odoki 2005: 276).

Similar reasons for holding extensive public consultation have been echoed by other constitution-makers. Such views are in fact part of a wide spectrum of reasons why constitution-makers may undertake such activities, which may include promoting a deliberative process and opening public debate to a diversity of views so as to contribute to a national consensus on the constitutional framework, including the values the nation should be founded on:

- legitimizing the process and the constitution that emerges from it by ensuring that the process is “open” and “democratic”;
- promoting a sense of public ownership of the process and the constitution;
- determining what are the divisive issues or the extent of public support for constitutional options in relation to such issues;

- facilitating a political transition by encouraging change in the political system, in particular by seeking views of those who had previously been marginalized or excluded from the political and social life of the country (e.g., the process of seeking people’s views in South Africa [1996] was in part focused on involving black South Africans for the first time in the political process);
- conducting dialogue with citizens on issues of national importance;
- meeting the demands of groups with interests in a process—for example, people may hold demonstrations or demand to be consulted, or the international community may only fund or accept the legitimacy of the process if public consultation is conducted (e.g., the United Nations Development Programme would not fund a constitutional reform process in the postconflict Solomon Islands unless the constitution-makers held public consultation);
- serving as a public relations campaign to improve the standing of the government, or of the process, rather than as a mechanism to genuinely listen to the views of the people; and
- manipulating the consultative process so that the “results” support particular interests or agendas.

Of course, consultation with the people does not always take place or it takes place only in a limited way; it would be possible to make a similar list of the reasons why it does not happen. These include established traditions about decision-making that do not involve direct consultation with the people—often in part on the basis that a body such as parliament or a national conference (mainly in countries with Francophone influences; see part 3.1.3) represents the people in any event, making public consultation redundant; perceptions about constitution-making as a matter for politicians and experts; and political and other pressures for the constitution-making process to be dealt with quickly, so that allocating significant time for public consultation is seen as counterproductive.

There is too little research on the impact of public consultation in constitution-making processes to be able to assess the extent to which public consultation achieves or contributes to the achievement of even such clearly laudable goals as the increased legitimacy of a constitution. There is evidence, however, that public consultation may have a more modest impact such as broadening the social agenda of a constitution. For example, women’s involvement in constitution-making, inclusive of consultative processes, has contributed to more gender equity in the process as well as in the final content of the constitution (e.g., in Canada [1982], Nicaragua [1987], Uganda [1995], South Africa [1996], Afghanistan [2004], and Kenya [2005]).

Variations among countries in attitudes to public consultation by government and traditions of interest group organization and representation are important factors in reasons for choices for or against public consultation. In some countries, there is a deep tradition of public consultation, and if the public is not consulted the process will not be viewed as open or credible. More generally there is a growing expectation that public consultation by government bodies should occur in a wide range of situations, including constitution-making. In South Africa, where public consultation about constitutional issues was a new experience for the vast majority of the population, a poll taken by an independent evaluation group found that 83 percent of the people—regardless of race, ethnicity, or age—felt the constituent assembly should consult the

public about the new constitution.

There may be far less pressure for public consultation in countries that have traditions of legitimate representational bodies—such as political parties, trade unions, and major NGOs (issues discussed in part 2.2.1, under the heading “Changing modes of making the constitution”). The general public may feel satisfied that the process of aggregating and representing views through established patterns and mechanisms will be followed and that in doing so even marginalized citizens will be heard. However, in divided societies that also have some experience of representative bodies, such as South Africa, the constitution-makers may still feel that it is important to reach out directly to previously marginalized citizens.

In countries emerging from violence, consultative processes can have other purposes. They can provide opportunities for the public to meet and sit with leaders who have previously been at war about contentious issues and are now cooperating as part of a constitution-making process. As in South Africa, such an experience can send a powerful message about the potential “transformational” nature of the process and the future possibilities for the country—both to elites and to the public.

One of the most important reasons for public consultation concerns the benefits of face-to-face consultative meetings where constitution-makers discuss with citizens issues that they would not have had the chance to explore otherwise. The constitution-makers may be surprised at the sophisticated level of the discussions—even in poverty-stricken areas where few read or write. In Afghanistan [2004], commission members were often surprised to learn that rural populations were fairly tolerant of diverse religious beliefs and views. Public consultation has given many constitution-makers (even those initially opposed to public consultation) an increased appreciation of the diverse views, aspirations, and needs of different gender, ethnic, socioeconomic, or geographical groups.

On the other hand, some public consultation has led to demands for constitutional provisions that may be at odds with other sources of guidance being used by constitution-makers, such as international human rights norms. Examples may include demands for the death penalty or the exclusion in various ways of certain minority groups in society. However, understanding the reasons behind such views can help constitution-makers better address the concerns (see the discussion later in this part, under the heading “public consultation meetings”), and promoting dialogue about tolerance and why the new constitution should adhere to international human rights norms and protect minority rights.

The globalization of ideas and experiences through the Internet, social media, and other means has led to growing awareness in many countries of the trend toward participatory constitution-making. This has led to an increased expectation that constitution-making processes will include extensive provisions for consulting the public. For example, in Timor-Leste [2002], the Asia Foundation organized seminars on participatory constitution-making and brought speakers to discuss the experiences of Kenya, Papua New Guinea, South Africa, Thailand, and Uganda.

Hearing these stories of popular participation contributed to an increased demand for similar engagement in Timor-Leste.

The majority of the Timorese constituent assembly members felt that they could adequately represent the views of their constituencies (despite a weak and nascent political party system in which parties did not campaign on a platform based on specific proposals for provisions of the proposed independence constitution). The constituent assembly initially refused to consult the public on the draft constitution. The demands of public demonstrators, civil society monitoring groups, members of the international community, and the media led the constituent assembly to reconsider.

Some guiding principles for conducting a public consultation process

There is a trend toward consulting the public in a constitution-making process, but there has been little reflection about what constitutes a genuine and effective public consultation process. Unlike the situation with elections, there are no established standards for assessing whether a constitution-making process has been “free and fair.” Determining whether standards should be developed is an issue beyond the scope of this handbook. However, many processes have spent large sums of money consulting the public, only to have the views ignored or never analyzed. There have been numerous reasons for this, including insufficient resources or time to analyze the views, a lack of interest in using the views, and constitution-makers feeling that they have already heard firsthand the views of the public and do not require additional analysis of the input. (See part 2.2.4.)

However, at a minimum, for the consultation to be credible the views should be recorded, seriously considered and the public informed about how the views were used.

The following broad principles will facilitate a credible process—they are based on emerging standards of good practice (drawing on our own experiences of assisting with public consultation as well as numerous other practitioners):

- Planning well in advance of the public consultation;
- Establishing realistic timetables;
- Preparing the public to participate meaningfully;
- Being transparent;
- Being representative;
- Ensuring that the consultative process is accessible, secure and inclusive;
- Respectfully listening to the public’s views;
- Faithfully recording, collating, analyzing, and considering the views submitted;
- Carefully considering the public's views when making key decisions;
- Being accountable and providing feedback;

- Ensuring that the consultative process is nationally owned and led; and
- Evaluating the consultative process.

Planning well in advance of the public consultation

One of the lessons learned from past public consultation processes is that the constitution-makers should begin work as early as possible on a strategic plan for public consultation. It needs to include a detailed set of tasks for every phase of the public consultation process.

Such a plan should seek to ensure that everyone conducting the public consultation is clear about what they are expected to do before, during, and after the process. It should include a detailed operational plan and accompanying budget. (See box 23 below, on making a strategic plan.) If the process will be highly participatory, with numerous phases, the planning process can take several months.

Box 17. Nepal 2009: Problems that arise when a process is poorly planned

The Nepalese public consultation process in 2009 is a cautionary tale about launching a public consultation process without a clear and agreed upon plan. There was little effort to prepare the public for the consultations. The constitution-making body launched into the consultation process by requesting that the members of the public phone in, e-mail, or send their views by mail. When few responded, a three-hundred-item questionnaire was prepared and distributed at the face-to-face public consultation meetings. However, the questionnaire was not tested beforehand, and it was overly complicated and confusing. Highly educated Nepalese had a hard time understanding the questions.

Additionally, the public did not have sufficient time to review and answer the questions. The respondents were expected to hand in the questionnaire at the end of the face-to-face meetings. The meetings were organized at the last minute with little advance notice, there was no harmonized plan for conducting the meetings or recording the views, and they were poorly attended. The exercise did generate thousands of views. But the constitution-making body did not have a plan for analyzing the views and reporting the results. In the end, each member of the constitution-making body was given about a thousand submissions to analyze. The methodology ranged from ignoring the submissions to handing them over to civil society actors or friends to assist with the analysis. The resulting analysis did not accurately reflect the views gathered, and at times was manipulated to suit the members' own views.

Establishing realistic timetables

If widespread face-to-face public consultation meetings are planned, then depending on the specific context it can take several months or more to plan the process as well as to prepare the public to participate. It could take many more months to hold the public consultation. Analyzing the views may also take several months, depending on such factors as the form in which the views are received, the number of staff members available to analyze the data, and so on. (See part 2.2.4.) Reporting back to the public on the results and using the views to prepare a draft constitution or report may take an additional six months. Yet many constitution-making processes allocate less than a year (and at times only a few months) to complete all of these tasks in a highly participatory process. Planning a realistic timetable for credible public consultation requires identifying each step of the process and how long it will take to complete each step of the process.

Preparing the public to participate meaningfully

Civic education prior to the public consultation is critical for the public to participate meaningfully. (See part 2.2.2.) This will assist individuals, groups, and organizations to understand the process, how to participate and how to give their views with the constitution makers.

Being transparent

Those consulting should be transparent about the public's role in the process, the deadline for receiving views, how to provide views, and how the views will be recorded, analyzed, and used. They should also inform the public about how they will receive feedback, in particular about how the views will be used and how they will know how the views affected the decision-making process. The views received should be available for the public to review. In Iceland, where the security of those sharing views is not considered a problem, all views are posted on the council's official website. (See box 22 below.)

Being representative

The body or group holding a public consultation should be as diverse as possible. Smaller subgroups of the constitution-making body may be needed to ensure that as many face-to-face public consultation sessions as possible can be held. Such subgroups should be as representative as possible. For example, each group should include at least one woman so that women do not feel the process is being led only by men. This principle applies to other relevant groups such as minorities or political parties.

Ensuring that the consultative process is accessible, secure and inclusive

Here are some measures that can help ensure accessibility, security and inclusion of the process (see box 9 for a discussion of issues to consider to promote an inclusive process):

- **Notice.** Provide sufficient notice about how and when to participate. Different social groups may need to be reached using different methods. Notice can be given through the mail or via e-mails, television or radio announcements, posters, announcements by village leaders, leaflets, or the Internet.
- **Language.** To ensure accessibility, any important documentation should be in all relevant languages. Simultaneous interpretation at public meetings may be needed. For sight-impaired citizens, copies of the draft constitution and any other important documentation should be in Braille, or an audio recording of the draft being considered should be made available.
- **Venue.** For consultation sessions that are open to all members of the public, the venue should be evaluated to determine whether it can be easily reached by public transportation, whether it can be accessed by the handicapped, or whether anyone is excluded (e.g., women from entering a male-only mosque). It will usually be important to go to where the group being consulted lives: in rural villages, slums, prisons, and so forth.
- **Level of formality.** Neither a highly formal nor a very relaxed setting may feel appropriate. The cultural norms or preferences of the group or community being consulted will need to be considered. Public consultations should be structured in ways most likely to make participants understand the issues under discussion and feel comfortable enough to share their views freely.
- **Timing of public consultation.** It may sometimes be necessary to arrange the consultative meetings to avoid any particular times that could exclude or limit attendance of people due to factors such as gender, occupation, or religion. For example, women may only have limited time periods in which they are free to attend. Consulting in advance about what days and times will work for groups that should be included may be essential.
- **Empowerment measures.** To have access to the process, some groups may need encouragement or additional assistance, such as special civic education sessions or transportation to venues.
- **Specific meetings for those who cannot speak freely.** If women do not feel comfortable speaking in front of men or youth in front of elders, holding separate face-to-face meetings with women and youth may be critical to hearing these voices.
- **Security.** Ensure that sufficient security is provided. If the environment is too insecure, public consultations may not be possible. For example, in Zimbabwe [ongoing process] some people attending public consultation meetings were attacked and others felt intimidated to speak in public for fear of retribution later.

Respectfully listening to the public's views

Those consulting should not advocate for certain views, defend a draft of the constitution, or correct or criticize any views or options put forward. Ideally, they should play the role of active

listeners. However, this does not mean that debate and discussion should be discouraged. In face-to-face meetings, as far as is practicable, there should be enough time to ensure everyone who wishes to speak has the opportunity to do so.

Citizens should be encouraged to express their aspirations for the constitution on the most important basis of all: their experience as citizens of their country. For example, participants should feel free to talk about having no access to clean water or healthcare. They should not be expected to have in-depth knowledge of constitutional issues and what can or cannot be dealt with in a constitution. No one facilitating the consultation should say “This is not relevant.” It is the job of the constitution-makers to take the views and concerns and translate them into constitutional terms as necessary. (See the discussion later in part 2.2.3, under the heading “public consultation meetings,” for discussion of how views expressed by people on issues that may seem to have little connection to the constitution can assist constitution-makers in better understanding the attitudes, beliefs, and concerns of the people, thereby contributing to the constitution-making process.)

Faithfully recording, collating, analyzing, and considering the views submitted

The public consultation will not be credible unless there is a transparent plan for recording and analyzing the views and the public, media and civil society can confirm that these tasks are being done fairly. Part 2.2.4 provides guidance on each of these steps.

Carefully considering the public’s views when making key decisions

A constitution-making body needs to have skilled staff members who can ensure that the views received are made accessible to decision-makers in ways that best enable the views to be considered when decisions are being made. (See part 2.2.4 on the analysis and use of views.)

Being accountable and providing feedback

After the public consultation process is concluded, a final report should be provided that summarizes the results and explains how competing interests or perspectives were balanced and compromises reached. (For further discussion see part 2.2.4, under the heading “Reports of constitution-making bodies on use of the people’s views.”) It can also explain the extent to which public consultation affected the decisions made. In addition, those conducting the public consultation can sign codes of conduct to be held accountable for their conduct. (See appendix C for sample codes of conduct.)

Ensuring that the consultative process is nationally owned and led

Experienced foreign advisors can assist national actors in developing the plan to consult, and perhaps even in implementing the plan if needed. However, the lead roles in a public consultation must be undertaken by the relevant national actors. “Nationally owned” also means that the people should feel ownership of the process. This can be facilitated not only by simply consulting with the public but also by ensuring that the people are satisfied with the mechanisms

and plan for public consultation.

Evaluating the consultative process

Evaluation of the consultative process should ideally occur at an early stage. Such evaluations should involve assessing whether the objectives are being met, and determining what is going well and what needs improvement. Ongoing evaluation from an early stage will allow changes to the consultative process to be made as required in order to improve it. Evaluation should be incorporated into the strategic work plan from the start.

Evaluation can be performed by an independent evaluator, by those conducting the process, by the participants themselves, or by a combination of these. In most cases, however, there will be advantages if competent external evaluators have a role.

Choosing methods for consulting the public

There is no single generally applicable and correct model for how to conduct a public consultation process. It is common for constitution-making processes that give a high priority to consulting to use a combination of methods to ensure that as many people as possible are given the opportunity to participate. For example, constitution makers may invite elites to make written submissions or attend hearings on particular issues, and they may travel to far-flung places to hold face-to-face meetings with rural or marginalized groups.

In a society in conflict, the process of constitution-making should serve many purposes. If reconciliation among groups is essential, the methods chosen will need to promote a deliberative process handled with sensitivity, avoiding methods and approaches that may refuel the conflict. This will have to be determined on a case-by-case basis. For example, in a country that has suffered atrocities, engaging in widespread public consultation on the future constitution before some form of healing has taken place may be counterproductive. Expectations for the process also have to be carefully managed otherwise the people may be disillusioned when the process and a new constitution does not lead to the hoped-for result.

Although there are potentially dozens of methods for consulting the public and experts on either the process or the content of the constitution, the methods most commonly used by constitution-makers have been:

- **Nonbinding referendums** (see part 3.5 for a discussion of this public consultation method).
- **Requests for submissions**—the requests can be made through the media, including social media tools, as well as more traditional methods, such as local leaders or strategically placed posters.
- **Questionnaire-based surveys**—a set of questions that can be addressed to either a representative sampling of the population or a group of volunteer participants.

- **Face-to-face meetings**—including meetings with the public, specific groups (e.g., women, business leaders, farmers, youth), thematically organized sessions (e.g., sessions focused on a specific constitutional topic such as human rights or the judiciary), focus groups, and experts. Face-to-face meetings combined with civic education efforts are often the best way to reach marginalized groups and encourage them to participate.

Most public consultation processes will use a combination of these methods depending on the reasons for holding the public consultation. The sections on civic education and guiding principles for public consultation provide tips for preparing the public and organizing open, transparent, participatory, and inclusive public consultation. Part 2.2.4 describes how the views gathered by any method should be recorded, analyzed, and used.

Requests for submissions of people’s views

The constitution-making body usually announces a time period for the receipt of submissions, often through the media. Printed material or messages broadcast in various ways can explain the reasons for the interest in receiving views and give an indication of the kinds of issues about which views might be submitted. A suggested format for making submissions may also be provided. The efforts of the Uganda Constitutional Commission to encourage and assist people to submit their views included preparation and wide distribution of an 111-page book discussing in simple language all major constitutional issues on the agenda, a 23-page brochure containing 253 guiding questions intended to help people prepare written memoranda of views, and a brochure entitled “Guidelines on Submission of Memoranda on Constitutional Issues.” Over 60,000 copies of each were distributed. Posters explaining the constitution-making process and inviting the submission of views were also distributed.

Some constitution-makers have specifically invited submissions from experts, groups, or organizations whose ideas it wanted to hear. Publicity for the consultative process can sometimes result in strong lobbying campaigns being launched, including petitions with thousands of signatures, and card campaigns. The range of forms in which views can be submitted is vast, from one- or two-line notes to long and detailed draft constitutions.

Using the Internet, phone lines, texting, and social media to call for and receive views

Rapidly changing technology is allowing constitution-makers to call for submissions or comments on a draft or set of proposals using, at times, innovative and ever-changing methods. Constitution-makers need to be ready to adapt to new technologies.

Text-message services using mobile phones have been used to send comments to the constitution-making body. The Women’s Coalition of Zimbabwe launched a texting campaign to push the parliamentary constitution committee to redress gender imbalances in the constitution-making process. In Somalia, where severe security problems made it impossible to hold public consultation meetings, there was extensive use of SMS (mobile telephone text

Box 18. Use of the Internet in Kosovo [2008]

Constitution-makers created a website (www.kosovoconstitution.info) that became a central meeting space for citizens interested in discussing constitutional issues and providing feedback. The website was interactive and citizens could read the constitution drafts as they were being produced, and share their views. The constitution was translated into Albanian, Serbian, English, Bosnian, Turkish, and Roma. The website had more than 2,700,000 hits (the population is approximately one million people) and views were requested through this site.

messages) to receive views on constitutional issues. South Africa used a phone line to receive views and questions about the process.

Websites as well as social media tools such as Facebook and Twitter are other methods that can allow constitution-makers potentially to reach large numbers of people, including those in diaspora communities, away from their home countries. (See box 23 for an example of how Iceland's constitution makers are using social media to hold widespread public consultation on the content of the constitution and keep the public informed of the process.) The increased numbers of public submissions that may be generated can create much extra work for a constitution-making body serious about analyzing the views.

Use of guiding questions

Some constitution-making bodies develop guiding questions on constitutional issues that are distributed prior to a public consultation process. They have been used to focus attention on the key constitutional issues, promote debate and discussion, and suggest the manner in which written or oral submissions can be made to a constitution-making body.

To prepare questions reflecting the public's concerns, the Constitution of Kenya Review Commission (Kenya [2005]) developed a list of guiding questions only after extensive public consultation with communities at the local level. The list of twenty-two constitutional issues or themes reflected the concerns of the public. The commission then created a "red book," which posed 199 guiding questions. The commission's regional offices helped distribute the red book to all of the communities, and three- to five-member panels of the commission then engaged in public consultation on substantive issues. The red book helped citizens organize their oral presentations as well as their written submissions. The Rwanda Legal and Constitutional Commission organized public meetings in each of its sixty-three districts, and discussions were guided by a sixty-item questionnaire distributed in advance. Similar efforts by the Uganda Constitutional Commission were discussed earlier in this section (under the heading "Requests for submissions of people's views").

Practical tips for guiding questions

Guiding questions:

- can be developed based on prior public consultation about the concerns of the people or based on a predetermined reform agenda;
- should be made public and distributed far enough in advance of the public consultation process to promote debate and discussion and help people think about the issues;
- should avoid jargon and be kept to an easy, digestible length (testing in advance can help determine when a set of guiding questions is too complicated or lengthy);
- should be realistic about the issues on which citizens can make a choice, since certain choices may not be an option either for political and historical reasons or because of international obligations;
- should pose real choices and not simply lead people to a particular predetermined conclusion;
- should not raise expectations about what the new constitutional order can deliver (for example, it is misleading to ask “Do you think that government ought to provide free secondary education?” when this is not an option); and
- should be in all local languages; in societies with low literacy levels they can be shared orally in advance of public consultation.

Use of questionnaire-based surveys

Conducting a scientific questionnaire-based survey

A constitution-making body may wish to know the public’s view on a constitutional option; for example, whether a parliamentary or presidential system should be adopted. To obtain a representative data set for the views of the public as a whole, the constitution-makers would need to use a scientific method called a “probability sample.” The benefit of the scientific probability sample is that it gets information not just from those who volunteer but even from those who would not otherwise participate. Statisticians have shown that it is possible to get a good sense of the views of the entire population by questioning quite a small sample; a group of two thousand people is often used to represent the views of a whole country. However, when a probability sample is conducted, everyone in the population should have an equal chance to participate. For example, the endeavor could involve surveying a person in every hundredth household.

We are not aware of a constitution-making body that has conducted a questionnaire-based survey using a probability sample. Uganda rejected the idea of a scientific survey because the commission felt it was more important to use public consultation to engage the people and promote dialogue and debate than simply to distribute a questionnaire to a set number of people. The commission may also have felt that such a survey would pressure it to answer why its proposals did not align with the results of the survey.

A good probability survey could be used to provide constitution-makers with information about

whether their views are shared by the population as a whole. A survey in Nepal carried out by civil society actors showed wide differences in support for federalism between members of parliament (93 percent) and citizens (42 percent), and among castes and ethnic groups, regions, and education levels. It also showed differences in attitudes toward official languages and the continuation of the Hindu state.

This type of survey is unlikely to tell the constitution-makers why groups hold certain views, unless the survey is extremely well designed and probably conducted through interviews. A scientific survey may not be welcome because elite negotiations have foreclosed certain options, whether or not they are views held by the majority of the people. A scientific survey can potentially lead to an increase in tensions or mistrust among communities by highlighting stark differences at any one moment of the process.

A deliberative process should create a dynamic that will lead to changes in views and, ideally, a greater willingness to compromise to reach consensus. A probability survey that is conducted at a single moment may not accurately reflect the situation even a few days after it has been conducted if the context is volatile. In particular, in unstable contexts, events can change public perceptions and views, as well as the political environment, overnight.

If a scientific survey is to be held only once, it may be most useful to hold it after conducting civic education and after the draft constitution has been circulated to the public. In particular, if the draft is to go to a referendum, a survey can indicate to constitution-makers where there is strong disagreement with the draft and provide them with the opportunity either to explain the draft or to revise it so that the constitution will be accepted.

A scientific survey may not be possible. In postconflict countries in particular there is rarely accurate demographic data about how many households there are in the country and how many citizens there are in particular groups or communities. There may be millions of people displaced outside the country; violence may still be widespread, precluding certain populations from being surveyed. It simply may not be possible to get a representative sample of views.

A good probability survey requires contracting experts to guarantee a scientifically designed sample. Where there are large numbers of illiterate or semiliterate citizens, interviews may need to be conducted to ensure that the survey is inclusive. Questions should be tested in advance so that they are well understood by the respondents and do not guide or influence them to give particular responses.

It is important to understand the limitations of surveys. A telephone questionnaire (in which numbers are randomly selected to be called) may be unrepresentative if everyone does not have a phone. Busy professional people may decline to respond. Surveys are often conducted only in major cities, or in only one language. All such factors may skew results so that they fail to reflect the views of the people as a whole. All of these objections can be overcome, but only by increasing the costs involved.

Box 19. Pitfalls to avoid when using volunteer questionnaires: The case of Iraq [2005]

In Iraq, illiterate citizens were largely excluded from a survey because they could not fill out the questionnaires, even though there was no other way to get their views. There was also no civic education prior to distribution of the questionnaires or testing of their contents ahead of time. Educated elites in Iraq could understand the questionnaires, but few others could. Distribution of the questionnaires was heavily skewed toward Shia-populated areas of the country, and no special efforts were made to reach women. It has been estimated that upwards of a hundred thousand questionnaires were collected, with only a small percentage coming from the other two major groups (Kurds and Sunnis). Although the views were clearly not representative of the country as a whole, this mattered little because the views were given to the constitution-makers too late to be considered in the decision-making process (Morrow 2010).

Volunteer questionnaires

Questionnaire-based surveys have tended to target only respondents who were sufficiently interested to participate (e.g., in Afghanistan, Iraq, Kenya, Nepal, Papua New Guinea, Uganda, and Zimbabwe). Latin America seems to have no tradition of using volunteer questionnaires in a constitution-making process.

Although some constitution-making bodies have tried to disseminate questionnaires widely and have statistically analyzed the results of these volunteer questionnaires, the results could not provide an accurate representation of the views of the public as a whole. It cannot be claimed that 80 percent of a country's people support a particular constitutional idea simply because 80 percent of voluntary respondents took that view. It is also possible that 60 percent of the people know nothing about the constitution or the process, or that they do not care. It is therefore unwise to use only this method to consult with the public.

Reports on surveys

Reports on the results of a survey should describe the methodology used and the number of people surveyed, and provide the questions that were asked along with the statistics gathered. If the statistics are not representative, this should be explained, along with information about how the views were used.

Reports of surveys should be scrutinized carefully. For example, it was reported in the press that a survey in Kenya on attitudes toward abortion had found that approximately 80 percent of

the people were opposed to abortion. An electronic billboard displayed this “fact” to the public. A little later a member of the company that had carried out the survey explained in the press that it had also asked people whether they would favor abortion in a number of specific situations (e.g., rape), and the proportion left as opposing abortion under any circumstances was reduced to 18 percent.

Practical tips on surveys

- Draft questions so that they are easily understood, and test them in advance for specific audiences.
- Allow for written answers, make the survey short, and leave space for the respondents to include other issues.
- Produce the questionnaire in all relevant languages.
- Provide instructions on how to fill it out; explain the constitution-making process, the role of the questionnaire, how the views will be used, and what feedback will be provided.
- Use a logical order and place important issues in the beginning. If security is not an issue, request relevant biographical information such as age, ethnicity, and region of country.
- Explain whether the responses to the questionnaire will be made public (e.g., posted on the official website) and provide an option for respondents to remain anonymous.
- Give the public at least two weeks to read and fill out the questionnaire. (Such a time requirement would not apply to a scientific survey questionnaire.)
- Make it easy to return the questionnaire via the Internet, through the mail, in a drop-off box, at a designated office, or at a public consultation meeting.

Use of face-to-face public consultation meetings

This method has the potential to promote a more deliberative and open process and—perhaps most important—allows constitution-makers to hear views and concerns firsthand. We discuss four types of face-to-face public consultation:

- public consultation meetings (open to any participants);
- focus groups;
- meetings with sectoral groups (e.g., women, business leaders, nomads, youth); and
- thematic meetings (e.g., human rights, judiciary, land rights).

Regardless of the type of public consultation organized, in postconflict contexts or divided societies, the challenges faced will often involve ongoing violent conflict or potential for conflict, high illiteracy rates, and mistrust of official processes, as well as limited resources and poor communication channels or inadequate transportation. The following discussion outlines how past processes have organized these various kinds of meetings and also how they addressed some of these common obstacles.

Public consultation meetings

In highly participatory processes, public meetings have been held countrywide and also in places with large diaspora populations. Constitution-makers (most commonly constitutional commissioners) have invested in organizing hundreds of meetings and engaging tens of thousands of citizens (e.g., in Papua New Guinea [1975], Uganda [1995], South Africa [1996], Rwanda [2003], and Kenya [2005]). Members of elite groups in most countries normally have ways of channelling their views into the process to ensure that they are heard. That is why many constitution-makers have emphasized using the resources available for public consultation to reach the marginalized and disadvantaged, in order to empower them to have a voice, or to participate in dialogue directed toward reconciliation.

As noted above, guiding questions have sometimes been used to frame the discussion. Prior to a draft constitution being prepared, public meetings should be open to any topic, unless certain reforms have already been excluded (e.g., by the legal mandate for the process). Eritrea set aside a four-month period for extensive public meetings on a set of proposals that had been widely distributed. The meetings began with an introduction of the proposals and then provided a period for questions and answers as well as the sharing of views. The questions were recorded and analyzed according to biographical information. Some 175 meetings were held, which lasted about three hours each. Constitutional commissioners were often inspired by the wisdom of the views given. In some countries recovering from conflict and even from atrocities, there may first need to be some other public process that enables people to begin to talk openly about their experiences of those circumstances (some form of a “day of reckoning”). Otherwise, the first attempt at public consultation may yield views that are not aspirational but rather focused on the past.

A prerequisite for open public meetings is a secure environment. Recently in Zimbabwe in 2010 participants were attacked at public consultation meetings. (See part 2.3.10 for a discussion of security issues.) The meetings must also promote the free expression of views. As noted previously, separate meetings may sometimes be needed for some groups (e.g., for women or youth if they are unable to express their views in public).

In Uganda [1995] and Kenya [2005] the commission members assured the public that every concern or experience was a relevant constitutional issue. In other processes, constitution-makers failed to listen. In Timor-Leste [2002] some of the constitution-makers would comment that the views being expressed were not constitutional matters. This was primarily because these constitution-makers did not understand why it was important to listen to the views of the people to ensure the constitution, to the extent possible, reflected their concerns or aspirations and addressed serious problems. For example, in Kenya a large percentage of the population complained about lack of access to medicine. Commission research showed that this issue was related to the need for improved decentralization of healthcare, and this finding was reported back to the participants.

Views that seem “off-topic” should also be carefully recorded because of what may underlie the concerns or desires expressed. In Bougainville [2004], for example, men commonly complained about women wearing “six-pocket trousers.” (This was seen as involving women dressing like men, thereby ignoring what some leaders saw as major differences in culturally based social and other roles for men and women.) These concerns did not lead the constitutional committee to consider making the wearing of trousers by women an unconstitutional act, but rather to incorporate more comprehensive gender equality provisions into the constitution, in order to combat the discrimination against women they heard about during public consultation. In short, public consultation can help constitution-makers better understand the attitudes, beliefs, and aspirations of the people.

To help organize meetings in far-flung places, constitution-makers have set up district or regional offices (e.g., in Afghanistan [2004] and Kenya [2005]). In Afghanistan, offices were also set up in Pakistan and Iran to facilitate meetings with diaspora populations. In South Africa, secretariat staff members worked closely with local leaders and civil society to organize meetings. In Kenya, the commission visited all 242 constituencies and set up constitutional committees in each one. The membership consisted of ten persons, three of whom would be ex officio: the local member of parliament, the chair of the county council in which the constituency was located, and the district coordinator. Each committee was to be as representative of the people of the constituency as possible. It was recommended that a third of the committee members should be women. The commission also established district-level offices to facilitate public consultation.

The Constitutional (Reeves) Commission was asked to review the 1990 constitution. It conducted public consultation (South Africa [1996]), local leaders and civil society helped organize transportation for people to reach central locations for meetings. In Afghanistan [2004], people had to find their own way, and some traveled for days to reach the meetings. Providing food at meetings for people who had traveled long distances and had little income was sometimes necessary.

In Fiji [1997] public consultations were held on how to reform the constitution but without preparing the public through a program of civic education. Transcripts of the meetings indicate that few of the views were informed by an understanding of the 1990 constitution or of constitutionalism. A representative of the Women’s Advisory Forum stated, “We did not have access to a copy of the constitution. We asked the District Officer for a spare copy to be able to quote the section or provision that covers this issue but he did not have a copy.” (Le Roy 2010)

In postconflict or transitional contexts the state is typically viewed with mistrust. Constitution-makers may need to persuade people that their efforts are genuine. A woman in Fiji commented that “some of my uncles thought it [the public consultation meeting] was maybe just for chiefs you know, and the commoners would not have any say and it would be a waste of time to go down and listen because their voice would not be heard anyway.” (Le Roy 2010) Prior to South

Africa's massive awareness-raising campaign about the public consultation, most citizens also doubted whether their views would be seriously considered. Where such concerns are likely, the constitution-makers should explain how the process will take place and how the views will be gathered, recorded, and considered.

Several countries have made considerable efforts to provide feedback, which also enhances the credibility of the process and encourages others to participate. The example of Kenya [2005], where each constituency received a report of the public meeting held there and could make corrections to the record, has been noted above. Further, a later report by the Constitution of Kenya Review Commission explained how views were considered and incorporated. In many other countries, however, there were no efforts to provide feedback. In Colombia [1991], Ecuador [1998], Venezuela [1999], and Bolivia [2009], the views were passed to the constitutional commissions but no efforts were made to check with participants to see if their views had been accurately captured or to explain how they had been taken into account.

Focus groups

Focus groups involve group discussions that follow a set agenda and are led by a moderator. To be effective, the groups are kept small; they involve between six and ten people. The discussions and interactions among participants are designed to provide insight into the views of the participants, and the thoughts and feelings behind the views. The analysis of the outcomes is designed to help decisions-makers test their assumptions and take the views and concerns of the public into consideration when preparing the constitution. If the focus groups are about how to make the constitution, the attitudes expressed can help the constitution-makers improve the design of the process and ensure that concerns are addressed at an early stage.

Focus groups may have a better chance than polls or surveys of capturing the complexities of the constitutional debate and promoting rich discussions. However, as with questionnaires, focus groups can capture only a particular moment in the process. As a result, if such groups are to prove useful to the decision-makers, they may need to be held periodically because the public's views can change during a process because of the public debate or other factors in a dynamic process.

Unlike probability surveys, focus groups are a qualitative research method. Because of the small number of views gathered (depending on the number of groups organized), they will not be statistically representative of the population as a whole. Organizations such as Interpeace and the National Democratic Institute have used this method to feed information to decision-makers in places such as Israel, Sudan, and Timor-Leste.

As far as we are aware, constitution-makers themselves have not used this type of approach (though in Somalia focus groups set up by the National Democratic Institute were part of a process coordinated by the United Nations because the constitutional commission could not set

up its own focus groups). The official process has typically underscored organizing larger meetings, and the moderators were not specifically trained to use discussion to get at deeper underlying concerns about constitutional issues. This may be because of the emphasis on getting large numbers of people to participate rather than exploring what smaller group discussions could yield in terms of research for the task at hand.

In deeply divided societies the focus group method may be a useful first step in understanding the views of the different groups before embarking on a more open process of civic education and debate that could refuel conflict if it did not first take into consideration the current dynamic in the country. For example, the focus groups could first be held with homogenous groups. This method might also be effective in insecure environments where open public meetings would be vulnerable to threats or attacks.

Meetings with sectoral groups

These meetings are held to get an understanding of the concerns and views of particular groups, such as business leaders, political parties, the media, nomads, women, and youth. These tend to be larger group public consultation meetings, but they can also be organized as focus groups. Certain views may not be voiced in open public meetings. For example, in Eritrea women rarely speak in the public meetings. In other contexts, youth may not feel comfortable speaking out with their elders present. Sectoral group meetings can help ensure that all voices are being heard and considered.

If local leaders heavily influence the views and opinions of communities, meetings with sectoral groups may help the constitution-makers understand how the process is viewed and what messages will be communicated from the leaders to the public. This may be especially so in clan-based societies. Working with key local or community leaders to organize broader public consultation meetings can yield greater credibility and public participation in the process.

In Afghanistan [2004], because of the lack of security in the country, no public meetings were organized. Rather, the meetings were by invitation only and focused on receiving the views of particular groups, including internally displaced persons and religious minorities. Similarly, in Puntland [2009], the commission identified a set group of stakeholders to provide input into the draft subnational constitution. It included:

- governors, mayors, and officials from the ministries of the interior and local government;
- civil society, umbrella organizations, and business leaders; and
- traditional and religious leaders.

Prior to each forum, participants were provided with a copy of the draft revised constitution and requested to identify specific articles for discussion, amendment, or suppression; to note

gaps; and to suggest improvements in the drafting language. Each forum opened with a presentation by the legal advisor on the general content of the draft and the process by which it had been drafted. The comments and input from participants were tabulated and recorded in a matrix that was later used by the commission to finalize the draft. The contributions tended to reflect the category to which the individuals belonged. Examples include increased autonomy from the central government, including access to revenue generated through natural resources; women's rights; education; and political and economic empowerment.

In addition to organizing open public meetings throughout the country, South Africa's constituent assembly organized "national sector public hearings." In these forums, the members met with national stakeholder groups, such as women, business leaders, and religious organizations, to get their input on specific questions of interest to these groups. However, in Brazil [1988], the subcommittees of the constituent assembly organized hearings only for interest groups, including environmentalists, labour groups, indigenous peoples, and even maids. Political parties were poorly organized, and interest groups fought strongly to get their interests reflected in the constitution. Perhaps one of the weaknesses of the Brazilian process was that the constituent assembly members did not also travel throughout the country and hear the views of the public directly. This omission may have led to a process that was less deliberative and more of an aggregation of narrow and short-term interests.

Thematic meetings

In many of the Andean countries, such as Colombia [1991], Ecuador [1998], and Bolivia [2009], public consultation meetings were organized around thematic issues that mirrored the internal organization of the constituent assemblies. Indeed, they were often organized by thematic committees of the assemblies. The committees convened public gatherings to discuss specific topics, such as human rights or the judiciary. This was an efficient way of helping ensure that views on a specific subject were heard by those addressing that topic. However, if this is the only type of meeting held, public consultation may discourage the general public from attending because people may be less interested in giving views on how the judiciary should be structured, for example, than simply sharing more general concerns and aspirations. Civil society will tend to participate the most.

Practical tips for organizing all types of face-to-face meetings

- Give advance notice of meetings through local leaders, the media, district offices, and other means.
- If there are specific issues upon which views are sought, explain this and notify participants far enough in advance so that they will be able to prepare.
- Ensure that all participants have advance copies of any public consultation documents (such as guiding questions) in all relevant languages and in a format that avoids legal jargon.

- Train facilitators, in particular, how to address conflicts and to promote dialogue (especially where these are key objectives, as, for example, in a divided or postconflict society).
- Try to ensure that constitution-makers, facilitators and other key official actors at the public consultation reflect a balance to the extent possible with regard to gender, age, race, and any other relevant diversity factor.
- Record all necessary biographical information about the participants unless this information would lead to the intimidation of those sharing their views.
- Introduce the agenda and all facilitators and speakers and explain the role of other staff members present, such as those recording the public consultation.
- Explain the objectives of the public consultation, the time allotted to each speaker, how the meeting fits into the wider discussions held on the constitution, how public views will be gathered, recorded, and used, and how feedback will be provided.
- Record all views carefully.
- Provide time for questions and answers about the public consultation or for general debate and discussion.
- Provide interpreters if necessary, including in sign language.

Using video to facilitate public consultation

Interpeace regularly uses video in its peacebuilding work, but to our knowledge this has not been used in a constitution-making process. Careful (and perhaps creative) use of video of various phases of consultative processes may have the following uses and benefits for a public consultation process:

- It can be shared with all constitution-makers. One of the key benefits of a public consultation process is that those preparing the constitution get to see and hear firsthand the concerns of the people from different parts of the country, groups, and communities. But there is rarely enough time for members to travel to all areas of the country. Video footage can capture the essence of meetings in all areas and give members who were not in attendance the benefit of hearing a wider perspective. Or, if an external group is organizing meetings, it can film and edit the meetings to share with the official body.
- It is a preparation tool for facilitators. In the testing phase, video footage can be used to reflect how focus groups or public meetings can be improved. It can also be used as a training tool to support the skill development of other facilitators.
- It promotes dialogue among groups. Showing footage of a group or community discussing constitutional issues can stimulate discussion elsewhere. Where geographical, social, or political reasons may prevent different groups from communicating, showing videos of the conversations of one group to the other can create an experience of listening and possibly seeing the humanity of the other group. Depending on what is appropriate and possible at a

given time, video footage of conversations within each group can gradually transform into “indirect dialogue.” Video documentaries can also facilitate the sharing of views of refugees and the members of the diaspora. Showing footage of others discussing constitutional issues, even sensitive ones, can also encourage groups to participate that may have viewed a constitution-making process as something only “elites” should do.

- It brings “public opinion” to a sociopolitically elite audience—and vice versa. Urban elites who are not involved in public consultation may not have opportunities to listen to the views of disadvantaged, minority, or rural citizens. And where the media do not reach far or only disseminate “official” discourse, video footage of interviews and discussions of these different groups can be shared.
- It keeps constitution-makers involved in the public consultation. If those preparing the constitution are not involved in the process of consulting the public, they may tend to ignore the results of the process. In Timor-Leste it was suggested that the constituent assembly leaders did not trust that reports of a public consultation process held in advance of the election of the assembly were accurate, or they were concerned that the reports had been manipulated. In such a situation, video footage could illustrate that the public views of different sections of society had been captured and transmitted accurately.
- It documents the impact of dialogue. Video is the most powerful way to show the kinds of changes in attitudes, discourse, and interactions that constructive dialogue can help bring about. This can be used to show constitution-makers the direction of the constitutional discourse in communities. Video footage can be a monitoring and evaluation tool for the participatory process.
- It creates a historical record of the constitution-making process. A new constitution is an important historical event in the life of a country. A record of the constitutional dialogue can be used in a constitutional museum (see part 2.3.7) or in other educational institutions.

There are, as always, also dilemmas and risks involved with using video. Filming can intimidate participants and perhaps silence those who might otherwise speak. It can also have the reverse effect and lead participants to speak at length and for the camera. It can pose a serious security risk for participants if intimidation or coercion is a problem in the process. Decisions may need to be made in advance about whether specific locations of meetings, as well as the names of speakers, should be provided.

If the benefits of video outweigh the risks, production and editing choices will need to be made. What kind of attention span does the anticipated audience have? Certain audiences have little time, and the key messages need to be gotten across quickly. Others will not only be willing but even eager to watch a longer film that provides a wider range and more in-depth perspectives. Films of different lengths could be made for different purposes. How will decisions be made about whose voices are portrayed?

Viewers may question whether the views presented are representative. If a film shows different groups of constitution-makers consulting the public, the constitution-makers themselves can agree that the captured public consultation session conveyed the essence of the discussions and

views presented.

2.2.4 Receiving and analyzing the people's views

Whatever decision is made about the methods of consulting, the public views gathered should be handled in a transparent and accountable manner and be carefully considered. This requires careful planning. Constitution-makers are often surprised by the number of citizens who actively participate. Some public consultation processes generate a significant number of public submissions that can be either oral (recorded during face-to-face meetings or from special phone lines) or written and in the form of questionnaires, petitions, memoranda, or draft constitutions. With the recent option of sending comments via the Internet or by texting, the number of submissions could run into the hundreds of thousands.

Written submissions may be a paragraph or hundreds of pages long. Many processes have received thousands of written and oral submissions and tens of thousands of questionnaires. In Afghanistan [2004], the combined public input was over a hundred thousand submissions. To ensure that the endeavor is a genuine effort to consult the public, the constitution-making body should be well prepared to record, collate, analyze, summarize, and report on the results of public consultation.

Making use of these views is a major task. In this section, we begin with a brief discussion of the experience of constitution-making processes that have made major efforts to receive the views of the people. In doing so we discuss why even some processes that make efforts to collect people's views may do little to analyze those views or to make use of them in decisions about the new constitution. Drawing on the experience of processes where the people's views have been analyzed and used in decision-making, we then discuss:

- how the different purposes for which the views of the people are received and used by constitution-makers can affect the work involved in receiving and analyzing views;
- a range of more general issues concerning how constitution-making bodies organize the work involved in receiving and processing views; and
- the reports that constitution-making bodies make about their use of the people's views.

Experiences of processes in which the people's views have been received

Extensive use by constitution-making bodies of the people's views in making decisions on constitutional arrangements is a relatively new development. Until the 1960s and 1970s, constitution-making tended to be regarded as a matter mainly for political leaders and experts on constitutional issues. There has been a significant change in the past thirty to forty years, in part based on broadening concepts of the people's right to participate.

Nevertheless, while in recent years the people have often been consulted, the number of cases

in which the views received have been carefully analyzed and used in making decisions about the new constitution has been limited. One of the first of these was Papua New Guinea [1975]. Others have included Uganda [1995], Eritrea [1997], Albania [1998], Bougainville [2004], Kenya [2005; 2010], and Nauru [2010].

The processes in which the greatest efforts are made to consult the people and receive and analyze their views tend to be in countries with large rural populations, and where there are not well-established ways in which the people's views can readily be aggregated by broadly representative bodies. In many countries (especially those classified as relatively "well developed") there are long-established ways in which the people's views on controversial issues tend to be aggregated by bodies seen as legitimately representing the main strands of public opinion. They may include political parties, trade unions, and major NGOs. When constitution-making processes occur in such countries, representative bodies and the general public may all tend to assume that established patterns of aggregating views will be followed. As a result, there are less likely to be major consultative efforts where views are collected and analyzed, and instead more likely to be a limited public consultation process, in some cases one that mainly engages with a few categories of major organizations.

In addition, there are many processes where there is little or no focus on people's views as a source for decisions. This may be because constitution-making is a negotiated process, as is often the case in postconflict situations where parties to a peace process negotiate a settlement that includes constitutional change. In still other cases, it is assumed that the people's representatives, such as members of parliament, of a constituent assembly, or of a national conference already have a mandate to express the views of those who elected them (or whose interests they were nominated to represent, as with appointed members of a constituent assembly or national conference), so there is no further public consultation required.

What perhaps might at first seem odd is that in a number of constitution-making processes,

Box 20. How South Africa's two million submissions were counted

In South Africa [1996], it is sometimes claimed that more than two million submissions were received. Most were signatures on petitions (mainly on specific issues); there were only about thirteen thousand substantive submissions. However, even though these submissions were analyzed and reports about them were provided to technical committees of the constituent assembly, for the most part they had a limited impact on decisions about the constitution, largely because the primary outcomes were negotiated among the major political parties.

Box 21. Use of views in Papua New Guinea [1975]

Although extensive use was made of the many views collected, and the recommendations of the pre-independence Constitutional Planning Committee are regarded as being based heavily on the views of the people, twenty years later one member of the committee said, “in the end we abandoned the idea of analyzing all the submissions that came in, because there were just too many. And there was also, to a certain degree, a position taken . . . that we represented the people and that in some ways the people had to be led and not be followed” (Mackenzie Daugi, member of the Papua New Guinea Constitutional Planning Committee, in Regan, Jessup and Kwa 2001: 361–62).

while considerable efforts were made to collect people’s views, those views subsequently receive little attention from the constitution-makers. In Rwanda [2003] only 7 percent of the responses to fifty thousand lengthy questionnaires provided to the people by the constitutional commission were analyzed. In Iraq [2005] the questionnaires that had been distributed and gathered were never looked at by the constitution-makers.

Reasons why views are not analyzed may include:

- a failure to make a plan or budget to effectively analyze and use the views;
- the view held by primarily elected constitution-makers that they represent the people and so should be free to make decisions based on what they think is best.
- the effort and extensive resources required if large numbers of written and other submissions are to be received and analyzed, and the extreme time pressures that are often experienced in constitution-making processes;
- constitution-makers who participate in numerous face-to-face meetings with the public feeling that they are capable of making their own assessments of what they have heard, and do not need further analysis of transcriptions of what was said at such meetings or of what they may feel is similar material contained in written submissions;
- people often being consulted about their views for purposes other than to inform the constitution-makers, including:
 - raising awareness about constitutional issues (almost a form of civic education);
 - attempting to legitimize the process;
 - responding to expectations of or pressures from civil society, the media, or the international community; and
- the pressures on constitution-makers to ignore, or downplay, the views of the people on particular issues, as, for example, in South Africa, where strong popular pressures for constitutional provisions in support of capital punishment and in favor of prohibitions on abortion were ignored because of the concern of the African National Congress (and others)

to ensure that the new constitution contained progressive protections for human rights.

The views of the people are never the only source the constitution-making body is permitted to use. (See part 2.2.3.) While the people's views may be important, the use of other sources necessarily results in constitution-makers allocating their research and analysis efforts in other directions. That can result in the development of views on constitutional issues that are different from, and even contrary to, those that predominate in the views submitted by the people.

Effects of public consultation choices for receiving and analyzing the people's views

A constitution-making body may want to receive and analyze the views of the people for a range of quite different purposes. Such purposes can have major effects on the type and the timing of the work involved, and staff and resources needed to do that work.

An initial round of public consultation about the people's views may be held to help the constitution-making body determine the agenda of issues to be addressed as part of the process. In such cases a subsequent and usually much broader public consultation process will usually take place concerning that agenda. Quite apart from the task of organizing the public consultation, the receipt and analysis of views required people to record the meetings, transcribe the views presented, and summarize those views into reports the commission used in making decisions on the agenda of constitutional issues.

The most common purposes for obtaining views, however, usually concern developing proposals on the new constitution. This can be done in the many ways outlined in the earlier discussion of public consultation, and may require attention to the organization and resource issues outlined in the general discussion of requirements for receiving and processing views.

If, however, people's views are sought in relation to a draft constitution, additional organizational and resource issues will arise. There will be a need to print copies of the draft, or at least to prepare adequate explanatory materials (i.e., providing enough information to the people to enable them to be meaningfully consulted). There may be a need to have the draft constitution and explanatory material translated into local languages. It may also be necessary to have a specifically designed civic education program to help people understand the content of the draft constitution sufficiently to be able to provide meaningful comments.

One purpose of analyzing views is to provide the constitution-makers with insights into the extent to which views differ between regions of a country, or among ethnic or religious communities within a country. An understanding of such variations may be of great significance in the process of making recommendations on constitutional issues, especially in a postconflict situation. To ensure that such an analysis is possible, it will usually be necessary to organize the consultative process in such a way that the views of the distinct communities are separated as they are received, or so they can readily be separated and subjected to later analysis. (The 210 separate constituency reports in Kenya are an example of what can be done.)

A further reason for receiving and analyzing views may be to assist the constitution-making body in the resolution of contentious issues. In Uganda, a careful statistical analysis of views submitted to the constitutional commission on divisive issues was one of several sources the commission used to make decisions on the limited number of issues where a broad consensus had not yet emerged after a highly consultative process taking more than three years. As outlined below, the commission needed a specialist staff and significant resources to undertake the analysis of the views on those issues contained in the 25,547 written submissions it received. The commission also published the results of the statistical analysis, as a means of reducing any suspicion that the statistical analysis had not been conducted in a bona fide manner.

Requirements for receiving and processing views

The following discussion provides a brief overview of some of the issues that arise when receiving and analyzing the views of the people.

Who collects and analyzes the views

While most commonly this work is done by the constitution-making body or its administrative management body (e.g., its secretariat), there can be major difficulties involved in doing this. Putting together the personnel and resources required can be a major exercise, one that it is hard for the constitution-making body to do on its own and in the limited time likely to be available. So, in some processes, either existing governmental or nongovernmental bodies undertake the work on behalf of the constitution-making body, or a special body is established for that purpose.

In Papua New Guinea, the colonial government's political education office (later called the department of information) was put at the disposal of the constitutional planning committee. It designed the public consultation program and conducted the training of advisors for discussion groups established all over the country, through which much of the public consultation took place. Those advisors then took responsibility for transmitting to the committee the answers given by the discussion groups to guiding questions contained in six discussion papers circulated by the committee. In Colombia, a government commission organized almost sixteen thousand working groups throughout the country to gather public views. It worked for the three months before the constituent assembly met. It then organized the written submissions for use by the constituent assembly. In Albania [1998], a newly established ministry of institutional reform and relations with parliament was established to support the constitution-making body (a committee of the parliament). The ministry assisted in establishing a quasi nongovernmental body to facilitate public participation and the processing of views. It was funded mainly by donors.

In the more common situation where the constitution-making body itself takes responsibility for coordinating public consultation and the receipt and analysis of views that it generates, especially ones that continue for several years, constitution-making bodies do build up their own workforces, including specialist employees. An example of the personnel required concerns the Uganda Constitutional Commission, which took on the work of receiving and analyzing the memoranda, reports, and oral submissions containing the Ugandan people's views. This was a

major exercise. All submissions were summarized for general use by the commission. In addition, the views expressed in all submissions were examined to identify positions expressed on a number of controversial issues. Those views were analyzed statistically in order to help the commission make its decisions on the controversial issues. The commission's workforce, which already had almost a hundred personnel, many working on summarizing and managing written submissions, was expanded by the employment of forty-eight university graduates and other staff members, including computer specialists.

The various forms in which views may be provided, and receiving and storing the views

People may provide their views to constitution-makers in a wide range of ways, including:

- oral submissions at public meetings and in some processes over dedicated telephone lines (as in South Africa);
- answers to questionnaires or to guiding questions circulated by the constitution-making body, which might be in writing or could perhaps be submitted online;
- written or printed submissions on issues of particular concern to the authors, which can include brief notes, letters, long and detailed submissions, draft constitutions, and the like; and
- petitions on particular issues, in some cases signed by hundreds of thousands of people.

With increasing access to electronic forms of communication, the ways views can be submitted is increasing, including:

- text messages sent through mobile telephone networks;
- e-mails;
- blogs;
- submissions made on dedicated websites; and
- Twitter and Facebook.

A constitution-making body that is serious about receiving and analyzing views needs to give careful attention to the arrangements it makes for managing these views in ways that ensure that the material is accessible to and readily available for analysis by the constitution-making body.

For management of large volumes of views submitted electronically, it will be essential for a constitution-making body to employ a specialist staff capable of setting up systems for recording receipt of such submissions, and electronic storage and backup. Such arrangements will need to make the material readily accessible to the constitution-makers and their staff, and also available for such statistical and other kinds of analysis as the constitution-makers require. Special arrangements may be needed if there is substantial use of video technology to record views. Where large numbers of oral and written or printed submissions are generated, arrangements will be required just to ensure that all such material reaches the constitution-

Box 22. Use of social media to prepare a constitution: The case of Iceland [ongoing process]

The Icelandic Constitutional Council has established a website (<http://stjornlagarad.is/english/>) with links to Facebook (<http://www.facebook.com/Stjornlagaradand>), YouTube, and Flickr. The council views this as an effective way to engage a large percentage of the public because at least 90 percent of Icelandic citizens have access to the Internet, and most have Facebook pages. The public is invited through media advertisements, the Web, and social media to send messages using Twitter, Facebook, or the website. All of the messages are posted as long as the sender provides his or her name and the message is cleared by the council's staff. Others can comment on the views expressed, which has been promoting debate on the issues. Every day the council posts short interviews with council members on YouTube and Facebook. Every Thursday, the council meetings are broadcast live both on the council's website and on Facebook. The website also includes the current constitution, drafts of the constitution and other key documents, a schedule of meetings and events, the council's procedures, names of council members, a newsletter, and the like. The country is relatively small, so this may be manageable. Such an experiment might prove more challenging in a larger country. The use of social media to prepare a constitution is a new approach (other countries, such as Ghana, have used social media tools as well but not as extensively) and should be studied to determine how it can be most effective.

making body. In a large country where much of the population lives in far-flung and relatively inaccessible areas, literacy levels are low, and many local languages are spoken, systems for receiving views may need to include arrangements for:

- recording what is said at face-to-face meetings; and
- encouraging submission of views in written or printed form, and then collecting the submissions and getting them to the constitution-making body.

In Kenya, the Constitution of Kenya Review Commission established documentation centers in all administrative districts not only to facilitate distribution of civic education material produced by the commission but also to act as depositories for submissions. In other places, government and administrative staffs have collected submissions from the public and forwarded them to the constitution-making body.

After the views have been received, the need for the material to be stored and managed in ways that ensure accessibility to the constitution-makers and availability for statistical or other forms of analysis gives rise to a number of major considerations, including:

- Filing and storage systems will be needed for both electronic and documentary submissions. Consideration will need to be given to whether written or printed submissions are saved online (to make them more readily retrievable) and about where and how the originals will be stored.
- Oral submissions may need to be transcribed, to make them available for reading by members of the constitution-making body, and perhaps for inclusion in statistical analyses of views submitted.
- Both oral and written or printed submissions may need to be translated from local languages into languages that enable the views to be read and (if necessary) analyzed statistically.
- In some processes, constitution-making bodies have put great effort into summarizing submissions so as to make them more readily accessible to both perusal by the constitution-makers and statistical analysis.
- Constitution-making bodies need to consider how best to address the concerns, often expressed by people when consulted, that their views will not be used, or may be manipulated (e.g., to meet the interests of a political party). Sometimes such concerns are answered by producing reports of the views received. It might also be possible to make the views received available on a website, accessible to all who are interested.

For a more detailed discussion of issues about the records that may need to be kept by a constitution-making body, inclusive of records of submissions of views, see part 2.3.8.

Analysis of the views

A credible public consultation process requires analysis of the views. In particular in cases where large numbers of submissions (oral, written, printed, or electronic) are received, if only because it is usually impossible for members of the constitution-making body to read every submission. Apart from an analysis that essentially summarizes or identifies main themes expressed by the participants, various other forms of analysis may be required. These can depend on the terms of the legal mandate of the constitution-making body, and also on which of the various purposes for which views are received and analyzed are applicable in the particular case.

Most commonly, there is no special purpose beyond making the views readily available for use by the constitution-making body when it makes its decisions on constitutional issues. But to do that it may be important to have the views available in a range of forms. These might include analyses of views on particular issues, along with their main variants; analyses of views from different regions; or statistical analyses of options for responding to certain issues. There is no clear pattern here in terms of the tasks involved or in the way such tasks should be carried out.

For answers to questionnaires or to guiding questions that have been closely followed in submissions, a statistical analysis may be reasonably straightforward. But where submissions containing views are more open-ended, various technical issues may arise. For example, should a submission from a large political party, church body, NGO, or trade union be given the same statistical value as a submission from an individual? When statistical analysis is undertaken to

help resolve divisive issues, usually the analysis aims to identify the number or percentage of views submitted that support each particular option. As was the case with the Uganda Constitutional Commission in 1992, this may require analysts to examine each submission to identify whether the submission takes a position on any divisive issue being analyzed, and what that position is. Determining such issues can involve matters of judgment.

Wherever summary or further analysis of views is required, there is the potential that the public will be concerned about manipulation of the analysis. The sensitivity can be especially high when statistical analysis is used as part of an effort to handle divisive issues. In all such cases it may be vital to establish procedures to protect the data from manipulation. To this end, the Uganda Constitutional Commission used several levels of review for all data entry in its statistical analysis exercise. Constitution-making bodies can help build confidence in their analyses by being as open and transparent as possible about:

- their decision to undertake statistical analysis;
- the method of analysis being used;
- their efforts to ensure that there is no manipulation of data or results; and
- the results of the analysis, ideally through publication of reports on the outcomes.

Examples of processes for which reports focusing on analyses of views were published include Uganda (where a report of the results of statistical analyses of views expressed on divisive issues was included in the three-volume report published by the constitutional commission) and Kenya [2005], where the Constitution of Kenya Review Commission published a number of reports on its analysis of people's views, including separate reports on views expressed in submissions from each of Kenya's 210 electoral constituencies.

Staff, resources, and funds

Whether the views of the people are received, managed, and analyzed by the constitution-making body or by another agency, a large-scale public consultation process that results in many submissions will usually bring with it the need for specialist personnel, technical equipment, and funds. Personnel needs could include record keepers, data-entry personnel (physical and digital), computer specialists capable of developing software, managing digital record keeping and statistical analysis, and people to transcribe oral submissions, translate oral and written submissions, and persons who can summarize and analyze submissions.

Equipment required may include filing cabinets (or other pieces for storing original documents), equipment for transcribing recorded oral submissions, and scanners and computer software and hardware for storing and analyzing written and printed submissions. In Zimbabwe [ongoing process] those managing the process had to develop a system of locking away or securing the original submissions so that none of the political parties could later claim the submissions had been tampered with.

Serious allocations will be required, not just of staff members, resources and funds but of also time. This commitment will exceed what was needed for civic education and public consultation. A serious effort to collect and analyze views will be almost impossible unless adequate provision for such an effort is made in the work program of the constitution-making body from an early stage.

Reports of constitution-making bodies on use of the people's views

Some constitution-making bodies, notably constitutional commissions and committees of parliament, prepare and publish reports of their work. (Other constitution-making bodies such as constituent assemblies, parliaments, and constitutional conferences do not in general issue reports on constitution-making, though verbatim reports of the debates of such bodies are often published.) Reports of constitutional commissions and the like are usually intended to explain the reasons for their recommendations on constitutional issues. As such, they are usually directed mainly to the constituent assembly or parliament that will debate the draft constitution prepared by the commission or committee.

An additional and often important purpose of such reports is to be transparent and inform the public about the analysis of the views of the people, and to explain how those views were taken into account (or discounted or ignored) in making decisions on constitutional issues.

Because they are directed at persuading constituent assemblies and parliaments of the value of the proposals for the draft constitution that they explain, such reports often are long and detailed. The volume of the 1974 report of the Papua New Guinea Constitutional Planning Committee containing the narrative and recommendations was 348 pages, while the 2004 report of the Bougainville Constitutional Commission was 368 pages. The 1996 report of the Fiji Constitution Review Commission was 791 pages. The Uganda Constitutional Commission's final report consisted of three separate volumes:

- a 144-page draft constitution;
- a 921-page volume, *Analysis and Recommendations*, explaining the reasons for the decisions on which the draft constitution was based; and
- a 383-page *Index of Sources of People's Views*, listing all written submissions received and reports of public seminars conducted by the commission, and containing tables summarizing the statistical analysis used by the commission to help it make decisions on several divisive issues.

While such lengthy reports may be read by some in the constituent assembly or the parliament, their length and detail usually make them inaccessible to most ordinary citizens.

An alternative approach, used by the Constitution of Kenya Review Commission, was to publish not only reports giving feedback on views received in each constituency, but also a short version of the major report addressing the constitutional recommendations of the commission. The short report was specifically intended to overcome the common problems of accessibility encountered with long and detailed reports.

The roles of such reports are in some cases made more significant by provisions in a new constitution requiring courts interpreting that constitution to make reference to key documents relevant to the original intention of its provisions. In the constitutions of Papua New Guinea and of the Autonomous Region of Bougainville, such provisions extend the reports of the respective constitutional commissions. In that way, to the extent to which the reports analyze and rely upon the views of the people (and in both cases they do to a considerable degree), those views remain relevant to the ongoing interpretation of the constitution.

2.3 Administering and managing the process and its resources

Participatory constitution-making processes can require the planning for, coordination of, and implementation of hundreds of complex and politically sensitive tasks, and the management of hundreds of people over an extended period. In a postconflict environment these tasks can become formidable. Infrastructure may be scarce or seriously damaged, human resources diminished by warfare or exile, and mistrust rife between communities and leaders. Managers have had to overcome these constraints and many others to raise funds, refurbish buildings, hire and train large numbers of personnel at short notice, fly in photocopiers and computers and vast quantities of paper, accommodate the media of many countries, pay staff members and send money to field offices with no functioning banking system, secure the process, and handle members of the international community who want to influence the process, as well as slow-moving or corrupt bureaucracies. Administrators and managers have accomplished this and more with little time for advance planning.

The administrative and management requirements of a constitution-making process are often not well understood by the designers of the process. In this section, we alert our readers to the administrative and management tasks that are unique or critical to constitution-making. The tasks discussed in this section do not involve policy decisions taken by the political leaders of the constitution-making body. These are primarily the tasks that are carried out in support of the constitution-making body. A closely related discussion about the bodies that perform these tasks and how those bodies are structured and managed can be found in part 3. In particular, part 3.3 deals with the administrative management body that may be responsible for many of the tasks described below.

2.3.1 The core tasks of administering and managing a process

The administrative tasks of a constitution-making process may be broadly outlined in the legal framework, but the process will often entail far more tasks, such as:

- strategic planning;
- financial matters, including budgeting, fiscal record keeping, auditing, fundraising, and

donor relations;

- personnel issues, including recruitment and management;
- logistics, including bringing people from far away for meetings and arranging accommodations;
- procurement of transportation, equipment, supplies, and services;
- security, including making policies and procedures and implementing them;
- refurbishing or securing buildings and maintaining equipment;
- conference management and catering (possibly for five hundred or more people);
- translation and interpretation services;
- information and communications technology, including setting up networks and database systems as well as repairing computers;
- capacity development and orientation for personnel and constitution-makers;
- research, drafting of constitutional provisions, archiving, and record keeping;
- secretarial tasks, including note taking, minute taking, and distributing agendas;
- printing and publishing books, pamphlets, questionnaires, or leaflets; and
- public outreach, including civic education and public consultation.

A wide range of expertise will be needed to carry out such diverse tasks, each of which will involve many more specific activities. Here is a glimpse of the variety of possible tasks:

- organizing a pop concert, song contest, or soccer game as part of a civic education and youth outreach program;
- translating the draft constitution into several languages and printing millions of copies of it prior to public consultation;
- hiring tents to serve as meeting rooms for a large constituent assembly or constitutional convention;
- designing security passes to indicate who has access to which parts of the constitution-making grounds and meeting rooms;
- arranging for daily tea service and meals for up to a thousand people for a national convention; and
- designing the logo and official stationery for the constitution-making body.

2.3.2 Strategic and operational planning

By strategic planning we mean establishing a plan for implementing the broad policy decisions of the constitution-making body. The strategic plan should set out where the process is going and how to get there, including detailed operational plans about how every task will be carried out, by whom, and what resources will be needed to carry it out. This helps with the next step in the planning phase: creating the budget. The more detailed plans are critical, because in

difficult circumstances—perhaps with inexperienced staff members, changing deadlines, and political crises looming—even basic tasks can be overlooked. For example, in past processes administrators and managers have failed to:

- secure, in plenty of time, a meeting place for the constitution-making body, which led to the need to pay for an expensive hotel for months on end so meetings could be held;
- order enough paper or toner cartridges for the printer, which prevented members from receiving drafts of the constitution to review and led to lengthy delays until more paper and cartridges arrived;
- realize that the members would be speaking different languages, and that translators and interpreters would be needed for several languages on a daily basis, which slowed down the process considerably and left many constitution-makers feeling excluded from participating;
- train note takers or establish a system to record decisions, which led to confusion about what had been decided and charges of manipulation against the leaders of the constitution-making body because certain constitutional provisions had been changed and members could not recall if this had been agreed to;
- realize the need for analyzing submissions, which has led to various difficulties including delays in the process, use of ineffective methods of analysis, or the abandonment of any serious attempt to analyze the views received, and pressures to obtain funds and specialist staff members at short notice; and
- deliver copies of the draft constitution to a minority community before the public consultation process began, which led the community to accuse the constitution-makers of manipulation and secrecy.

The strategic plan is developed by the managers or leaders of the process and includes some or all of the following components:

- the overall goals and objectives (which may be defined in a legal mandate for the process or may need to be developed further for the strategic plan) for the administration and management of the process;
- the core tasks that will achieve the objectives of the process;
- an overall timetable for the main tasks that need to be completed and coordinated mapping of what will be needed to implement the tasks in the time frame provided, including personnel, materials, and financial resources as well as external partnerships;
- identification of who or which department or body needs to do what and by when; and
- how the tasks will be monitored and evaluated.

The plan should be realistic both in terms of what can be achieved in the time frame given and the resources available for the process, including funds. Ideally, the key personnel or managers implementing the strategic plan will help develop the detailed operational plans. These plans describe specifically how each task will be carried out and how success will be monitored. This handbook, in part, has been prepared as a planning tool to identify the tasks, personnel, institutions, procedures, resources, and external relationships that may be needed. A quick

Box 23. Example of a strategic planning process

To provide an example of strategic planning, let us assume there has been a decision to have a constitutional commission that will prepare a final report and a draft constitution that will go to the parliament. The overall road map for the process might include the following stages:

- preliminary civic education;
- public consultation;
- analysis of views collected;
- first draft;
- consultation on the draft;
- final decisions;
- legal drafting; and
- debate in parliament.

The commission is appointed and it has several months to prepare its strategic plan. It has one chief administrator and three other administrative staff, one of whom is an accountant. It has access to the ministry of finance and other ministries for guidance.

For each stage, the commission must decide whether, and to what extent, the various tasks involve it. For example, by the time the final stage (debate in parliament) takes place, the commission may be winding up.

The strategic plan involves broad activities and time frames. After the plan has been created, the commission will have to break down those activities into more detailed tasks, then identify the resources that are needed to perform the tasks, and finally prepare the budget. There is a feedback loop covering the various stages; the commission can't simply plan to do things with no idea of whether it will have the money.

The framework for the strategic plan must be the legal or policy document (here we call it the law) that enshrines the thinking to that point. Also crucial are the realities of the situation—and for this the commission should not hesitate to ask for information from all relevant sources, including ministries, research bodies, and international agencies.

In planning the first stage—on civic education—the commission would ask itself the following questions:

- What does the law say? Is the commission required to carry out civic education? If not, is it able to do so, or is it expected to encourage others to do so? Or would it and other organizations all carry out civic education? Would it have—or should it seek—funding to pass on to others, or is it expected to remain entirely outside the education process? If the commission is to play no part, the planning process might stop there and move on to “receiving views.”
- If the commission has a choice of what to do, what structure for civic education will make the best use of the available resources—of the commission and others? This will require

assessment of the capacities of the commission and of other bodies.

- What is needed—how much do people already know about the constitutional issues?
- If the people have had some civic education already, who has done it? Was it well done? Are those bodies able to continue?
- If the commission is to be a funding body only, it will depend on other bodies to help it decide how much funding will be needed. If the commission is to do more, it should proceed to the following questions.
- How much time is available?
- How can marginalized or hard-to-reach groups be educated?
- What methods should be used to communicate—radio, television, theater, books and pamphlets, comic books, meetings, art and writing competitions, and the like (see part 2.2.2). At this stage, much help will be needed from others—does someone have figures on newspaper readership, listeners to radio, literacy? Experts on civic education will be needed (the commission is unlikely to have any, or not more than one, among its members). What language or languages will be used? Eventually the commission will need to know how much these things cost. Do newspapers publish this sort of thing without payment? How will marginalized groups be reached, and who are they?
- If the commission is to be involved in delivering, coordinating, or funding civic education, it should develop an overall plan to cover issues such as:
 - How are most people to be reached—by newspapers, face-to-face meetings, radio, television? And what type of electronic media programming: discussions, drama, phone-in programs?
 - At what level should meetings take place (every town, major headquarters)?
 - What sorts of publications will be needed?
 - Will the commission have a website, and will it use other online platforms such as Facebook?
- Its strategic plan will need time frames—within those probably set by the law. Benchmarks will be mainly for internal purposes: by a certain date staff must be hired; by a certain date partner organizations, if any, must be identified; during a certain period public meetings must be held, and so on.

This may seem daunting—but in reality much of the work will be done by others. Some tasks can be postponed until more staff members are appointed (but not for long). Government agencies, consultants, and others can help.

This is not the end of the process. Next comes budgeting: how much will all this cost? Roughly, how many pamphlets at how much per copy? How many meetings at how much per average meeting? How much does a website cost? How many staff members will be needed, and how much will they cost? How much does it cost to translate a thousand words into another local language, and how many thousands of words will need to be translated?

And the art of budgeting is not a precise one: there must be contingency plans, chances to ask for more (within reason), and rough estimates.

This sort of planning has to be carried out for each step in the process.

perusal of the detailed table of contents of this handbook can assist with the planning process.

A common management tool used for making strategic and operational plans is the analysis of the strengths, weaknesses, opportunities, and threats related to each component of the process. This is really just applied common sense. The idea is to assess the tasks to be accomplished, the resources and opportunities available, and the difficulties that lie ahead. The mention of strengths and opportunities as well as weaknesses is designed to encourage organizations not to ignore what they do have in the way of resources and circumstances—and not to focus only on the problems and the needs, which may lead to unnecessary pessimism and overspending on new people and resources. The analysis of potential threats or challenges will help managers when they are devising alternative plans for problems that may arise.

If managers have little or no experience with strategic planning, an external facilitator could help. However, it is not true that the same techniques necessarily work for producing a constitution as for producing paper clips, or even that public consultation on constitutional issues requires the same strategies as a participatory poverty assessment. Someone with planning experience may be useful for facilitating the development of a strategic plan. But to be useful, that person should be conscious of the particular features of a constitution-making process, including its technical nature and political sensitivity.

The overall strategic plan or parts of it could be a public document to inspire trust in the process and explain the road map of how the process will proceed. It could be placed on the official website or shared with key stakeholders, such as donors, the media, and civil society. This has been done to varying degrees in several places, including Afghanistan [2004] and Kenya [2005].

2.3.3 Financial management

Managers of a process in a conflicted or postconflict state—in particular, one where institutions have collapsed and are being reestablished—may have few or no financial procedures to follow and no government revenues to fund the process. The potential challenges include:

- developing an internal financial management system from scratch;
- the requirement by international donors to have an external actor (for example, the United Nations Development Programme) handle the financial management of the process, which can slow the process down if the financial systems are cumbersome (e.g., UNDP's bureaucratic procedures for financially administering the process in Zimbabwe [ongoing process]) or the financial managers of the external organization are not competent and the constitution-makers do not have control over who is hired or fired;
- securing funding from international donors who may then require some kind of management,

- oversight or advisory role while attempting to retain national ownership of the process;
- handling complex and multiple financial reporting or auditing requirements required by international donors; and
- needing to administer corruption-prone activities such as procurement, per diems, salaries, and the like entirely in cash because there are no functioning banks.

In states with functioning governmental institutions, financial management may be carried out according to preexisting systems and procedures, and at least some of the funds for the process come from contributions made by the government. When financial systems are in place, the existing governmental procedures can create other problems. They may involve reliance on a slow, corrupt, or incompetent bureaucracy. If the government has no legal obligation to fund the process, government actors may stop the funding if the proposed changes threaten those who have power over the money.

Some processes have received funds from governments and also from international donors, and their managers have had to deal with a combination of all of these problems. In this section, we discuss the challenges in a range of contexts. (Issues in relation to dealing with donors are discussed in part 2.3.12.)

Budgeting and costing for the process

Before costs for the process are determined, ideally a strategic plan has been created that has considered the level of funding available and has identified the realistic objectives, tasks, institutions, and resources needed. (See part 2.3.2 on strategic planning.) The next step is to develop a detailed budget that identifies the items and costs for each aspect of the process—for example, the costs of establishing and running each of the needed institutions and procedures, such as a constitutional commission, a constituent assembly, and a referendum. This can become complicated, because the establishment of institutions or procedures may depend on a precondition. For example, in Kenya the law provided that if a divisive issue could not be decided by the constitutional conference it would be decided by referendum. In a country where state institutions have broken down, there may be no electoral management body and no government funds for elections, yet managers must budget for the possibility of holding a referendum.

If the funding comes exclusively from international donors, one overall budget may be required and the approval process may be established by the donors. The process then resembles that of a civil society organization making a project budget and receiving funds from a donor. Additional budgets may need to be prepared if and when new components of the process are added, such as a decision at a later stage of the process to consult on the draft constitution. Establishing good relationships based on trust with the donors or government officials will help with the dilemmas that may emerge in planning for the process and getting funds released on time.

This handbook, in part, has been developed to serve as a planning tool and can assist with identifying budgetary items related to the potential tasks, institutions, procedures, and personnel required. Simply reviewing the table of contents will help in the creation of a budget.

Practical tips

- The task of developing the budget should be led by experienced local financial managers (to the extent possible) and personnel who will understand the unique challenges and needs of the context. International actors with relevant experience in budgeting for a constitution-making process can assist but should not take over the process even if international donors are required to approve the budget.
- Budgetary items that tend to be overlooked include audit fees; fuel for vehicles; maintenance and repair expenses; running costs such as rent, electricity, and gas bills; catering; cleaning services; security services; cell phones and usage costs; accommodations; the establishment of regional or district offices; the refurbishing of buildings; the extensive amount of paper as well as printing and photocopying expenses; interpretation and translation costs (especially if the constitution-making body is working in several different languages), graphic design work; salaries or per diems if necessary for future members of the constitution-making bodies; transportation costs (for personnel, members of the constitution-making body, and possibly for members of the public to get to public consultation meetings), the technical equipment and personnel required to record, secure and analyze public views for a widespread public consultation process; and capacity development or workshop costs so that staff members are adequately prepared to undertake their responsibilities.
- A decision will need to be made about how much or whether to pay constitution-makers for their time and whether to provide them with transportation and living allowances. It is reasonable to compensate people for lost income from time spent away from their job. However, when the compensation is more than what they might expect to earn otherwise, this can lead to members purposely delaying the process. Remuneration should be modest, and it should be noted that for larger constitution-making bodies—ones that are convened only to adopt the constitution—members may expect no remuneration (though payment of daily allowances and travel expenses may still be required). Corrupt politicians or others may try to pad the budget so that large per diems are made available as a way for political parties to influence key actors to serve their interests.
- To be cost-effective and promote national ownership of the process, requests for funds and in-kind contributions should be made not only to donors (from the international community) but also to local civil society organizations, the business community, the media (perhaps space in a newspaper for the draft constitution), and so on. Past processes have benefited from such offerings as secondment of staff and free radio time.
- Many constitution-making processes are funded only until the adoption of the constitution, but this is not the end of the process. Many costs remain, including those for keeping some personnel on staff to ensure that all official documents and media materials (such as pictures and video) are properly archived, that civic education and outreach continues so people are aware of the contents of the constitution, and that key government officials understand the implementation

Box 24. Benefits of a diverse staff

In Afghanistan [2004], the secretariat made it a priority to include women in leadership positions and to have a staff that was balanced in terms of gender and ethnicity. If the secretariat had not hired women it would have been difficult to speak with women leaders or organize elections in areas where women often are allowed to speak only to men from their families. Similarly, the secretariat communicated with marginalized groups more effectively because members from those groups were hired to perform outreach tasks. In contrast, in Iraq [2005], the committee secretariat had formed an outreach unit to handle the public consultation process. The Iraqi staff members recruited were predominantly Shia Arabs and they used predominantly Shia networks to gather input on the constitution. Far fewer Sunni Arabs or Kurds were consulted or had the opportunity to participate.

requirements of the constitution. (See part 2.7.2 on implementation.) Any official website established as part of the process should be continued for a while at least (as it may play an important role in making the new constitution accessible and better understood). When it is no longer needed for such purposes, the website should be archived, so that the material is later available to researchers. Or the website could remain active and used as a tool to continue to engage the public on constitutional issues. These items should also be put in the budget.

Financial accountability

Preventing corruption is a key challenge. In states emerging from conflict, there may be no financial systems in place. Policies for procurement may not be well established or understood, and where no bank exists, creating a system of cash disbursements that carefully tracks all financial transactions is tricky. If funds have been spent but there are no supporting documents in the form of receipts or vouchers, there may be accusations of corruption even if the problem is simply poor financial management. Accurate records of financial transactions are critical and must be reviewed regularly. All supporting documents should be gathered and filed in the order received, and cross-referenced to the books of account.

In contexts where the funds are controlled by a corrupt bureaucracy, managers may need to develop special methods of oversight to avoid problems. Even a slight misuse of government or donor funds can have serious consequences. In Uganda in 1992 a donor withheld critically important funding because of corruption in the ministry of constitutional affairs. The funding, however, was for the constitutional commission, and the corruption was identified by the financial managers at the commission. The withholding of funds delayed the drafting process and reduced the credibility of the process.

To ensure fiscal accountability, the expenditures should be audited. In Kenya, the chair of the Constitution of Kenya Review Commission (2001–3) invited the national auditor general to carry out an early audit, which enabled the return of funds that had been siphoned off through corruption. A code of conduct (see appendix C.1) should provide clear guidance about what practices are considered corrupt.

2.3.4 Personnel

Hiring or seconding personnel

In divided societies, the hiring process must be inclusive. It is not only the constitution-makers who should be representative of the nation, but also the administrative and management personnel. Such personnel are often the public face of the process. This is especially so when they are involved in civic education or public consultation efforts or in setting up field offices. Because of the important and sensitive roles that staff members play (including assisting with the drafting of the constitution), if a single ethnic or other group dominates the management bodies, there may be charges of bias in the whole constitution-making process.

Minorities, women, and other groups should have equal opportunities to manage and administer the process. Equal-opportunity, gender-sensitive, and diversity policies and procedures should be developed or adopted to guide hiring practices and should be followed in the work environment.

Table 6: Types of positions staffed in a constitution-making process

Staffing of positions	
Archivists	Interpreters/translators
Capacity development specialists/trainers	Legal drafters
Catering staff	Legal researchers
Civic educators	Logistics and procurement personnel
Data-entry staff	Managers
Drivers	Media specialists
Electoral specialists	Photographers
Empirical social scientists	Public consultation/deliberation experts
Financial managers	Secretarial staff, including transcribers
Fundraisers	Security officers and guards
Graphic designers	Specialists/librarians
Information personnel	Translators
Information technology experts	Videographers
Foreign advisors/mentors	Website developers

Box 25. Examples of secondments: Timor-Leste [2002]

In Timor-Leste, a media group lent a media relations expert to assist with press conferences and daily communication with the press, and the Asia Foundation hired and managed translators and interpreters to assist the secretariat, which was managing the process. (The secretariat had not planned for these positions and did not have funding for them.)

Careful consideration should also be given to whether public servants should become staff members. Public servants may be aligned with or too easily influenced by the government because of their reliance on the government for their salaries. Parliaments require considerable support in the form of secretarial and administrative assistance, including procurement, drafting, research, record keeping, building management, and security. The same useful skills are often needed to support the constitution-making body. However, in South Africa [1996], the former parliamentary staff members who had worked under apartheid were not trusted by some of the other staff and constitution-makers.

An inclusive hiring panel can interview potential candidates from a less biased perspective. There should be strict rules against nepotism. In many countries, anyone charged with setting up a constitution-making body or process of any type could expect to be inundated with requests for jobs or contracts for relatives, friends, relatives of important people, and so on. Such persons should be chosen in part on the basis of capacity to resist such pressures, and should insist that proper processes are used from the outset. Failure to do so risks compromising the reputation, integrity, and legitimacy of the process. In one instance, the director of a secretariat hired his young and inexperienced cousin as a deputy. The resulting poor execution of many tasks led donors to threaten to cease provision of funds.

All of these considerations underscore the importance of planning the hiring process early and having hiring guidelines and procedures in place, especially for a process that requires a wide range of personnel.

The types and number of personnel will depend on both the availability of funds and the number of specialized tasks that must be carried out. Management will have to determine the qualifications, terms of employment, and levels for each position.

In postconflict situations especially, a large proportion of the country's skilled professionals may have fled. Drawing members of the diaspora back to support the process can help inject needed expertise. Yet overreliance on returnees can create tensions, as local people who remained during the conflict may resent the diaspora members returning to take up important positions just as peace is taking hold.

Professional "headhunters" have been used to find appropriately skilled personnel. Civil society,

academia, the media, and the private sector have also lent personnel to the process, and public service staff members have been seconded.

Employees, seconded personnel, and consultants

An official process will probably have to operate within existing national procedures for the recruitment and terms of service of staff. In many systems there might be three basic categories of staff.

An employee is someone who is under contract to work for the particular body, and paid a salary, usually a certain amount each week or month. Such an employee will probably have a contract for a fixed length of time—often with the possibility of premature termination by either side. There may be provision for some sort of benefit for an employee who works for a certain length of time. In the case of a short-lived body, this is likely to be a lump sum rather than a pension system.

A person may be seconded, usually from another government agency. Such a person would likely continue to receive the same pay and other benefits as in his or her regular job, though sometimes the person would receive some extra benefit during the period of secondment.

A consultant is someone who receives either a lump sum to do a particular piece of work, or a certain amount a day, perhaps for a limited number of days in a period. A consultancy contract is more likely to be used for a specific expert for a specific project, though it is sometimes used for people doing less specific tasks. Often a consultant will be required to produce one or more “deliverables”—reports, drafts, and so on, before being entitled to payment.

When deciding on the relevant basis for employing staff, the constitution-making body might wish to take into account factors such as:

- will the staff member count as an “employee” for the purposes of the local law of employment, including liability of the body for accidents they might have, or even liability for their breaches of the law?
- would certain types of arrangement have cost implications for travel, insurance, health, housing?
- would a person seconded potentially have some kind of conflict of interest (for example, if they regularly work for parliament would they have an interest in certain provisions getting into the constitution)?
- relationships between employees, especially resentments that may be created by marked differences between people doing similar work.

Accountability of personnel

Unfortunately, in countries where corruption is a significant issue (though hardly anywhere is

it not a problem at all), constitution-making processes are not immune. If “corruption” means allowing personal interest to conflict with one’s responsibilities (that is, excluding purely political interference), the following are examples of the problem:

- obstructing work (perhaps by not turning up, or unnecessarily prolonging debate) in order to benefit more from salaries and allowances;
- engaging in procurement scams, such as issuing purchase orders for goods that are not intended to be delivered (at the time of the constitution-making process in Uganda, this form of corruption was known as “air supply,” and there was at least one elaborate scam of this kind that caused major problems for the Uganda Constitutional Commission when the commission discovered it), or services that are not rendered or not rendered in full, or for which the price is inflated (airtime offers an easy example, as it is hard for auditors to check how many minutes of purchased airtime have been used);
- employing, or secretly facilitating the employment of, one’s relatives and associates or their businesses (in one instance, commissioners employed their own relatives as drivers, insisting on having them paid through the commissioners, and then pocketing—stealing—some of the money); and
- taking bribes to vote in a certain way.

How can this be handled? Other than insisting on background checks before people are appointed or hired, some possibilities are:

- having and enforcing a code of conduct (see appendix C);
- not permitting people whose job it is to draft a constitution to be involved in management activities that involve hiring or procurement;
- asking for extra official audits;
- insisting that existing procurement procedures be used;
- using a private accounting firm to control certain activities (such as procurement);
- being creative in checking on whether goods and services have been provided (insisting on seeing the stacks of photocopy paper; asking commercial companies that track media how many of your advertisements have indeed appeared); and
- being alert to the “cash for votes” issue.

2.3.5 Capacity development

In a country emerging from conflict, capacity development can be an extensive task, and perhaps costly, because institutions that develop skills and knowledge relevant to a constitution-making process—such as parliaments, academic institutions, and civil society organizations—will often have collapsed. In these cases, developing the skills and knowledge necessary for staff members to carry out their tasks is essential if the process is to be nationally owned and led. This can include providing training on how to plan, take minutes of meetings, use the Internet, conduct

civic education, administer and manage a process or run a referendum.

Ideally, all staff members should have a basic understanding of the whole idea of a constitution and constitution-making. The more the members of the staff understand, the more committed they will feel to the project. Staff members who are in contact with the public, or are involved in the production of documentation, or who analyze submissions, will need more. Different levels of training will be needed for different types of staff members. Training in the terminology of constitutions will be essential for translators and interpreters.

When the international community has a stake, it often rushes the process and provides foreign advisors who perform key tasks, such as drafting the constitution or devising the rules that govern the process. While this may speed up the process, it blocks the opportunity to build capacity for other democratic tasks and more importantly may lead to the people not feeling a sense of ownership over the results.

Taking the time to develop capacities strengthens the foundation and sustainability of other democratic institutions that emerge. For example, in Afghanistan [2004], many of the trained personnel of the secretariat for the constitution-making process later managed and staffed the newly formed electoral management body and secretariat for the legislature.

2.3.6 Foreign advisors

We use the term “foreign advisor” broadly to mean any international actor who supports the administrators, managers, or constitution-makers in planning and carrying out their tasks, regardless of whether such actors serve as mentors, technical advisors, or substantive advisors on the content of the constitution.

Why are foreign advisors needed? Preparing a constitution is not an everyday event. In some countries few if any local actors may have ever participated in or witnessed a constitution-making process; local actors may have little or no experience with governance, and professionals may have fled the conflict. Foreign advisors have played effective advisory and mentoring roles in many such contexts and have assisted with a variety of tasks, including sharing their comparative constitutional experience on how to structure the process, the content of the constitution, setting up websites, information technology systems, and financial systems, supporting the running of large assemblies, coordinating security, and observing electoral processes. Here we focus mainly on the roles of advisors other than those with expert specialist knowledge of constitutional issues and the drafting of the constitution whom we categorize as “experts” (adopting a term for such persons used in a number of processes). We discuss “experts” (local and foreign) in part 3.4.1.

Ideally, the foreign advisor will not simply take over a position but also serve as a mentor to appropriate counterparts, helping them develop the capacity to do the job. However, this requires

the foreign advisor to have not only skills in transferring knowledge, but also a good understanding of the local context (history, culture, and so on)—and not all do. Moreover, for foreign advisors to succeed, they should view the transfer of knowledge as a reciprocal process, and so should not just read books and papers to research the historical, political, and cultural contexts in which they are working (many do not even do that) but should also seek assistance from the national staff they work with in an effort to better understand local context and how it may best be taken into account to improve the effectiveness of their work.

Avoiding common pitfalls of using foreign advisors

When foreign advisors are involved, careful planning is required to avoid common problems. Some foreign advisors have been inexperienced, have provided advice that did not suit the context, have taken over the jobs of national actors without developing local counterparts, have pushed the agendas of their home countries, or have advanced their own personal interests. In this section, we discuss some practical tips for avoiding these pitfalls.

Before hiring or accepting foreign advisors or mentors, managers should ensure that local knowledge and expertise are harnessed by the local constitution-making bodies. It is best to determine needs through the strategic planning process and request the types of foreign advisors, if any, that will further the process. Such advisors have ranged from experts on analyzing public consultation views to graphic designers.

Some countries do not attract much international attention, and if foreign advisors are needed they must be requested. But in higher profile processes, embassies or international organizations are usually keen to provide advisors. Before accepting assistance, the constitution-makers should determine whether the foreign advisor or mentor will be viewed as an unacceptable foreign intervention in the process—in particular by spoilers. In some contexts, the international community is viewed as having caused the conflict. If the context is sensitive, all foreign advisors (or those from a particular country) may be refused, or other measures may be taken, such as having the advisors sit separately from the constitution-makers or even answer questions via the Internet or telephone.

The constitution-making body may be able to select and budget for its own foreign advisors. However, they can be costly. Embassies or other international actors will sometimes offer advisors at their own expense. In this case, the constitution-makers or managers should request to see the qualifications, evidence of experience, and references of the proposed advisors, or else suggest their own. Managers will have to be diligent in seeking out the right types of advisors. To give an example relevant to the category of experts (discussed more in part 3.4.1), if advice is needed on an issue such as federalism, Western countries tend to offer only Western advisors, from countries such as Australia, Canada, Germany, or Switzerland, when experts from India, Malaysia, Nigeria, or elsewhere may be more relevant or better qualified. There should be a trial period to see if the foreign advisor is well suited for the task at hand and fits the context.

To ensure that managers and advisors both understand what is expected, the foreign advisor or mentor should be provided with clear information about tasks, length of trial period and employment, reporting lines, expectations of confidentiality, and the like. If the advisor is being seconded from an international agency or organization, it will be important to be clear about who will manage the foreign advisor and to whom he or she will report.

It is essential that foreign advisors understand the context in which they are working—both the historical and the cultural context—and also the aspects of culture that can affect working life and relationships where absence of understanding and sensitivity can lead to misunderstandings and conflict in the workplace. Ideally, the foreign advisors selected should be persons who already have an extensive knowledge of the country in question, or have worked in countries with similar circumstances. If the only ones available have little or no knowledge of the local context, the foreign advisors should be briefed. A packet of reading material illuminating the local history, politics, and culture—or at least a reading list—should be put together. If there is a group of foreign advisors, it might be possible to arrange a briefing seminar. Neither the host country nor the advisors should feel that this is inappropriate; ignorance or biased knowledge derived from casual conversations with interested actors will not enhance the contribution of the experts.

Ideally, foreign advisors will be accountable to and report to the national managers of the constitution-making process. There should be a duty of confidentiality if they are advising on sensitive matters, and the advisors should sign a contract to this effect. In one instance, a constitutional advisor helped with a sensitive process, and then upon returning to his academic institution wrote an article divulging information that endangered the process.

It may not always be possible to find an advisor with both the necessary expertise and the relevant language skills. The advisor should be offered the necessary translation or interpretation services (see part 2.3.9) and whatever material resources are needed, such as a cell phone, computer, desk, transportation, and housing.

When managed properly, foreign advisors have played effective roles in many contexts and have assisted with a variety of tasks. In general, foreign advisors who have been effective:

- had relevant experience in a number of diverse constitution-making processes;
- were good listeners and humble and remained in the background;
- either knew the local context well, or learned and worked closely with and respected those who did;
- did not advise on issues or aspects of the process for which they were not qualified, and helped find qualified advisors when necessary;
- supported a nationally owned and led agenda without attempting to take over the process or take credit for the official work of the constitution-makers (as one South African noted, “if I had a dime for every international who has claimed to write the South African constitution I would be rich”);

- emphasized the development of national actors rather than always doing the task themselves; and
- remained engaged in the process over the long term (although sometimes it is helpful for specific experts to fly in for a short time to advise on a specific issue or problem or assist with a discrete task). In some processes, foreign advisors have remained in-country or have returned regularly to work closely for years with the constitution-makers, managers, and staff members turned implementers.

2.3.7 Making a historical record of the process

Constitution-making processes are rare and often defining moments in a country's history. The process should be carefully documented, using photography and videography as well as archiving all of the important documents. Some countries have created national museums or special exhibits that display original drafts and final versions of their signed constitutions, and that educate and promote awareness about the constitution, the role it plays in society, and how it was made.

Even if a decision has not been made about how the process will be preserved and shared with future generations, managers should plan from the outset, if possible, to document and preserve the process. Some processes have had photographers, videographers, and archivists on staff.

2.3.8 Keeping records

Why record keeping?

A constitution-making process creates an astonishing quantity of words: public and other submissions, deliberations of commissions, committees, and assemblies, and, of course, the words of the constitution, as well as various drafts. Careful planning is necessary for keeping records of these words (and for deciding which words are to be discarded and which retained). Records may need to be kept for a variety of purposes:

- **Records of what people say to the constitution-making bodies**, whether orally or in written form; important because public participation is meaningless if there is no way of recording it and ensuring that it can be used in the constitution-making process; also because the people want to know that what they say is being treated with respect, even if they realize that not everyone's point of view can have an impact on the final document.
- **Records of the deliberations of the bodies** responsible for making the constitution; important because in the future lawyers and courts may come back to the records for assistance in interpreting the constitution, and because there are likely to be disagreements during the constitution-making process about what was said, and these can be resolved only by referring to the records.

- **Records of the actual decisions made;** important for obvious reasons—this is the immediate basis for the constitution; but also difficult because in the heat of debate, unless there is firm leadership and impeccable note-taking, it may not be possible to reconstruct later what was decided, especially as some people will have vested interests in distorting what was decided.
- **The developing text of the final document:** this must be kept in reliable custody to avoid the risk of its being lost or even tampered with.

These points concern the integrity of the actual process. In addition, making a constitution is an important national event, and future historians ought to be able to study its various stages.

In many legal systems it is permissible to look at the record of lawmaking bodies as a guide to interpretation. Such reference to sources has become much more prevalent in recent years, and is perhaps particularly common in constitutional interpretation. Many courts will permit this only if the records are publicly available, because any other procedure would be unfair. To make this possible, the proceedings of many constitution-making processes have been published. An early example is the verbatim record of the debates in the constituent assembly of India—similar to the verbatim reports of parliamentary debates, often known as Hansard in common-law systems.

Issues in record keeping

The steps that need to be taken to ensure proper record keeping can include:

- acquiring the necessary equipment and staff in advance to record oral submissions;
- establishing good filing systems in advance for submissions and other documentation;
- setting up a good system for analyzing submissions and communicating them to the decision-making bodies (this is looked at in some detail in part 2.2.4);
- supporting each committee with a secretarial staff, including someone with knowledge of the substance of the process to make notes and keep formal minutes of decisions;
- having available the staff and equipment necessary to record the deliberations of decision-making bodies and their committees, including transcribing the records and (ideally) publishing them. Whether a verbatim record of committee meetings will have to be determined, but a full record, like that normally kept of the proceedings of legislatures, should be kept of the meetings of a constituent assembly or similar body; and
- arranging for full records to be kept after the constitution-making process is completed. One copy (indeed, perhaps originals, for which this concept makes sense) should be deposited in the national archives, but if there is any rule in the particular country that records in the archives are not open for public use until a number of years have passed, that rule should be waived for the constitution-making records.

Among the factors that should be taken into account are the risks of records being destroyed (by vermin or damp in the case of paper; by fading in the case of photocopies) or lost. National

archives are not necessarily immune from these problems (in the 1990s the national archives of Vanuatu were seriously damaged by a typhoon), so more than one depository should be identified. Reliance on modern technology may have its own hazards; it may be superseded, and websites may cease to be maintained. University libraries may be less efficient than one would wish. (Copies of important documents donated to some university libraries seem to have disappeared.)

It would be wise to have several copies in different places. It may indeed be wise to keep copies of documents in more than one country.

Maintaining security of documents connected with the process can be an important during a process, not least because of the dangers of sensitive issues being misunderstood or deliberately manipulated by opponents of the process, or simply by people seeking their own political advancement through a controversy arising from the process. For example, at a very early stage of one process, a foreign advisor produced a draft document intended to be seen only by the chair of the process, generating some ideas about structures. But a member of the constitution-making body stole the document, removed the cover sheet that explained its purpose, and passed it on to political interests who wanted to stop the process and who used it in attempts to discredit the process. While as much transparency as possible in a process is both desirable in principle and makes the burden of maintaining security lighter, this example illustrates the point that there are likely to be stages in a process and some categories of documents generated where secrecy will be required. In such instances, it needs to be made clear who has rights of access to any restricted document. Measures need to be put in place to ensure that no one else has that access.

More on records and record keeping

As noted, some countries have contemplated establishing special archives—indeed, museums—of constitution-making. The verbatim records of the constituent assembly debates in India were published, and they are available on the Internet:

<http://parliamentofindia.nic.in/ls/debates/debates.htm>.

There is also a useful search engine at:

<http://viveks.info/search-engine-for-constituent-assembly-debates-in-india>.

Many modern constitution-review processes have websites, and they may even have full records on these. However, websites are ephemeral; there is no guarantee that they will be maintained after the review processes are completed. For legal purposes it may be difficult to persuade a court to accept a document taken from a website.

A constitution itself may contain provisions about interpretation that have implications for record keeping. The Papua New Guinea constitution says:

- (1) The official records of debates and of votes and proceedings—
 - (a) in the pre-independence House of Assembly on the report of the Constitutional Planning Committee; and

(b) in the Constituent Assembly on the draft of this Constitution, together with that report and any other documents or papers tabled for the purposes of or in connection with those debates, may be used, so far as they are relevant, as aids to interpretation where any question relating to the interpretation or application of any provision of a Constitutional Law arises.

An act of parliament provides how these records are to be used in court. The records of the constituent assembly were published to enable them to be referred to in this way.

2.3.9 Translation and interpretation services

Especially in divided societies, language can be a highly politically sensitive issue as well as a logistical hurdle. Constitutional deliberations require clear communication among those involved. Tensions have arisen when documents as important as drafts of the constitution have been put forward in the dominant language and other members have waited for the documents to be translated into their language, or when the translations are so poor they cannot be understood. Other key challenges involve ensuring inclusive communications with the public. The process should reach all members of society. This takes careful planning and significant resources if more than one and sometimes even dozens of languages are spoken. Finally, communicating with foreign advisors and donors may require another set of translators and interpreters altogether.

Translation for nationals

In some countries there are people with a great deal of experience in translation, Neglect of certain communities in other countries may have been among the causes, or the consequences, of conflict. Linguistic chauvinism in Nepal on the part of the dominant caste groups was entrenched, and an element of the People's Movement of 2006 was the demand for rights for all, including distinct language groups—symbolized by the members of the constituent assembly being able to take the oath in their own languages (of which there are perhaps a hundred in the country). But in other countries there may still be those whose attitudes are stuck in the past. In Somalia, for example, speakers of the dominant language, Af-Maxaa Tiri, will sometimes insist that Af-Maay (classified in Somalia as a version of Somali) is a dialect of Somali, although the two are largely mutually unintelligible, and the Af-Maay speakers have always felt marginalized, especially because official Somali orthography is based on Af-Maxaa Tiri.

Translation is both time-consuming and expensive, and common sense as well as sensitivity is required. It is not possible to translate materials into many languages, and there may be few literate members of some linguistic communities. While the actual text of a constitution ought to be available in major languages, few will read the text in any language, and leaflets making the main points in some other languages may be enough.

All the problems of translation from foreign languages highlighted below may be more acute when there is a need to translate into languages that—along with the communities that speak them—have been somewhat neglected in the past, with the result that constitutional terms have never been developed in those languages. This raises the question of whether it is appropriate to invent new words, or use existing words in a new sense. Though this may be a long-term solution, it hardly helps comprehension in a popular-consultation exercise, which is often the reason for the translation. It may be necessary to insert an explanation rather than an obscure or invented word.

Translation for foreigners—and of foreign material for nationals

Unfortunately, in some processes there is no foreign member of a team who has a command of the constitutional and political terms needed in a given local language, and no local staff member who has that same degree of facility in the foreign language or languages. This means that there is no quality check on translations, which may actually be almost incomprehensible.

All too often the issue of translation is not addressed early enough. And the need to recruit translators quickly may lead to the recruitment of quite unsuitable individuals. Although most people realize that simultaneous interpretation is a highly skilled task, they may not realize that the skills needed for translation of technical documents are equally great, if different. In one process an international organization recruited as a translator a young man whom they met while he was working in a bar. His English was indeed excellent, but his knowledge of constitutional

Box 26. Translating the language of constitutions

“Convention” has two quite different meanings, one referring (in only a few countries) to an established constitutional practice, and the other (more common) sometimes referring to a constitution-making assembly.

“Proportional representation” usually refers to an electoral system designed to ensure that the votes each party receives are reflected in the number of legislative seats it wins; the phrase is now used in Nepal to refer to the ethnic, religious, community, or caste representativeness of a body.

“Federalism” is a system of government under which power to make and administer laws, collect taxes, and the like is divided between the national government and governments at one or more lower levels—used by some purists to refer only to a country such as the United States, where preexisting units came together to form a new state.

“Penitentiary” means “prison” in the United States, but the word isn’t used in the English of many other jurisdictions, though people there would likely understand it.

law was nonexistent. In Timor-Leste, the secretariat did not realize it needed interpreters until the constituent assembly held its first session and it became evident that the younger members could not follow debates in Portuguese. Interpreters were found, but some were poorly trained, and communications problems among the members existed throughout the process.

Not only is the language of constitutions technical; it is also specific to countries. A camshaft may not vary in its nature from country to country, but legal terms are not necessarily understood in just the same way everywhere, and constitutional terms also have political overtones. While a person who has some knowledge of constitutional concepts in English and some knowledge of French and Latin might be able to translate a constitutional text from Spanish or Portuguese into English with a little help from a dictionary and an online translation program, there will inevitably be significant gaps in his or her understanding of what the terms would mean to a Spanish or Portuguese lawyer. This is a matter of constitutional knowledge as much as of translation; it points to the need to be careful not to make use of terms in any language without knowing what they mean. This serves as another reminder that foreign experts need adequate preparation and briefing. Only a dictionary focused on a particular discipline is likely to include many of the necessary words and phrases. A bilingual dictionary is unlikely to include phrases such as “parliamentary system” or “proportional representation.” This is true particularly because these are concepts, not just labels.

Some concepts have no exact equivalent in some languages. In Nepal the word “democracy” was translated in two ways, each version having political overtones. In Somali, “democracy” seems to be viewed as a foreign term, and there is no clear word for “federalism”; any word for it that does exist is essentially Arabic.

Practical tips

Both local and international actors should focus as soon as possible on whether translation is going to be a problem. Some of the strategies listed below may be helpful. But it must be emphasized that translation is a technical matter; ideally it should no more be carried out by an amateur than technical constitution drafting should be. The first strategy should be to locate the people with the necessary skills and knowledge:

- Recruit a group of good translators and train them in the concepts and the language they will need; this will probably require a short course in constitutions. A well-run course in constitutional and political translation would be a useful contribution to the country’s future development.
- Identify as soon as possible a good bilingual dictionary that focuses on the range of vocabulary likely to be used.
- Prepare a glossary of words in the relevant local languages and the relevant foreign languages; this should not just be a dictionary, but should explain the use of the words, at least in the foreign languages. It is important to address the problem of words with no translation and agree on how to handle them. (This may have its risks; one writer observed that the English phrase “Lord Chancellor” was translated into Turkish as “Lordlar Kamarası Başkanı,” meaning

the “head of the House of Lords” (Anthroscope n.d.). The Lord Chancellor still exists, but is no longer the head of the House of Lords!

- Train the translators and interpreters in the use of the glossary, and insist that they use it.
- Emphasize the importance of always using the same words for the same concepts, resisting any temptation to sacrifice accuracy for elegance. Resist also the urge to use “politically correct” terms if these were not used in the original—for example, it is not proper to use the word “gender” when translating into English instead of “sex” just because this is the United Nations’ favored word. This is particularly important when drafting a legal text as opposed to a piece of political analysis.
- Obtain a bilingual version of the existing or most relevant previous constitution, especially if there is what is professionally thought to be a good translation, and insist that translators consult this when translating a new draft.
- Try to persuade translators not to adopt dying usages in other languages; for example, modern drafters in English are moving away from “shall” to indicate obligation (a word that modern nonlawyers would read as a statement of what will happen in the future) and toward using “must” or some other clear word of obligation. However, when translating into the local language, it is perhaps not a good idea for international actors to try to “improve” local usages, though some education about the existence of alternatives might be permissible.
- Establish cooperation among organizations so that only one translation needs to be prepared for each new document.
- Explain the problem to foreign experts and insist that they do not use obscure words in their presentations and written documents—there is no point if the words, when translated, will be nonsensical.
- Ask speakers in a foreign language to discuss their topics with the interpreters in advance, so that the latter can ask for guidance on meaning and be forewarned about possible difficulties.
- Discourage foreign experts from asking for complex writings to be translated, thus taking up the valuable time of translators to produce something that is unlikely to be read.
- Consider using a commercial translation agency; in Iraq it proved possible for documents to be sent to agencies in a different time zone and for translations of fairly short documents to be made overnight. This, however, has the obvious shortcoming that it bypasses local workers and does not contribute to the development of their skills—and quality control may be a problem.

2.3.10 Security

Today, many conflicts end in stalemate, and the constitutional process is one of negotiation among previously warring factions. Spoilers may remain outside the process and pose serious threats. Managers have to face the possibility, often quite real, that constitution-related activities will be disrupted by violence. In Iraq and Somalia constitutional commissioners were murdered and in Afghanistan rockets were launched in an attempt to hit the tent of the Constitutional Loya Jirga. Security procedures need to be developed to suit the context and all constitution-makers,

staff members and those participating in the process should be briefed about them, such as what do to in case an armed intruder enters the constitution-making area or a vehicle is attacked.

Security is also essential to guarantee that a participatory process protects the rights to freedom of speech and assembly as well as personal security. In Zimbabwe [ongoing process] people participating in a public consultation meeting were beat up and even arrested for observing the process. Managers must determine the level of security needed to safeguard the process. In postconflict contexts in particular, official security forces may not be trusted; private security companies (even international ones) may be required (though their record has not always been good). And if there is a severe shortage of local security options, the international community may play a role. In insecure environments, constitution-makers or others may demand excessive security protection. Constitution-making venues of all types (for public consultation as well as deliberations) must be carefully selected to avoid security risks. It may be necessary to decide the context is so volatile that public consultation and travel must be limited.

Constitution-makers have addressed the issue of security in different ways. In Eritrea, management went directly to the heads of the military and negotiated with them for security for all aspects of the process. In Albania, local police and constabulary forces were enough to counter threats of violence. In Afghanistan [2004], the army checked every car entering the constitution-making area for bombs, perhaps now a common post-9/11 practice. Managers should be specific with security providers about their needs, and enter into a written agreement about such issues and how many security officials will cover each event and what they will be expected to do.

Handling security requires more creative solutions when the police or the military may have committed human rights abuses, may represent a particular interest and be considered biased, or may be viewed as poorly trained. In some contexts, police or other officials may be an impediment to public participation; in Kenya [2005] the police were asked to keep out of public consultation meetings because people feared to speak openly in their presence. Commercial security firms may sometimes be used instead of the police, either because of the inadequacy of the latter or because of their perceived loyalties.

The international community has helped provide security. These efforts have ranged from United Nations peacekeepers or other security forces providing security at constitution-making events or meetings to their providing security information. The international security providers should work in close coordination with the national actors so that no steps are taken that will undermine the process.

Outreach teams and field offices will need communications systems so that they can be in touch with their base. When the United Nations is involved, it judges security situations on a scale and takes corresponding precautions, including sometimes prohibiting United Nations employees or consultants from traveling by anything other than a United Nations vehicle, and barring them from going to certain places.

2.3.11 The media

“Media” refers to the printed press, radio, and television. The term now also includes the Internet, as well as short messaging services for mobile devices. The media play two key roles: informing and educating the public about the process (see part 2.2.2 for examples) and playing a traditional “watchdog” function, whereby they investigate and assess whether the process is being properly conducted. (For tips on how the media can do this effectively, see part 4.1.) These two functions can cause tensions between the constitution-makers and the media.

On the one hand, media outlets cannot always be relied upon to report the news in a neutral fashion. In many countries they are owned by one of the major political forces, such as the state, a political party, even politically active individuals, or a major economic interest. These media outlets often report stories that promote their own concerns and interests, which could be biased, or at least decline to publish or heavily edit “unfavorable” matter. Even where media diversity exists, journalists may lack experience and fail to report on important matters, or may misinform the public about constitutional issues or the constitutional process. In some countries, because journalists are poorly paid they may want to be paid for printing stories. Even when journalists are well trained and experienced they may still fail to report on issues of substance because they are looking for stories that are sensational.

On the other hand, the media can become frustrated by the failure of constitution-makers to provide them with access and information about the process and the constitutional issues at hand. In some cases, media outlets have complained that the process was being conducted in secret. Constitution-makers have failed to provide the media with regular press releases or briefings, clear and accurate information, or guidelines about access to proceedings or information. These and other tensions have led to negative reporting in the media and the lowering of the credibility of the process.

The media strategy

Developing a media strategy (i.e., a strategy to communicate with the people as widely as possible by using radio, television, newspapers, the Internet, or social media technologies) can reduce the tensions between constitution-makers and media actors, and ideally ensure that the media is used to inform and educate the public and encourage its engagement in the process. Components of a media strategy may include:

- identifying key media outlets, bloggers, methods such as Twitter and Facebook, or newly emerging media innovations that can be used to reach the people (see box 22 on how Iceland is using the media to reach the people);
- organizing regular briefings for the media or bloggers, etc.;
- distributing regular press releases that are clear and accurate;
- organizing training for the media about key aspects of the process;

- recommending a suitable spokesperson for the process, and training him or her;
- hiring a dedicated staff to coordinate with the media and communicating important information about upcoming events or new developments;
- having the leaders of the process be as accessible as possible to the media, and attending public events as often as possible;
- issuing regular press releases that highlight newsworthy stories and summarize essential facts;
- providing sample interview questions to journalists in advance of interviews with members of the media, particularly in countries where media development is in its infancy;
- inviting journalists to attend internal meetings (in South Africa, journalists were welcome to attend nearly all of the administration and management meetings, which promoted transparency);
- developing alternatives to state controlled media outlets (e.g., distributing shortwave radios); and
- developing rules regarding media access.

Developing rules regarding media access

Ensuring media access at appropriate stages of the process can promote accountability, transparency, the public's right to information, and the people's right to political participation. At the same time, media access needs to be managed. There should be a presumption of access unless there is a good reason to exclude the media. The extent of access at any particular time will depend on a range of issues, including the stage of the process and the nature of the work being carried out.

It would be expected that the media will have access to the public deliberations and debates of a constitution-making body. However, some deliberations are best held in closed sessions. For example, it may be helpful to ban television coverage at certain stages where such coverage might encourage the "grandstanding" of members for political gain and discourage consensus building and compromise.

The rules concerning media access should adhere to international standards and to any local legislation that defines the types of information to which the public has a right of access from their public institutions.

It may be useful to meet with key media professionals to get feedback on the rules, explain them, and answer questions. To promote openness, a small handbook for the media could be developed to inform them about:

- the constitution-making body and the process;
- times of press conferences and briefings;
- where relevant information can be found (e.g., the official website for the process);

- what access the media will have, and at which stage of the process;
- how, when, and where members of the media will be accredited and be given security clearances if required; and
- whom to turn to with questions, complaints, or requests for assistance about access or accreditation.

2.3.12 “Managing” relationships with the international community

Who is the “international community” in a constitution-making process?

For the purposes of this handbook, the “international community” is a collective term that refers to the broad range of countries and other international actors that may influence, directly or indirectly, a constitution-making process. The international community is not a homogenous group and it does not represent a single policy or viewpoint. There are at least six main categories of international actors that may make up the international community in any postconflict context:

- International, regional, and multilateral organizations, such as the United Nations, the African Union, the European Union, the League of Arab States, and the South Pacific Forum, may initiate, or at times lead, the constitution-making process or provide political legitimacy and legal authority—for example by passing resolutions in support of the process. They may also deploy missions to support the process, provide special representatives to help out, and provide funds.
- International agencies, such as United Nations agencies—most often the United Nations Development Programme; the United Nations Development Fund for Women; the United Nations Children’s Fund; and the Office of the United Nations High Commissioner for Human Rights—or international financial institutions, may provide expertise and assistance programs and may also serve as donors.
- Individual countries may have a direct interest in the process and provide diplomatic influence or skills, technical assistance, or resources. They may be from the region or beyond it; Australia (Australian Agency for International Development), Canada, the Scandinavian countries, Switzerland, the United Kingdom (Department for International Development), and the United States (especially through the Office of Transition Initiatives of the United States Agency for International Development) often play this role.
- International NGOs may provide expertise and resources or run programs related to the constitution-making process.
- Sometimes, essentially domestic organizations from one country take an interest in another

country's constitution-making affairs. They do not tend to interact with other international organizations, and may be secretive. For example, it is clear that churches from the United States were funding parts of the “No” side in the Kenyan 2010 constitutional campaign (primarily because of the abortion issue).

- Individual advisors are often provided and remunerated by a particular international institution or government but generally do not represent them. (For more on management of foreign advisors, see part 2.3.6, and for more on roles played by constitutional experts—a specialist category of foreign advisor—see part 3.4.9.)

The interests and roles of the international community

Historically, countries have made their own constitutions. For many years law was considered to be largely irrelevant to development, and the United Nations, donor agencies, and other international actors were concerned with the latter. Now any developing country that wants to make or review a constitution is likely to find itself drowning in a positive alphabet soup of United Nations and aid agencies as well as international NGOs that wish to engage in the process. There can often be pressure on constitution-making processes to accept support from the international community (e.g., limited domestic funding for constitution-making processes in postconflict countries makes donor funds attractive—issues discussed further under the next subheading—as does limited availability of expertise in respect of offers of foreign advisors, as discussed in part 2.3.6). But acceptance of foreign funds and advisors often comes together with pressures to meet particular interests on the part of the international community offering the assistance or cumbersome financial management requirements.

Where the international actors are offering support to the process, they may do so for a variety of reasons. Their interests may include promoting rights, democracy, or international standards, preventing terrorism, improving regional or national security, preserving or expanding business or natural resource interests, or ensuring that the new system of government is similar to that of their own countries. At times these interests will coincide with those of the constitution-makers and at other times they will conflict with them. For example, the international community might attempt to keep references to Sharia law out of a constitution in an Islamic country because it believes that such law clashes with human rights.

The international community has exerted substantial pressure in favor of particular outcomes in many processes—most notably in Bosnia-Herzegovina and Iraq. The United Nations has also played a key role, often in partnership with other major actors, in countries such as Afghanistan, Cambodia, Namibia, and Timor-Leste. In other contexts (such as Peru and Sudan), regional associations have taken the lead in negotiating peace and also in shaping the constitutional process. The United States in Afghanistan and Iraq significantly shaped the processes and influenced the contents of the constitutions.

Some international actors may emphasize empowering constitution-makers to design and

implement their own processes, but others become involved in constitution-making primarily to advance their own interests. Their interests can be advanced through involvement in the initial negotiation about the design of the process, the provision of experts or technical assistance and resources, the use of incentives, the application of political pressure, lobbying, controlling the flow of resources to the process, or even threatening to use or using military intervention or action. It is also worth remembering that even such international actors as United Nations agencies and international NGOs can seek involvement in a constitution-making process more out of self-interest than out of a true desire to assist the process. International NGOs and United Nations agencies have to justify their existence; they constantly have to develop projects to raise funds, and if they see the opportunity of getting project funding because of their involvement in a “significant” constitution-making process, they will rarely decide that they are either not needed or not the most relevant body to help the process.

The international community also plays other important roles in constitution-making processes, as in various cases of mediation to end a conflict through constitutional means rather than arms. At times the international community may even create the conditions for the process to proceed, as in Somalia where the United Nations enabled the constitution-makers to be based in Djibouti so they could do their work in a secure environment.

Some constitution-making processes, especially those connected to peace processes intended to end significant conflicts, can attract heavy involvement from regional bodies, United Nations agencies, international NGOs, and embassies, some offering support to the constitution-making process, some to the peace process, some providing humanitarian or development assistance, and almost all monitoring the situation. All will need national staff of one kind or another, and will usually pay higher salaries or fees than local institutions, such as constitution-making bodies. As a result, they often lure the best-qualified national actors into working for them—sometimes taking them from the constitution-making bodies, thereby undermining local capacity (and sometimes making it more necessary for constitution-making bodies to rely on foreign advisors). Such problems are not readily resolved, though they have sometimes been helped a little where donors have been persuaded to supplement salaries of national staff, to make their conditions of employment more attractive.

Donor funding to the process

The significance of the extent of donor funding in support of constitution-making processes varies greatly, from situations where a single donor provides small amounts of funding targeted to support a particular activity to others where one or more donors together fund virtually all aspects of the process. Funding the entire process tends to occur mostly in situations where international community actors are not so much donors to the process as they are leaders of a political transition process in one way or another (e.g., in Cambodia [1993], Bosnia-Herzegovina [1995], Timor-Leste [2002], Afghanistan [2004], Iraq [2005], and Somalia [ongoing process]).

There are other situations in which limited availability of domestic funds results in heavy

reliance on donors even in processes initiated and run by domestic actors. Even where the donors are not pursuing their own political or strategic interests, such funding is usually subject to conditions about use of democratic and transparent mechanisms, financial management and reporting procedures, regular meetings with the embassy, and perhaps the dominating presence of foreign advisors supplied by the donor country. Results of such arrangements can include widespread suspicion in the host country of foreign interference. Even in the more common situations where donor funds merely supplement significant levels of domestic funding for the process, such perceptions can arise. A perception of foreign interference can undermine any sense of national ownership, and damage the legitimacy of the process and perhaps of the constitution it produces.

Such dangers might be reduced by constitution-makers releasing regular media statements about the roles of donors, and the extent of conditions of engagement and reporting requirements, emphasizing both that these are normal aspects of donor funding arrangements and that the donors play no role in determining the agenda of constitutional issues or the options for contents of the constitution that are being considered.

There are also quite different situations where donor funds may be needed for a process to operate but where donors may be reluctant to become involved, because of poor records of effective and accountable spending by a government, or because prospects for peace and security seem poor. In such circumstances, entering into a constitution-making process may be seen as a sign of new beginnings, which may provide opportunities for those involved in the development of the process to work closely with prospective donors to encourage an interest in and understanding of the new possibilities.

Other problems can be experienced in processes either where there is a need to rely on numerous donor inputs, or where the international community interest in the process is so great that there are pressures from many sources to accept technical and other forms of support (or both, as has been the case in Nepal [ongoing process]). In such circumstances there may be considerable overlap in what is being offered by different donors, and managing the proposals from and various conditions and reporting requirements demanded by them can be an extremely onerous task for constitution-makers to manage. Constitution-making bodies that are overwhelmed by offers may be tempted to reject all assistance, or to pretend to accept advice or other forms of assistance but then ignore it. It will be more productive to determine what is needed through the strategic planning process, ask for what is needed, carefully assess what is offered, and reject (politely but firmly) what is not helpful. Staff members put in charge of interacting with the international community should have knowledge and experience in working with aid agencies, embassies, and international NGOs.

Sometimes such difficulties are responded to by efforts to bring some coordination into dealings with the donors. Planning meetings are held with key donors. If this occurs first at an early stage, when the process is being created, early versions of a strategic plan and budget for the process can be presented to the donors, and they can be requested to consult among themselves

Box 27. Establishment of a donor group: Afghanistan [2004]

In Afghanistan, the United Nations Assistance Mission to Afghanistan established a donor group. Although the constitution-making exercise was considered an important benchmark in the political transition process, donors were initially reluctant to fund the process because they perceived it as poorly planned. They felt that previous contributions to hold the Emergency Loya Jirga had not been properly accounted for and similar problems would arise in the constitution-making process. Some donors also did not realize the centrality of the constitution-making process to the political transition and what a complex and expensive undertaking it would be. International constitutional experts, with approval from the leaders of the process, met with individual donors to urge their support for the process.

The United Nations Assistance Mission, in partnership with the head of the Afghan secretariat, then called the donors together to discuss how the process advanced the Bonn Agreement, the details of the strategic plan, the budget, and the role the United Nations would play to ensure proper implementation as well as reporting and financial accounting for donor funds. Through these efforts, the process became fully funded. The United States, however, opted to channel its support directly to the Afghan secretariat. It provided a financial advisor to the secretariat who worked with a national counterpart to establish financial systems and to meet reporting requirements.

and with the constitution-makers and agree on the aspects of the process they will fund or otherwise support, thereby reducing overlap and duplication, and establishing a single mechanism for dealing with donors collectively. Such a mechanism can be used on an ongoing basis, for briefing the donors on developments, and even as a forum where financial reporting and other aspects of accountability are handled.

In some processes, memoranda of understanding about the terms of assistance between a donor and a constitution-making body have been developed, defining assistance to be provided by agreed dates and the responsibilities and duties of each party. For example, if an international organization agrees to lend cars to the process, it should be clear who will maintain the vehicles, who will pay for the fuel, when the cars will arrive, and if (and if so when) they will need to be returned. The memorandum ensures that expectations are clear, and is useful for reference when problems or disagreements arise.

Donors should be encouraged to contribute to the entire budget rather than pick and choose which activities to fund. This will discourage donors from funding only what they might regard as the more attractive civic education or public consultation activities and ignoring other essential costs, such as utilities, computers, rent, and the like.

Donors often have a limited understanding of what is involved in a constitution-making process—particularly the complexities, stages, and costs of participatory constitution-making processes, and the ways in which they may contribute to peacebuilding and transition. Donors tend to be more familiar with the goals and modalities of elections, and as a result are often ready to provide substantial support for elections seen as part of a transition or democratic consolidation. In such cases it may be important for leaders of the constitution-making process, as well as local political leaders, and perhaps friends of the country in question in the international community, to spend time with donor country representatives to explain the importance of the process, its role in peacebuilding, and the plan and costs for the process.

2.3.13 Making the rules of procedure and decision-making—when and who?

An existing constitution, a law, or a peace agreement may set the general course of the process. But detailed rules will be needed about procedures for the various bodies. They will cover, in particular, public participation, management (including financial management), and decision-making.

Rules will be needed especially for a constituent assembly; even the regular legislature may need some special rules for making a constitution, different from its regular rules of procedure. Smaller bodies, such as constitutional commissions, may not have such complex sets of rules, but will still need rules on matters such as how it makes decisions, finances, and how many members must be present to make up a quorum for a meeting.

Codes of conduct will also likely be drawn up: these may not be “laws” in the sense that breaking them is a crime, but they set down ideas of “proper” conduct—and members or staff who disobey may be liable to removal or disciplinary action.

People actively involved in a constitution-making process may have little experience of similar activities. Rules need to be clear and detailed to prevent confusion.

Who makes the rules?

If there is resistance to the constitution-making process on the part of government and the existing ruling groups, it may be wise to try to insist that the reviewing bodies can make their own rules (within reasonable limits). But existing rules of financial probity, covering audits, procurement, and so on, may be appropriately applied to the constitution-making bodies—which should not be held to a lower standard than are existing governmental bodies. For a body that is set up under an existing law (such as a committee of inquiry), there will probably be well-established rules of procedure, though they may not fit this sort of task perfectly.

It is common for a constituent assembly to be given power to adopt its own rules. This reflects

the common practice for legislatures; the right to adopt their own rules was a victory for parliaments asserting themselves against monarchies. The dilemma is that a truly democratic constituent assembly (more democratic than the country's legislature perhaps) ought to decide on its rules, but may include many people who have little experience. The constitution-making road map could set out guidelines for the rules, but this does not guarantee that the rules will be simple and clear.

Adopting the rules can be time-consuming. In Bolivia it took five months to decide on the rules of procedure. In Timor-Leste, where the Constituent Assembly had ninety days to adopt a constitution, the first two to three weeks were taken up by the adoption of rules of procedure. The issue that has often delayed rule-adoption processes (including Bolivia's) has been that of the decision-making majority: should adoption of the constitution require a two-thirds, a three-quarters, or even a simple majority? (In some countries, including Nepal, this percentage is prescribed by the existing constitution or legal system.)

If the constituent assembly is to make its own rules, it will probably do so through a committee; it is not realistic for a large body to draft rules. Where political parties are dominant, they will probably insist on dominating the rule-making committee, and also on proportionate representation of parties on that committee. But if possible, the committee should include representatives from various groups in the country, and it should not comprise only lawyers and people with parliamentary experience. This way, all members can have a fair chance to participate.

In many countries it is possible for a body set up by law to be given the power to make rules that have the force of law—called “subordinate” or “subsidiary” legislation in some systems. The steering committee of a constituent assembly or the chair of a constitutional commission might be given such a power. In many countries such rules would have to be reported to the legislature, which might have the power to negate them by a resolution.

When a process is set up by a peace agreement or a roundtable, it is unlikely that the same body will prescribe detailed rules for any of the organs of the process. But if a legislature designs the process, it may also design the rules.

If a decision-making body is to make its own rules, clearly these cannot be prepared in advance. Some provisional rules will be necessary to cover the period until the final rules are ready. This also means that members cannot know the rules well in advance. In Afghanistan it has been suggested that late release of rules for the Emergency Loya Jirga that adopted a provisional constitutional arrangement created problems.

Sources for rules

For a small body, rules about meetings can be based on common practices concerning

Box 28. Who makes the rules?

In Bolivia, India, and Timor-Leste, the constituent assembly made its own rules of procedure.

In Kenya the rules for the national constitutional conference were prepared, as required by the Constitution of Kenya Review Act, by the commission that prepared the draft constitution and provided the constituent assembly's secretariat.

In the revived Kenya process, the committee of experts made its own rules, except that the quorum was prescribed by law, as was the obligation to work for consensus, and failing that, to decide by a two-thirds majority.

meetings—the role of the chair, how to indicate a wish to speak, time limits, quorums, voting procedures, and so on.

Rules about finance can be usually based on those used for other public bodies, such as audit and procurement rules, even if these are not directly applicable.

Many constitution-making bodies will need rules and procedures that address processes not commonly addressed by public bodies, such as civic education.

In a large body such as a constituent assembly, members who are used to parliamentary procedure will often assume that the rules should be based on the rules of parliament. (This is how Bangladesh managed to adopt its rules in two days.) But there are good reasons why this may not be appropriate; a constituent assembly is different from an ordinary legislature in many ways, as set out in part 3.1.2. A constitution-making body typically must build consensus and the parliamentary rules may not be well suited for this task.

What are rules for?

The functions of rules about finance and about procedures for civic education and the like are perhaps fairly obvious. But it may be helpful to reflect briefly on the functions of rules that concern discussion and decision-making. It is suggested that their functions include ensuring that:

- consensus is built where appropriate;
- decisions are made—and are made neither too hastily nor in too protracted a manner;
- it is clear what has been decided, and why;
- decisions are made on the basis of the best available input in terms of factual analysis and reasoning;
- irrelevant matters are not taken into account;
- all members are able to participate;

- each group within the assembly or the country is able to participate (this may be a particularly delicate issue when a country is made up of different elements coming together—as was the case in India, where the constitutional advisor looked at the procedures that had been used in the Australia, Canada and the United States to ensure participation of their provinces or states);
- all members feel that they have had a fair opportunity;
- the dignity of the institution is upheld;
- the dignity of members is protected;
- publicity is achieved when appropriate, and secrecy maintained when appropriate;
- a good record can be and is kept of decisions and processes;
- outside participation is possible when appropriate; and
- irrelevant pressures are excluded.

2.3.14 Dealing with problems in the process

The path of constitution-making rarely runs smoothly. Indeed, only around 50 percent of processes result in the adoption of a new constitution.

We can look at these problems from several perspectives: Why? How? And (perhaps) when? We should also recognize that not every “failure” means that the process has been a waste of time, and that there may even be situations in which “failure” is not the right word at all for a process that does not end in a new constitution. For example, it may be possible to reach a settlement of the issues dividing a country by nonconstitutional means.

Why processes come to a halt

Processes come to a halt for a variety of reasons:

- Government officials or others in powerful positions are simply opposed to a new constitution.
- It has proved impossible to reach agreement on contentious issues between parties.
- It proves impossible to produce a document that the people will accept.
- Those involved have such a personal stake in extending the process that they are able to drag it out until there is a new government, or the money runs out.
- War or an insurgency commences or resumes.
- It is decided that other approaches—such as a gradual process of lawmaking or amendment—can achieve the objectives.

The last is more likely to be a consequence of “failure” rather than a cause—it will probably result from one of the other “whys” on this list.

How processes come to a halt

Here we are concerned with the mechanisms or processes by which the constitution-making

process grinds, or shudders, to a halt.

- A document is rejected in a referendum (a process that may be genuine popular reaction or the result of political, personal, or ethnic manipulation).
- The money runs out.
- Politicians refuse to play a constructive part in the process.
- Other things (such as a constitutional assembly needing to act in its other role as legislature, political wrangling, wars, or natural calamities) delay matters so that patience is exhausted, deadlines are missed, money runs out, and so forth.
- Those with the power to do so call a halt to the process by, for example, disbanding a commission.
- An interim constitution is amended to become a permanent or long-lasting document.
- An election removes from power those with an interest in continuing the process.
- A coup has the same result.
- The courts are used to declare that a process is inadequate or a draft constitution does not meet certain standards or requirements.

When processes come to a halt

This may happen at almost any stage (and the stages vary from process to process).

- In Pakistan the constituent assembly met only a few times and adopted a resolution setting forth its objectives (1949), but did little else because of political instability, and was ultimately dismissed by the head of state (1954).
- In Israel the constituent assembly turned itself into the parliament (Knesset) and put the constitution-making on hold because of the invasion by the Arab states immediately after the declaration of the state of Israel. It later proceeded to make a constitutional structure by passing different pieces of legislation over the years.
- In Nepal in 1951 a constituent assembly was never set up; the interim constitution was amended so that it provided for all that was necessary to run the country, and it lasted for eight years—because the king lost his commitment to a process of constitution-making that involved the people.
- In Kenya, a court, in a decision rendered immediately after the national constitutional conference had adopted a draft, which was supposed to go to parliament for enactment or rejection as a whole, held that the process used to adopt the draft constitution was invalid, and that there must at least be a referendum. This gave the government the chance to take over and amend the draft—but it was unable to win the subsequent referendum [2005].
- In several countries (e.g., Zimbabwe [2000]) a constitution has been completed and then rejected in a referendum.
- In Nigeria in 1966 a conference of “leaders of thought,” set up to discuss a new constitution,

was aborted within months because of the threatened, and ultimately real, attempt of part of the country to secede, and the consequent three-year civil war.

- In Eritrea [1997], the constitution was completed, but it required the signature of the president to come into effect (which is true in many cases). The president failed to sign it for some time.

So sometimes processes have been aborted when little progress has been made, while in other cases progress was halted when there was already a draft, or even a complete constitution ready to be put into operation. Sometimes it is not possible to avoid the abortion of the process; the cross-references indicated above will lead the reader to discussions of preventive or remedial measures. And in part 2.1.10 we discuss briefly issues concerning restarting such stalled or aborted processes.

It is beyond the scope of this handbook to discuss one of the most common types of failure of constitution-making processes—that is, the failure to bring the constitution fully into effect. This may be an almost wholesale failure to do anything that the government finds inconvenient, as was the situation in Eritrea even after the president belatedly signed the constitution into law. (This was attributed by some to a failure to include a date for its becoming operative, but others believe this would have made no difference.)

More often, the problem arises from the failure to pass laws that in theory the constitution requires. In Papua New Guinea, although the constitution, passed in 1975, requires the passing of an “organic law on the integrity of political parties,” no such law was passed until 2001.

Most implementation failures result from corruption or incompetence on the part of courts and parliaments, a lack of resources, or the failure of the people to make active use of the implementation provisions that do exist. No constitution is self-executing; each one requires the people to use their votes wisely, to go to court, to complain or to petition, and to refuse to participate in the subversion of the constitution.

Finally, we should note another type of failure: one in which a constitution is adopted and comes into force and then is overtaken by a coup or a civil war or some similar cataclysmic event. These events likely lead to the constitution being consigned to the dust-heap, whether by being suspended or abrogated or being so totally disregarded that it might as well not exist. Nigeria amended its 1960 independence constitution in 1963. There was a coup in 1966; various attempts were made to produce a new constitution, which were largely thwarted by a civil war and other coups until a new constitution was adopted in 1979; this was overthrown by a coup in 1983; a new constitution was adopted in 1989; this was ended by a coup, and yet another constitution was adopted in 1999. Fiji’s 1997 constitution has had the novel experience of being “couped” three times: in 2000, then restored as the result of a court case in 2001; modified and partly suspended by a supposedly “proconstitution” coup in 2006; and abrogated as a response to a “constitution-restoring” court decision in 2009.

2.4 The agenda of constitutional issues and generating ideas on the issues

2.4.1 Determining the agenda of constitutional issues

Deciding on the issues that might be included in a new or revised constitution is an important task in many constitution-making processes. Determining the agenda is a separate task from deciding what the constitution will say about any given issue on the agenda. The agenda can be created in many ways, and it usually changes in the course of a process.

The importance of the agenda

How the agenda is determined can influence both the way a process develops and the shape of the final constitution:

- When the agenda is controlled by a group in power, and is used as part of an effort to control the contents of the constitution, the agenda itself can be divisive.
- In some processes where the agenda has been decided consultatively, this has contributed to building consensus on the way forward for a previously divided country.
- Decisions on the agenda can influence other aspects of the process, including:
 - decisions on subjects to be included in public awareness and public consultation efforts;
 - the subjects to be considered by committees of a constituent assembly;
 - the structure of debate in the main constitution-making bodies; and
 - the contents of the final constitution.

What are constitutional issues?

The factors that shape the agenda of issues regarded as constitutional in any particular process can be divided into external and internal ones. External factors include:

- historical and cultural traditions (views on constitutions and institutions created by them can depend on whether a country's colonial links were to France, Spain, Portugal, or the United Kingdom);
- the constitution's role in defining the state so as to ensure international recognition;
- treaties and conventions on human rights and their protection; and
- donor pressure for good governance and accountability, which can make independent institutions to combat corruption into constitutional issues.

Internal factors include:

- ideas about the ideal length of a constitution—it can be no more than a short statement of

principles in some countries, while others accept long and detailed constitutions;

- history of the operation of constitutions in a country; and
- the local issues that contribute to the origins of a constitution-making process, especially in a situation of peacebuilding or a transition from authoritarian rule.

There is no legal limit to the issues that can be addressed in a constitution. As a result, the agenda that could be debated as part of a constitution-making process is potentially unlimited. The main restrictions are practical. An open-ended agenda could contribute to pressures for a long and detailed constitution, covering many general matters that might better be handled later by laws and policies. Such a constitution can be difficult to implement, and can raise unrealistic expectations about the extent of the issues that can be dealt with by a constitution.

Public awareness programs can help people better understand the nature of constitutional issues and have realistic expectations about what a constitution can do.

Deciding the agenda in advance of the constitution-making process

There are several ways in which important aspects of the agenda can be decided in advance of the constitution-making process:

- **Interim constitutions:** Interim constitutions can influence the agenda in at least two main ways. First, in a postconflict or transitional situation (e.g., South Africa [1996], Nepal [ongoing process]), an interim constitution usually provides a new and more inclusive or just system of government intended to operate until a final constitution is adopted. This can provide a new set of possibilities that may heavily influence the agenda. Second, an interim constitution can define principles and features to be included in the final constitution (as in South Africa). In that way it can determine much of the agenda in advance.
- **Peace agreements:** Peace agreements can often play a similar role to that of interim constitutions in setting agendas of constitutional issues in advance of the process.
- **Negotiations in advance of a process:** Governments reluctantly engaging in constitution-making processes are sometimes forced into public consultation with those demanding change. In addition to addressing the design of the process, such talks often result in identifying and clarifying the issues that will need to be addressed during the process. In Kenya, years of pressure for reform resulted in several conferences in 1998 among the government, the opposition, and civil society.
- **Other documents establishing a process:** The law or other legal documents establishing a process often define some of the issues. For example, the 1972 terms of reference set by the colonial legislature for Papua New Guinea's Constitutional Planning Committee, the 1988 statute establishing the Uganda Constitutional Commission, and the 2000 statute establishing the Constitution of Kenya Review Commission all identified key constitutional issues to be considered in the processes.
- **Authoritarian regimes:** Authoritarian regimes sometimes attempt to control processes by

restricting the issues that can be considered. In preparing for some francophone African national conferences in the 1990s, rulers of one-party systems tried to restrict consideration of options for more democratic systems. In multiethnic Nigeria in the 1970s, the military dictator, General Gowon, tried to limit political damage from the constitution-making process by eliminating major divisive issues from the agenda. He directed a constitutional committee to consider all territorial power-sharing possibilities other than unitary or confederal arrangements.

- **Political party “victorious” after conflict:** In a few postconflict constitution-making processes, a victorious political party that dominates a deliberative body such as a constituent assembly can regard itself as authorized to determine the agenda. This occurred in Timor-Leste [2002], when the Fretilin party used its numbers to set the agenda for the elected constituent assembly by centering almost all debate on a draft constitution it had prepared previously, based on the constitution of Mozambique (another former Portuguese colony).

Setting the agenda in advance in these various ways can mean that it is decided by a narrow range of interests. The majority of groups and the mass of the people can be excluded. There are situations where this may be necessary (for example, in the transition from apartheid in South Africa). In other situations, determining the agenda in advance can be an antidemocratic aspect of a process, with long-term effects. For example, the sense of exclusion resulting from party domination of the constitutional agenda in Timor-Leste probably contributed to subsequent violent conflict in that country.

Setting the agenda in the course of the process

It is more common for the agenda to emerge during the constitution-making process. This can happen in many ways.

- **Early decisions made by the main constitution-making body:** When a body such as a constitutional commission or parliamentary committee is set up to consult with the people about a new constitution, often one of its first steps is to decide on the main constitutional issues. In Eritrea, for example, the constitutional commission identified what it regarded as the key issues early in the process, and then developed its material for public consultation with the people about those issues.
- **Consulting the people on the agenda—a special stage in the process:** In a few constitution-making processes, there has been a consultative stage of the process aimed at deciding the issues that should be considered. In some cases this has been specially planned. For example, one of the first things the Uganda Constitutional Commission did after it was established in 1989 was to hold a series of thirty-four district seminars of two days each, which were attended by more than twelve hundred people. The twenty-nine major issues identified by the commission during this process became the central agenda of issues for the commission in all its subsequent work. In Kenya, after considerable controversy about the constitution-making process through much of the 1990s, consultative national conferences involving many stakeholders held in 1998 achieved a consensus on both procedure and the agenda (though a

further three years passed before an agreed-upon process could proceed in 2001).

- **A special body:** National conferences held in French-speaking African countries have in several cases defined aspects of the agenda of constitutional issues that have then been dealt with through decisions made by other bodies. (See part 3.1.3.)

The agenda often changes during the process. There can be many reasons for this. For example, public debate on the initial agenda of constitutional issues may result in new issues being identified. In other cases, what were initially treated as many separate issues might be consolidated into a smaller number of related issues. There are also cases in which public consultation and public debate on issues in the early stages of the process make it clear that there is a consensus on how to handle most issues, leaving just a few issues that remain divisive or contentious.

Focusing on the divisive issues

In most constitution-making processes, there will be a few key issues that are the ones most likely to divide people. When the process is expected to contribute to conflict resolution and to build consensus on future directions in a divided country, great care may be needed in identifying and addressing such issues. In several constitution-making processes there has been a special focus on identifying such issues, and special procedures for making decisions about them.

For example, in Uganda [1995], more than three years of public awareness programs and public debates on the many constitutional issues had, by 1992, contributed to emergence of consensus on most issues. About ten specific issues had emerged as still divisive. They were given special attention through a process intended to resolve divisive issues. (See part 2.5.2.)

2.4.2 Generating ideas on the constitutional issues

A constitutional review may cover a limited range of issues (perhaps designed, for example, to address the previous exclusion of certain sections of the community). But if a full constitutional review is established, and especially if there is extensive public participation, it is likely that many other issues may be raised. Some people will have clear ideas of what they want in the constitution; others will have a sense of dissatisfaction, but no clear idea of what might meet their needs.

Analyzing the defects in the existing constitution

At some point it is wise—indeed, essential—to identify what is wrong with the existing constitution; a constitution-maker should no more try to fix a constitution without understanding what is wrong than a doctor should try to cure a patient without diagnosing the illness. Even if the agenda of issues is short, identifying the problem is important.

Political discourse may be presented in terms of the constitutional problems, but may be on a superficial level or be based on a misunderstanding of the constitution. Political imperatives may prevent any detailed diagnosis before a constitutional review is set up, but the design of the process should build in opportunities for such diagnoses, and a procedure for ensuring that these diagnoses are taken into account when designing the new document.

Dissatisfaction with the existing constitution may flow from various sources, internal or external. In some countries there is a positive commitment to an existing constitutional document, and people may oppose changing it, though not necessarily on rational grounds.

Not all perceptions are grounded in reality (though sometimes it is the perception that matters). Examples of misdiagnosis have included indigenous Fijians' complaint that the 1997 Fiji constitution did not protect their land rights. In Nepal people have blamed the 1990 constitution for many ills, even though many were the result of abuse of power by kings, acquiescence by political parties, corruption, and incompetence.

What may be wrong with the previous constitution?

Occasionally, the existing constitution is fundamentally unacceptable because of its origin or its content—especially if it enshrines the dominance of a now-defeated group, such as the apartheid constitution in South Africa, replaced by the interim constitution of 1993.

Less all-embracing issues may concern the concentration of power, for example, in the hands of an executive president (what has often been described in Kenya as the “imperial presidency”) or in the hands of the national government in the capital city (as in Nepal), or in the hands of a particular class or ethnic group (again as in Nepal).

A second type of complaint is that although concentration of power was not built in to the constitution, that document permitted the usurpation of power by autocrats. The Weimar constitution in Germany in the 1920s and 1930s was seen as having permitted the rise of Hitler and the Nazis.

People may complain that the constitution fails to control corruption, or offers too many opportunities for corruption. This perhaps underlay the assumptions in Nigeria in the 1960s that constitutional reform was needed—certainly corruption, and also election rigging, were identified as major issues even then. (That Nigeria remains one of the world's most corrupt countries despite repeated constitutional surgery should act as a warning against excessive readiness to blame the constitution.)

Sometimes the complaint is that government is too weak—that what is needed is a strong government. Unfortunately there are plenty of examples of so-called strong governments that are ineffective—and all too many of governments that are too strong. This may be a good diagnosis, but untrammelled power is unlikely to be the cure.

Other complaints may surface once the issue of reform has been aired. Former colonies may feel that their constitution was essentially an imposition by the departing colonial power. Somalis complained that their constitution of 1960 was too Italian or too British in inspiration. In Nepal the 1990 constitution is often criticized because it was not prepared in a way that involved the people. President Johnson Sirleaf of Liberia has called for amendment of the constitution, suggesting that changes introduced in 1986 may have been drafted in something of a hurry in order to be able to return to civilian rule.

It is not the function of this handbook to discuss how any of these problems might be constitutionally cured, or even how they might be accurately diagnosed. The point here is simply to offer a warning about the need for carrying out this operation, and for not taking a superficial approach to diagnosis.

Some cautions

Politics is often not at all logical. Blaming the constitution for the faults of a regime or a group may be easier than pinpointing the real problems, which may be divisive. It may also be that what was wrong with the last constitution cannot be fixed by putting into the new constitution what was missing in the old one; the deficits of the old constitution may have produced a new situation in which simply doing this time what ought to have been done last time is not enough. For example, if the problem was exclusion of a certain group (whether by constitutional provision or by poor implementation), it may not be enough now simply to ensure that the group is included. The group may insist that affirmative action is now needed to bring that group forward from its position behind society as a whole.

Sources of ideas

Historically, sources of constitutional ideas have been limited. The drafters of the United States constitution had at their disposal their knowledge of governance and theory in classical Greece and Rome, their experience under the British monarchy and its institutions developed over many years, and the constitutions of the thirteen original states, as well as a flowering of political writing in the late eighteenth century. They knew what they did not want—a monarchy. But many of the institutions they created had clear origins in the British system.

Modern constitution-makers are in a different situation. Few of them read theorists. One might say that most of the active constitution-makers of the present day have a great deal of information at their fingertips, but not much knowledge. But there is a great deal of literature about how constitutions have worked, and much of the older literature would be still valuable if only people would read it.

Where do or might those in need of constitutional ideas look?

- **International law**

Apart from its appreciation of human rights, international law has little to offer the constitution-maker. But human rights should inform the whole of the constitution. The International Covenant on Civil and Political Rights does commit parties (almost all states) to ensure that every citizen has “the right and the opportunity without distinctions [on the grounds of sex, race, etc.] . . . and without unreasonable restrictions . . . to take part in the conduct of public affairs, directly or through freely chosen representatives [and] to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot” (article 25). But this does not prescribe which system of democratic government, or which electoral system, and hardly touches most aspects of a constitution.

The wide range of treaties on the rights of various sections of the community (women, children, people with disabilities, minorities, indigenous peoples) do not necessarily commit signatory parties to constitutional provisions—states agree to take the measures needed, including laws but also including policies and practices of government. And the provisions of treaties are not necessarily suitable for adoption, as are those in a constitution or a law. But they may provide valuable ideas, and those ideas are not necessarily restricted to the context of the particular treaty. For example, the United Nations Declaration on the Rights of Indigenous Peoples makes use of the concept of “prior informed consent” (not found in other human rights treaties but found in environmental treaties). It is a notion, however, that might be more widely applicable.

Specific groups within society often become knowledgeable about “their” treaty. But they may not understand a constitution so well as they understand the treaty. Nor do international NGOs or United Nations bodies necessarily have a good understanding of constitutions. So the inspiration that may be gained from international law will need to be tempered by some constitutional knowledge.

- **Foreign experience**

Especially since the main period of decolonization, collections of constitutions have become common. And the Internet has made most of the current constitutions of the world, and many of the past, available, especially in English. It is easy to develop a collection of provisions on almost any constitutional topic, and international trade in constitutional ideas is brisk.

A few words of caution are desirable. Legal cutting and pasting in any field is fraught with risks. And legal transplants tend to work differently in different political, cultural, and economic contexts because of differing traditions, expectations, and resources. The wealth of material has made finding provisions almost too easy. In the days when constitution-makers asked themselves “What do we want to have happen, and how do we phrase the constitution to try to make sure that it does?” the outcome may have been more successful than when there is a tendency to say “Country X has this provision; it looks as though it might solve our problem—let’s use it,” even though there may be little understanding about the problem in country X that the provision was intended to address, or about how the constitution is used in

country X, and what has been the effect of the provision in country X. Unfortunately, it is far harder to get access to information about the politics and the law of other countries than it is to get copies of their constitutions.

- **Radical change or what is familiar?**

Sometimes constitution-makers are tempted to stick to what they know, for fear that something new may be unpredictable. There is some logic to this, but if there is a serious need to change a political culture, perhaps something significantly different will be necessary. Again, a change in one aspect of the constitution may have an impact on another aspect—and some provision that is apparently the same as it has always been will then work differently. Changing an electoral system may have a marked effect on parties, and consequently on the legislature and even on government.

On the other hand, deliberately choosing to do something radical may have unpredictable consequences. In 1979 Nigeria decided not to reintroduce a parliamentary system but to introduce the United States system. It has certainly not reproduced the United States in West Africa. What was seen as checks and balances between the head of government and the legislature led one state, when the constitution was young, into a complete deadlock as the legislature refused to approve any member of the state governor's cabinet, and concentrated only on finding reasons to impeach him (as it did).

- **Our customs**

Postcolonial resentment has sometimes led to a search for something indigenous by way of a constitution. Identifying what is genuinely “ours” and will also work in an essentially modern constitutional framework is no simple task. Second chambers with roles for traditional leaders and customary courts are perhaps the most common devices. These may work well, and some have been in existence for many years. Agreeing to include such features in a constitution may not be easy in a truly participatory process. Women may not be happy with male-dominated institutions, and “commoners” may resist the entrenchment of chiefly privilege.

Much of the rhetoric is self-interested. Nnamdi Azikiwe, first Nigeria's governor-general and then its president, argued that it was contrary to African tradition and understanding to have a leader without power, a “bird in a gilded cage,” though he himself came from a community that was acephalous (except to the extent that the colonizers found it expedient to invent chiefs).

This is not to say that inspiration can never be usefully sought from tradition. But the reconciliation between constitution and tradition is rarely easy. One might argue, for example, that a parliamentary system is more akin to some traditional cultures of government because of its reduced stress on one leader and its more collective nature. But coupled with a majoritarian electoral system, it is likely to produce a confrontational, two-party system, which is far from conciliatory.

2.5 Debating and deciding the issues

2.5.1 Procedures and rules for debating and deciding

Rules will be needed especially for a constituent assembly; even the regular legislature may need some special rules for making a constitution, different from its regular rules of procedure. Smaller bodies, such as constitutional commissions, may not have such complex sets of rules, but will still need rules on matters such as how it makes decisions, finances, or how many members must be present to make up a quorum for a meeting.

This section focuses particularly on constituent assemblies, and to some extent on commissions, though the issues are relevant to all bodies that engage in constitution-making tasks.

Major issues

Quorum

A quorum is the number of people who must be present before discussion or a vote can take place. The idea is to prevent minorities from making decisions. Many legislatures have small quorums. Less than 50 percent would seem undesirable for a constituent assembly, which is supposed to be a true mirror of the nation. Uganda had the 50 percent quorum rule, but this proved difficult to achieve, especially as some members were ministers. In Nepal the interim constitution says that for most purposes there must be at least 25 percent of the constituent assembly members present. This is quite low; discussion could begin when only women were present, or only men, or only members of one or two castes or ethnic groups.

At least for a vote, a higher quorum should be required. If there is to be a vote that requires a special majority (two-thirds of the membership is common), then at least that number must be present. But it does mean that debate can have taken place with far fewer members present.

The quorum rule can be a source of delaying tactics. The body should clearly be well attended, but members should not be able to exploit the rule to adjourn debate in order to delay decisions. The chair ought to be able to adjourn the meeting, however, if the numbers present clearly make debate pointless.

The rules for committees could be different. They could also make it possible for the chair or convenor of a committee to decline to allow discussion to begin if, for good reason, no representatives of a particular group were present. But no group should be allowed to hold the committee for ransom by failing to turn up.

The quorum rule alone cannot be relied upon to ensure attendance. Other factors include where the body meets (are there too many distractions?), whether for other reasons the process is

allowed to drag on for too long, and the effectiveness of the chair. There is also the vexed question of attendance allowances. They are not unusual, but must be properly policed or members will simply sign and go away. Publicity attached to attendance may help in some societies.

Speaking rules

Rules must recognize the freedom of speech—of all people. In some parliaments a person must “catch the speaker’s eye”—which may work against the less experienced members, and perhaps especially against women. In some assemblies the procedure has been for members to tell the chair in advance that they wish to speak on an article, and the chair will call on them in the order in which they appear on his or her list (e.g., as in Timor-Leste [2002]). Such an arrangement has the disadvantage that successive speakers do not respond to each other but simply deliver their prepared statements on the topic. Another possibility—drawn from the Kenyan National Constitutional Conference—is to provide each member with a large card on which the member’s enrolment number is printed. This is raised to indicate a wish to speak.

It is absolutely essential that there be a way to limit the length of speeches. The length of permitted speeches will probably be influenced by the size of the deliberating body, and by the stage of the process. In Uganda there was a thirty-minute limit during the initial debate—but the body comprised only 214 members. In Kenya there was a ten-minute limit, but there were 629 members. In Bolivia, during the “Vision of the Country” debate at an early stage in the process, each political group had a maximum of three hours. Committees were given two hours to report to the plenary. In debates on major motions, regional groupings had one hour each. At the decision-making stage when votes were to be taken, each member had no more than ten minutes per section to vote. And to make a motion, only two minutes were allowed.

There is a risk that extended time periods might be given only to political parties, rather than to other interest groups. It would be possible to allow other groups—which might include women, people with disabilities, or minority groups that may cross party lines, according to the particular country’s circumstances—to be given extended time.

The rules of the Indian constituent assembly provided that Hindustani (Urdu or Hindi) or English could be used, but, if the president of the constituent assembly took the view that a member could not express himself or herself in one of those languages, that member could address the constituent assembly in his or her native tongue and a summary could be provided for members in English or Hindustani. In Timor-Leste the official languages of the constituent assembly were Portuguese and the local lingua franca, Tetum, but members could express themselves in English or Indonesian (despite hostility from some to the use of Indonesian, viewed as the language of the oppressors). In Bolivia the rules of the constituent assembly provided that plenary and committee sessions would rely on interpreters and translators so that members could express themselves in their native tongues (article 52). Provisions about sign language could also be explicit.

Notice rules

Rules requiring suitable notice of any issue to be discussed help in ensuring that members do know when they should be present in order to make contributions on issues about which they feel strongly. The Bolivian rules usually required twenty-four-hour notice for documents.

Politeness and decorum rules

Also important are rules that ensure that members are addressed and listened to with respect—that other people do not use insulting language, or speak on their mobile phones in the hall, or read the newspaper or gossip with their neighbors. Rules may become rather complex and intimidating on these points, and care should be taken not to be overly formal. There may be other solutions to some problems; the parliament in Nepal has mobile phone–jamming devices.

Decision-making and voting

The majority by which decisions are to be made can be one of the most difficult aspects of the process (and has in some processes been the reason that rule making takes a long time). Different sorts of decisions may require different majorities. Majorities may be defined in various ways, including:

- A majority of those present and voting (sometimes called a “simple majority”); if fifty people are present, and eighteen vote for a motion and twelve vote against it, the motion is carried, even though this was not a majority of all those present.
- A majority of those present (which means that those who are present but abstain from voting are counted as having voted against); where the issue to be voted upon is whether to amend a draft constitution, this rule makes it difficult for the amendment to be accepted, which may be a desirable provision.
- A majority of all the members, whether present or not, and which means a number greater than 50 percent of all members (sometimes called an “absolute majority”); sometimes care is taken to say that “all the members” does not include any vacant seats.
- At least two-thirds of all the members, whether present or not (often used for constitution-making decisions).
- At least 75 percent of all the members, whether present or not (sometimes used to amend constitutional clauses regarded as being of particularly great significance).

Note that these rules assume the normal pattern in formal decision-making bodies: that all decisions are “binary”—a member votes either “for” or “against.” Even if there are several solutions to a question, the decision-making will be structured so that each one is voted on separately.

It is desirable for all these rules to be spelled out clearly.

A note on the “simple majority” question: on the one hand, the interpretation that it requires

Box 29. What is a simple majority? A debate in the Timor-Leste constituent assembly [2002]

The question was: did this mean just the largest number of those voting—or a majority of those present? The latter would mean that a person who was present but abstained was in effect voting against the motion. Members of the assembly were divided. A foreign expert favored the latter interpretation (Kathlene 1994: 565).

more than half of those present does mean that a motion requires substantial support. But the rule drafters could, and should if this is what they meant, have been specific and said “a majority of those present.” The normal meaning of “simple majority” in English is “a majority of those present and voting.” “Absolute majority” would most likely have meant “a majority of those present”—as a member of the Timor-Leste constituent assembly pointed out. To allow silence to be a vote against does make it easy to abstain. When the issue is whether to amend a draft, it favors the draft.

Clear rules should specify a majority of what: “a majority of those present and voting,” “a majority of those present,” or even “a majority of all members,” making the use of the term “a simple majority” unnecessary—and indeed, it is best avoided. Rules often require that those abstaining must also indicate that they are doing so, and that the numbers abstaining be recorded. Such a rule may act as a disincentive to members abstaining, something that is often a form of abdication of responsibility.

Administrative decisions may often appropriately be made by a simple majority (“a majority of those present and voting”)—but care must be taken if these decisions might disadvantage particular groups. In many constitution-making processes the required majority is set at two-thirds of the entire body. The purpose of such a rule is to give groups within the assembly the incentive to persuade others to support them. It prevents a small minority standing in the way of a new constitution—which may be a consequence of a rule requiring a higher majority.

To require total agreement in every human endeavor is unrealistic. But a number of processes have set “consensus” as the objective—as in the South African process [1996], and also in Kenya [2005] and in Nepal [ongoing process]. “Consensus” presumably means something other than unanimity. Many people claim that seeking consensus was the traditional way of doing things in their culture. As the chair of the Uganda Constitutional Commission and (subsequently) chief justice of Uganda, Benjamin Odoki, notes, an Africa consensus involves “settling disputes by listening to everyone and taking into account all views. It is a painstaking exercise, which is most rewarding in the end because it produces no losers since all are winners, and promotes legitimacy and acceptable decisions” (Odoki 2005). In modern politics, however, consensus is often hard to achieve—even in Africa. In South Africa, the concept of “sufficient consensus”

Box 30. Challenges to participation of women in decision-making bodies

Cultural practices and social expectations often make it hard for women to participate fully in public bodies. One writer (Aili Mari Tripp) says, “Even in parliamentary bodies, women have difficulty being taken seriously, being listened to, and are frequently subjected to humiliating stereotypes and derogatory remarks” (Tripp 2011: 153). In Timor-Leste [2002] a female constituent assembly member raised the issue of domestic violence and was laughed at by many male members. There is also evidence of sexual harassment of women parliamentarians in some countries, including in South Africa (Geisler 2000: 618) and Uganda (Tripp 2001: 153, citing Tamale 1999), and even in Sweden (The Local 2007).

Research shows that male interruption of women speaking is more likely than any other type of harassment. In legislative committees in the United States, “women entered the discussion later, spoke less, took fewer turns, and made fewer interruptions than men” (Kathlene 1994: 565). In developing-country legislatures, parties are often weak, with patronage rather than rules being the governing principle—which makes it hard to fight for fair party procedures for women. These difficulties, which may affect other groups that have been marginalized from public life, should be borne in mind by those who draft rules.

was developed; this meant that if the major parties, representing all the ethnic groups, agreed, the process could move on (but this did exclude some groups). In Nepal, consensus was defined as no vote against a provision in the constitution (regardless of how many abstained). Then there was to be a process to try to achieve agreement (through party leaders), and finally, if this proved impossible, a two-thirds majority of all the members would suffice. Consensus may be easier to achieve in small bodies, such as a commission.

A mechanism to handle deadlocks is almost bound to be required at some point, whether there is formal provision for it in the rules or not. (See part 2.5.2.) At different stages of a process, voting may work in different ways. If a document is being adopted for the first time, it is probable that a particular vote in favor will be required. At some stage, however, a draft already prepared by a particular process may then be presented to another body. There are basically two ways for that draft to be considered: either it is to be presumed to be the final constitution unless it is changed, or it is to be viewed as a proposal only. In Uganda the draft prepared by the constitution commission could be changed in the constituent assembly, but only if a motion to change it was moved and it passed by a two-third majority. But in Kenya [2005], the adoption of any clause of the new constitution required a two-thirds majority of the constituent assembly. In Kenya [2010], proposals to a draft constitution could be made by the parliament only by a two-thirds majority of all the members. Although there were at least that number present in the parliament, every time a vote was called members melted away—so that not a single one of

150 proposed amendments was passed, and only one was voted on.

Some constituent assemblies have made provision for secret ballots. This was possible in the Constitutional Loya Jirga in Afghanistan [2004]. In that instance there was a genuine risk of intimidation by warlords. In Nepal some members expressed concern that they might be subject to pressure, and some civil society activists were worried that members from various ethnic or caste groups and women would not have freedom to represent those groups, but would be essentially “vote banks” for their parties and their concerns. Secret voting would give members a way out of this dilemma.

Generally there are strong arguments against secret ballots, which are essentially antidemocratic: the electorate should know how the people for whom they voted carry out their responsibilities. There is also a risk in some countries of bribery; this certainly took place in the Kenyan National Constitutional Conference [2005]. A secret ballot may encourage bribery—because no one would know how individuals voted and would therefore not know whether they have been influenced by factors such as bribery. Some members might be tempted not to think hard about how they should vote, because they would not be answerable for it. Finally, most decision-making will probably take place in committees where secret voting is less feasible—either because voting will be a more open affair, or because smaller numbers will make it harder to conceal how members vote. It is unrealistic to expect political parties to agree to secret voting if they are determined to exercise control.

There are various ways of indicating a vote: a voice vote (where all those in favor simultaneously say “Yes” and then those against say “No,” and the chair judges by the volume who prevails), a show of hands, passing through division lobbies (“Yes” voters through one room and “No” voters through the other, or the equivalent of walking to the front of the hall to place a vote in an urn or box), electronic voting by pressing a button at each member’s seat, and a roll-call vote, in which the name of each person is called out and the voter must indicate his or her response out loud.

The voice vote is partially anonymous: the person sitting next to a member may know how his or her neighbour voted, but the person presiding and the public may not. This procedure was used when the Kenyan parliament adopted the proposed constitution—to go to referendum—in 2010. Though the “Aye” vote sounded overwhelming, it is not possible for anyone to say exactly who said “Aye”—and this may explain why so many members of parliament felt able to argue against the document in the referendum campaign. The roll call was used in Timor-Leste [2002]—not as a routine, but for a few issues of symbolic significance, for example in connection with the flag. Such a voting system is impractical for large constituent assemblies. This technique was used in the French constituent assembly; according to Jon Elster, “a procedure that enabled members or spectators to identify those who opposed radical measures, and to circulate lists with their names in Paris” (Elster 1993: 180).

In Timor-Leste each member had three cards and voted by holding them up: green, red, and

blue (for, against, and abstain). At one point it was suggested that rather than having each group hold up its cards separately, all should hold them up together and they could be counted by three people simultaneously. This would not work with six hundred people (as in the constituent assemblies of Kenya [2005] or Nepal [ongoing process]).

One issue in constituent assemblies is: How far ought party members to be subject to a requirement to vote according to “party line”—or how extensive ought the party line to be? There are topics on which a party may genuinely have a firm position. But “whips” (a term used in some countries to refer to the party officials who exercise voting discipline) are not readily compatible with consensus—unless they are used to encourage party support for a consensus reached among leaders. Even then, if members have to be “whipped” into support, it hardly seems to indicate a national consensus.

Absence of discipline is likely to produce a more well-informed debate. In some countries it is common for matters of conscience to be a subject for a free vote (but this may produce unreasoned populist voting on certain issues). In Nepal, despite much advance discussion, the rules were silent on this—presumably leaving it to party discretion whether to apply party discipline in any particular context.

Caucuses

Should there be a formal possibility of cross-party alliances or caucuses? Women’s caucuses are common in legislatures around the world. Sometimes they are composed of women members from a single party, and sometimes they are cross-party. In the constitution-making process in Uganda, as Aili Mari Tripp noted, the assembly’s female delegates formed a nonpartisan women’s caucus. It offered workshops on parliamentary procedures, speech-making, and how to build a coalition; it also made sure that the women’s views and concerns were represented in a weekly radio program on the assembly’s debates (Tripp 2001: 150).

In Nepal an attempt to recognize a women’s caucus in the rules was unsuccessful, defeated by the parties’ reluctance to lose control.

Openness

The whole process of a constituent assembly should be characterized by transparency. The public should know what is about to be debated, and by whom. Papers on which discussions are to be based should be publicly available in time to permit interested parties to make submissions and get in contact with observers.

But should the sessions themselves be held in public? The South African process was open: all meetings of the constituent assembly and its bodies were accessible to the public. There are risks in openness. In the French constituent assembly the mob terrorized the delegates. Even in more orderly circumstances the presence of a certain group might overawe the members. And

there is the risk that members will be tempted to play to the gallery rather than concentrate on the business at hand. The South African parliament, when debating the constitution, had some experience of this when committees were televised. The Philadelphia convention making the United States constitution decided to sit in secret partly because of a fear that its members would be reluctant to change their minds if those minds had been revealed in public. The Spanish constituent assembly [1978] had a secrecy rule for the committees. Jon Elster, who has studied several processes, suggests that sitting in public inhibits genuine discussion by privileging stubbornness and grandstanding. On the other hand, he suggests that secrecy encourages more interest-based bargaining than deliberation. His conclusion is that committees should sit in private and the plenary in public (Elster 1995: 386).

Relations with the public and the media

The administration of the constitution-making body should be responsible for ensuring that there is a constant flow of accurate information to the public. (See part 2.3.11 on the media.) In Timor-Leste a short daily bulletin was put out in several languages. Other methods include a newsletter and a website (which would be used by a limited range of groups but would be a resource for the media and for NGOs). The rules may not go into any detail on these issues, but it would be wise to make it clear where responsibility primarily lies—though this should not preclude civil society from monitoring and publicizing the work of the body.

One way to set up a structured relationship between a constitution-making body and the public is to have accredited observers to the body. Such observers would represent organizations or interests that did not otherwise have an adequate voice in the constitution-making body. These could be professions, religious groups, ethnic or linguistic groups, or possibly certain major NGOs. They should not be too many in number—which means that they must represent substantial (in the sense of important) interest groups or issues. Narrowly focused groups' concerns could be met by their having access to relevant thematic committees. Observers could have the right to attend all plenary and committee meetings of the assembly, but not to speak or vote. They could interact with members in an informal way, having the right to eat where the members ate. They could thus have the opportunity to persuade, but not in any way to coerce.

Rules for a commission or similar body

The rules for a constitutional commission or a similar body are likely to be simpler than those for a constituent assembly. However, drawing on some degree of common sense, and also on the rules of previous commissions, the following are, we suggest, the main points that ought to be addressed:

- **Quorum:** it would be normal for a smaller body to have a higher quorum in percentage terms than a constituent assembly. This is to avoid the risk that important issues will be decided on by small numbers, and also because each member of a commission may represent different interests; more than in a large body, the absence of a single person is likely to mean that some

voices cannot be heard.

- **Notification of meetings:** especially when a body meets part-time, it is important that all members are given due notice of meetings.
- **Record keeping:** it may more easily be overlooked in a small body that it is important to keep proper records of discussions, and ensure that they are retained in a secure place.
- **Speaking rules:** it can be just as difficult to be heard in a small group as in a large one.

A small group of people may develop a good relationship, and even become friends. But this may make it harder and not easier to impose discipline on members. Rules are therefore important—even if the atmosphere means they do not have to be relied on frequently. And if the atmosphere sours—as it has in some commissions—rules that make all the members feel they have a fair chance to participate may become important.

2.5.2 Dealing with divisive issues

Contemporary constitutions are complex documents, often the products of participatory processes involving ethnic communities, religious groups, professional associations, women, youth, the disabled, and indigenous peoples, and covering what is often a wide range of policy issues. Consequently there are likely to be many divisive issues that may derail the constitution-making process. These issues may not be easily resolved by the formal procedures for decision-making. Some processes include special procedures to resolve divisive issues. Sometimes measures outside the scheme of the process may be used to resolve these issues. A particular difficulty in resolving differences is the transparent nature of many contemporary processes (a result of the high degree of public participation), which makes it hard to negotiate and compromise. The very dual nature of participatory and transparent processes makes handling divisive issues difficult.

What is a divisive issue?

Divisive issues should be distinguished from mere differences of opinion, which are inevitable when so many decisions need to be made when a constitution is drafted. These differences would be discussed and negotiated in the constitution-making body, failing which the matter would often be settled by a vote. Normally the losing party could live with the outcome.

But a divisive issue is a source of tension or even conflict among the people or the negotiating parties. One of the most common (and intractable) issues involves differences about the place of minorities and the role of diversity in state and society. In the constitution-making process in Spain after Franco, the critical issue was the conception of Spain: whether it was to be a centralized state of a unified people, or a state of autonomous regions based on ethnic diversity. With variations this has been an issue in the constitution-making process in many countries—

for example, Bolivia, Fiji, Iraq, Nepal, Papua New Guinea, South Africa, and Sri Lanka. Countries have been divided over questions of political, economic, and social policy (as with differences between Maoists and other political parties in Nepal). Other divisive issues have been internal territorial boundaries, allocation of natural resources, secularism versus state religion, official languages, and systems of government. (Often that choice is between parliamentary and presidential systems.) Clearly what is considered divisive varies with the context.

What divisive issues have in common is that they relate to matters of considerable importance to the material advantages of groups, often couched in emotional terms, based on historical claims, and involving narratives of past discrimination or exploitation, or entitlements to human or group rights. Conflicting interpretations of rights or prior understandings can complicate a settlement. Divisive issues cannot be resolved in the same way as other differences, for example by a vote. There is a considerable emphasis placed on consensus in current notions of constitution-making processes, in part because many constitutions are now made in conflict or postconflict situations, where majority decisions would merely aggravate tensions instead of removing them. Divisive issues can neither be willed away nor handled in any easy way.

A divisive issue may be described as one whose nonresolution can cause fundamental problems, but that should not be resolved by majority vote, which would endanger the legitimacy of the constitution. A different dimension of divisiveness is that without its resolution, no constitution can come into being when it concerns a matter central to the constitution, such as the system of government. For example, if a two-thirds vote is necessary for a decision, and opinion is deeply divided, then a positive decision cannot be made. Sometimes an issue may be regarded as divisive in this sense, even if it is not central—if the vote of one group can lead to the rejection of the draft constitution (as can happen in a referendum). In Kenya [2010], fundamentalist Christian groups threatened to reject the draft if references to Kadhi courts were not deleted.

Some issues divide whole countries; some may be relevant to a particular interest. The former issues include disagreements about the system of government; the latter involve the application of personal laws or the availability of religious courts. They pose different threats, and different strategies may be needed to address them.

Divisive issues can arise at different stages of the process. Sometimes the very question of whether constitutional reform is necessary is divisive. In some tragic circumstances (as in Kenya and the Philippines) the matter has been “resolved” only by battles in the streets. Sometimes it may be hard to get agreement on the main objective of review. In Fiji it took six months to reach a compromise, one side demanding that the primacy of indigenous Fijians should be recognized, the other side championing Fiji’s multiethnic character.

A divisive issue can emerge during the process, for example, because of changed political circumstances. (In Kenya the change of government halfway through the process brought about a fundamental shift in the support of a key group from a parliamentary to a presidential system

of government.) And spoilers may generate a contentious issue out of a proposal on which for a long time consensus may have existed.

Some divisive issues may need to be resolved quickly; they will fester if they are not. Others are best put aside for future resolution. And ways of addressing divisive issues may depend on the body charged with making decisions on the constitution. Thus different approaches are needed depending on whether the decision-making body is an expert commission, a parliament, or a broadly representative constituent assembly, and altogether different considerations apply when there is a referendum.

We now turn to some specific strategies and techniques that have been used to resolve divisive issues.

- Some issues can be resolved by formal and symbolic recognition. Groups that have been marginalized or oppressed are often in great need of the recognition of past suffering and of their place in the new political order. Delicate negotiations may be required for the formulation to find the appropriate balance (as the example of Spain shows). Such recognition may facilitate the resolution of other issues geared more to substantive matters.
- Deadlocks over an important issue can sometimes be resolved by a referendum. Greece and Italy resolved the contentious issue of the future of the monarchy by referendum (an option canvassed in Nepal in 2006, but effectively vetoed by the Maoists). The vexed question of the division of the Swiss canton of Bern to allow the French-speaking inhabitants of the canton a space of their own was resolved through a series of referendums soliciting the approval of interested parties (leading to the establishment of the canton of Jura). The Canadian Supreme Court has sanctioned referendum as a way to resolve the issue of Quebec's secession. Of particular interest is the referendum in the Maldives on the choice between a presidential and a parliamentary system, the divisive potential of which emerged during the course of the proceedings of the constituent assembly. When negotiations failed, the assembly decided to refer the question to the people, and resumed its work only after the matter was settled in this way. Civil society in Kenya, where a similar issue was deeply divisive, advocated that the referendum should offer the choice between a parliament-based constitution and a president-based constitution. In both Uganda [1995] and Kenya [2005], legislation on the constitution-making process provided for referral to the people of issues that were contentious (i.e., ones that could not be resolved by a two-thirds vote). Unlike Kenya, Uganda used this provision for the question of whether to have a single or a multiparty system.
- A referendum will yield a result, and perhaps some legitimacy for it, but it can also deepen polarity. And if the vote is close, divisions in society and politics will continue, and they will affect adversely the implementation of the constitution. In any case it is best to avoid a referendum until a serious attempt is first made to resolve the issue through negotiations.
- It may be possible to resolve the issue by reference to public opinion. This is a likely option if the process has been participatory, people have been widely consulted, and a careful analysis

of views and recommendations has been made. It has similarities to a referendum, but there are important differences: public views can be taken into account at different stages, and balances struck. Both the Ugandan and Kenyan constitutional commissions used public opinion to resolve differences. But with this method there is a considerable danger of manipulating the analysis of public opinion (which can be fragmented, and indeed may be the cause of divisions). There is also a considerable degree of subjectivity among decision-makers.

- Some divisive issues can be negotiated by the expedient of a time limit (a “sunset clause”). The group wanting a particular provision, such as protection for some special right, can be satisfied by being given the right for a specified period. Those opposed to that protection may be reassured by the limited duration of that right. This approach was adopted at the independence of Rhodesia-Zimbabwe, where the protection of special rights for European settlers with regard to land and political representation was limited to ten years. The entire Fiji 1990 constitution was accepted by the Indo-Fijian and other minorities only on the basis that it would be reviewed within seven years of its inception (and indeed, that review led to large-scale changes). To some extent, sunset clauses have the character of transitional provisions, facilitating bargains and providing time for psychological and material adjustments.
- Another device used to help address divisive issues is the opposite of the sunset clause—postponing the issue for resolution in the future. This may be done because the issue is extremely controversial and has the potential to break what otherwise is an overall consensus (as with the decision in Iraq to postpone the settlement of the issue of Kirkuk, a territory disputed among ethnic groups and with a troubled history of migrations and expulsions and the presence of valuable petroleum deposits). Occasionally an issue may be postponed because the members realize that information and public views are not available to make informed, practical decisions, and would not be available in time for the conclusion of the process. Usually the postponement is subject to understandings about what principle or procedure would be applied to address it.
- Examples of postponement include the decision on whether Uganda should be a one-party (nonparty) state or a multiparty state. Iraq postponed some critical decisions on federalism because the issues were raised late in the day, and the request by the chair of the constitutional commission for an extension was rejected under pressure from the United States. In constitutional discussions on the secession and independence of Bougainville, New Caledonia, and South Sudan, the parties agreed to postpone a definitive decision by instituting a system of autonomy for a prescribed period (e.g., six or ten years), to allow time to see if autonomy met most of the concerns of the “seceding unit” (underwritten by guarantees that it would then be able to express its preference through a referendum, as an act of “self-determination”). In the case of New Caledonia (part of overseas France) and South Sudan, the referendum decision is binding, but in Bougainville it is merely advisory, triggering off a fresh round of negotiations between Bougainville and Papua New Guinea.

- Partway between those two devices is the decision to acknowledge principles in the constitution for the ultimate resolution of the issue and leave the details and implementation for later. Often the controversy is about the details. The detailed issues may be determined with the help of expert opinion or a formal enquiry, or through a referendum (as in Spain).
- Raising the divisive issue in the future. Closely connected with that approach is the possibility of raising the issue, whether unresolved during the process or new, in the future. The advantage of this approach is that there is no sense of closure or exclusion; the possibility that groups with specific claims may raise them in the future reconciles them to the constitution.
- There are variations on this approach. The Spanish constitution recognizes the principle of autonomy, but the precise entitlements of regions are left to further negotiation and referendum. In Canada the opportunity to reopen an issue is largely implicit. Significantly, this approach has been made constitutional by the Supreme Court in Canada, in the decision on whether Quebec has the right to secede. A framework was devised within which the wishes of a part of the country to secede must be negotiated. Whether because of this decision or some other reason, the tension between Quebec and the rest of the provinces eased after this decision.
- Leaving the divisive issue to other processes. A specific technique, consistent with some of the approaches mentioned above, is to leave the divisive issue to parallel or later processes, such as joint or special commissions, or the recommendations of expert group. When making its independence constitution [1975], Papua New Guinea set up a special committee, including outside experts, to recommend steps to be followed in order to set up the provincial government for extensive devolution. This approach was common in the process of decolonization, which involved specialist commissions on the electoral commission, regional or constituency boundaries, rights of minorities, and the scheme of devolution. Sometimes a matter was “resolved” by an assurance from the departing colonial authorities or the incoming government that the interests of a particular group would be addressed later. This is not a satisfactory approach in the absence of secure guarantees—there are several instances of failure to honor the undertaking.
- Resolving the issue in the future through ordinary legislation or the judiciary. Sometimes an agreement may be reached to leave the issue to be resolved in the future, not through a constitutional process but in the ordinary working of the parliament, through legislation. Or it may be left to be resolved by the judiciary (for issues such as capital punishment, same-sex marriage, or abortion). But it is unlikely that seriously divisive issues can be resolved in this way. This may have more to do with the strategy of a drafting body, anticipating controversy in the deliberating body.
- Using constructive ambiguity. It may be more common to reach an agreement with both (or more) sides read as supporting their position—what we call constructive ambiguity. Courts, which may be called upon to interpret the relevant provisions, may find themselves in an

unenviable position; it puts unnecessary strain on them.

- Anticipating difficulties on some issues, those who design the process may provide special procedures to resolve them. (We have already mentioned the use of referendums for this purpose.) This may be connected to the methods of voting, a specific negotiating process, or both. South Africans used the concept of “sufficient consensus,” whereby if the two major protagonists agreed on an issue, the smaller parties had to accept it. Sometimes, often informally, differences between two sides may be resolved by reference to the top leaders, who stay out of detailed negotiations among the parties. This happened in South Africa, where the buck stopped with Mandela and De Klerk, and later in Fiji. The Nepal interim constitution provides an interesting example. When an issue cannot be resolved by the constituent assembly through consensus, the matter is referred to the leaders of all parties for resolution. They have fourteen days to form a consensus, to be put to a vote in the assembly. If there is still no unanimity, another vote is taken for which the support of at least two-thirds of the members is necessary. Such a procedure leaves open the possibility that no decision will in fact be made.
- Another example of a specific procedure is the Kenyan process [2010]. In one sense, the whole process was about “contentious issues” (essentially among political parties), which had prevented the adoption of a constitution since 2004. An elaborate process was devised, including an independent committee of experts (appointed by the parliament) interacting with both the people and the parliamentary committee on the constitution. It was for the committee of experts to determine what were contentious issues by comparing, in particular, three previous drafts. Its proposals, finalized after consulting the parliament, were to be submitted to a referendum. Implicit in this law, prepared through agreement among political parties, was the undertaking that the people would accept the legislative scheme.
- Getting the help of third parties. Increasingly, divisive issues are resolved outside the formal framework for the constitution-making process, often with the help of third parties. We have indicated some local means for doing this. In many instances, third-party intervention is provided for by international or bilateral communities. This is particularly the case in conflict and postconflict constitution-making processes: Norway in Sri Lanka; the European Union and the United States in Sudan; eminent Africans and the African Union in Kenya; the United States and the United Nations in Iraq; the United States in Northern Ireland; the United States and the European Union in the Balkans; the United Nations in Afghanistan, Cambodia, Namibia, and Timor-Leste; and Australia and New Zealand in the Papua New Guinea/Bougainville negotiations. Sometimes the role is formal (as in Sudan, and often with the United Nations, and mostly based on United Nations Security Council resolutions). A typical form for intervention is the office of the special representative for the resolution of conflict. Such interventions often result in the marginalization of local communities and generally are contrary to the spirit and letter of the legal framework for constitution-making processes—particularly as in Iraq [2005].

2.6 The constitutional text: Coherence and drafting

2.6.1 Ensuring coherence in the constitutional provisions

The objective of a constitution-making process must be a constitution that is acceptable, workable, and just. “Workability” of a constitution includes whether the design will match the circumstances of the country, as well as questions of the capacity of the country to operate it, its likely cost, whether it will generate a great deal of litigation, and so on. Less important perhaps are other concerns: readability, length, and durability.

“Coherence” (the various aspects all fitting well together) is a bit different because it covers a number of points, some of which may affect workability, while others may affect acceptability, or even be a matter of style.

Incoherence

A constitution may be “incoherent” in various ways, including the following:

- The “working parts” (about machinery and procedures) may not reflect the philosophy set out in parts such as the preamble and discussions of national values and human rights.
- Different parts of the machinery of government may not be suited to work together, particularly where the objective is to set up checks and balances between different parts.
- It may not even be possible for certain parts of the machinery to work together—this may be a question of dates not matching, or some other fundamental incompatibility.
- Drafting styles may differ markedly between different parts.
- There may be great detail in some parts of the constitution and guidelines at the level of principle in others.
- Words may be used differently in different provisions, or different words may be used for the same concept or institution. This is not just a matter of style; it may affect how the constitution is understood and applied.
- There may be repetition—which may cause confusion, difficulty in reading, and also problems of comprehension.
- The document may be so badly organized that it is hard to find specific points, and the reader runs the risk of failing to realize that what she is reading is restricted or expanded by a provision somewhere else in the document.

Incoherence can arise from various causes, including:

- civil society focusing on “values” while politicians focus on power, and experts on “workability”;

Box 31. Parliament as the source of incoherence in the Fiji constitution

In Fiji in 1997, a parliamentary committee took over the final stages of the constitution-making process, after receipt of a full and coherent set of proposals by a commission, and introduced a power-sharing arrangement (which had already been rejected by the commission) under which any party with a significant number of parliamentary seats could take part in the cabinet. The committee members failed to think through the implications for other aspects of the constitution. (And time pressures made it hard for anyone, including professional advisors, to realize the problems that had been created.) A notable example involves the provisions on the senate. To ensure that body included a “nongovernment” element, the original proposal was that the leader of the opposition would nominate some senate members. This was retained by the parliamentary committee. But at the same time the constitution said that those senators must be from parties entitled to sit in the cabinet. So they were to be nominated by the leader of the opposition, but not to be members of the opposition, and not to offer a nongovernment voice.

- making changes at late stages in the process;
- a tendency, on the part of those preparing the constitution, to focus on only one part of the document at a time, or even on only one article at a time;
- dividing the preparation of proposals among committees in a way that leads to overlap;
- asking nonexperts to produce actual drafting language for the constitution, rather than the ideas;
- uneven knowledge on the part of those involved: it is almost inevitable that a body composed of those with some, but not great, knowledge of constitutions (and few countries can command the services of many experts with great knowledge) may seize on some idea without being able to understand all its implications, and even without understanding how it has worked elsewhere;
- cutting and pasting from a variety of foreign models;
- having different drafters with different styles working on different aspects;
- excessive speed; and
- a reluctance to use experts, and a certain arrogance on the part of those (usually politicians but sometimes lawyers) who think they have the skills and the mandate required.

Avoiding incoherence

Careful planning of the process—which is essentially the theme of this entire handbook—should avoid many of these risks. The planning needs to be done not only by those officially in charge of the process, but also by those wishing to influence it, including political parties and civil society generally.

Specifically, the following strategies can help avoid the various pitfalls outlined here:

- having in advance, or adopting at an early stage, a set of guiding principles (see part 2.1.8); however, these are likely to be broad, while issues of coherence are more likely to involve detail;
- civil society focusing not only on the values and rights, but working hard to see how the difficult technical aspects can achieve their aims;
- accepting the necessity for skilled and technical expertise at the decision-making stages, even for carrying into effect the necessary political compromises;
- having a skilled “harmonization committee” (usually found within a constituent assembly) whose responsibility is to put together the various elements of the draft and ensure coherence in the whole;
- minimizing the number of technical drafters, and ensuring that they are both competent and familiar with the style to be adopted; having one person in charge of the drafting with the authority to instruct drafters to use certain phrases and styles; and developing a manual of style for the particular process;
- preparing an explanatory glossary of terms to be used, including translation into major languages, and ensuring that it is used;
- having a workable timetable;
- having a philosophy of work that avoids procrastination, assuming that the timetable is to be taken seriously. Otherwise, important stages toward the end are squeezed; this is an important role, especially for the chairs of the bodies in charge; and
- avoiding superficial knowledge by organizing in-depth study groups on particular issues, including inviting experts, local and foreign, and ensuring that study tours do involve a rounded experience of the topics studied.

2.6.2 Drafting the constitutional text

A constitution is a political and a legal document. Ideally it should be:

- understood by the people;
- usable by politicians and bureaucrats; and
- able to be interpreted by the courts.

All readers should find the same meaning in the document. The aim of the drafter should be predictability; there is none if the people, the politicians, and the courts come to different conclusions about its meaning.

This can be qualified to a limited extent—the people may take away from their reading of the constitution something different than do the lawyers. But those additional meanings should not be about the way the machinery of government operates. It will instead involve a sense of whether this document is “their” document—does it speak to them? Does it have any resonance for them?

The art of the constitutional drafter is to connect with all these readerships. But any lawyer would insist that resonance with the people must not stand in the way of maximum predictability. Unlike many laws, a constitution has a variety of different components, some of which lend themselves more than others to reaching out to the people.

Occasionally it is intentionally left to the courts to decide what a provision means (as in the example from South Africa mentioned above [see part 2.2.3], where although the constitutional assembly could not agree on a position on the death penalty, the issue was left to the courts to decide whether the “right to life” affected the death penalty).

The courts’ approach

Diana Yankova has written that the “draftsman always has to keep in mind that he is writing for a hostile audience—his text will be interpreted by warring sides in the courtroom” (Yankova 2006). The people may find it hard to understand the need to express an idea in a way that the courts can understand, but lawyers will want to use precise language that sometimes seems rather dry, and to use the words used in other constitutions. Managers of a constitution-making process must recognize the importance of careful use of language—even in a process that is people driven. To take a simple example: in the Kenyan process, environmental enthusiasts seized on the notion that at a minimum Kenya should have 10 percent tree cover (a figure below which it had fallen considerably), and drafted a provision that “every piece of land must have 10 percent tree cover”—this in a country with semidesert areas.

When interpreting a legal document, the courts make certain assumptions, such as that:

- language used before is being used in the same sense; and
- a change of language is intended to convey a change in meaning.

They look at how courts elsewhere have interpreted similar language, and at international law if that is where the language comes from. And they will be concerned about detail:

- “includes” is not the same as “means”; and
- “shall” or “must” is not the same as “may.”

There are often well-established traditions about how certain aspects of a constitution are used by the courts. In particular, the preamble and any “directive principles” will often not be treated as rules—though they may be used as guides. Citizens may find these parts of the constitution easiest to read, but might be disappointed to discover that in the courts these parts have limited legal force.

Drafting styles

The tradition of legal drafting in continental Europe, and in countries that have adopted European traditions, is broader, and interpretation focuses more on the spirit and less on the actual words of a legal text, while the common law tradition (used in England and countries

that were once British colonies) is more detailed. Constitutions in the United States tradition also tend to be more concise. But differences are much less marked in modern constitution-making because:

- of participatory constitution-making;
- of the influence of international law;
- of occupying forces, international agencies, and international NGOs;
- of constitutional borrowing; and
- even in common-law countries, constitution drafting is less rigid and complex than ordinary statute drafting (because a constitution is as much a political as a legal document).

In some countries (or for some judges) it is common to look at the discussions that took place when the law was being made; in some countries this is unusual, or even limited by the law.

Stages of text development

There are three “intellectual stages” in producing a constitutional provision:

- adopting the idea (a job for the people with political, legal, and other expertise);
- framing the provision in a legal way (a job for constitutional lawyers, with political scientists and other technicians); and
- preparing a final legal text (a job for legal drafters in close collaboration with a drafting committee).

This neat scheme of things—used in many national lawmaking processes—may not apply in a constitution-making process. A draft of a final text is often produced at an early stage, or else those involved resort to existing texts rather than beginning with the ideas, because:

- lawyers or active politicians find it easier to operate with familiar existing provisions;
- a political party or group produces a draft;
- advisors (local or foreign, national or international) offer concrete suggestions;
- a committee or commission working in advance to generate ideas for the constituent assembly does so in the form of a draft constitution; or
- time pressures exist.

And the technical drafters may be involved at a much earlier stage than is usual in national lawmaking. This is a good thing—so that drafters have an accurate idea of what the people want from the constitution, though it may call on the drafters’ reserves of patience as they have to interact with the people and their demands instead of only carefully formulated drafting instructions. The drafters may need to understand the culture and the symbols of a particular society.

Box 32. Development of the text in some modern constitutions

Fiji: The Reeves Commission, which produced the proposals, included no lawyers, but had two legal advisors. The report includes suggested language for many provisions. But the final drafting was done by a drafter in Australia.

India: The 1935 Constitution of India Act was an important basis for the work of the constituent assembly. The constitutional advisor, B. N. Rau, a historian, judge, and capable drafter, prepared a draft on the basis of the reports of major committees, making use of the 1935 act, the U.S. Constitution, the Irish constitution, and others. A drafting committee (which Rau attended) worked on this further; the drafting committee made the final changes after debate in the full assembly.

Kenya: Legal drafters (from several countries) were involved in the preparation of the first draft, working parallel to the commission. Some provisions were derived from the Ugandan and South African constitutions. Drafters assisted most committees, and then revised the draft in the light of the constituent assembly's decisions.

South Africa: The interim constitution of 1993 was negotiated largely by parties; the 1996 constitution was prepared through the constituent assembly. Both processes used committees of technical experts. A number of drafters worked on the final constitution, and one was appointed with the mandate to produce a plain-language, gender-neutral document.

Uganda: The commission set up a drafting committee, and also used the services of two professional drafters.

Vanuatu: There was no legal framework for the constituent assembly, and most of the drafting was done by the legal advisor to the local political parties (a nonlocal), with contributions from an experienced Papua New Guinea lawyer.

The work of the technical drafter

Legislative drafting is a specialization within the field of law. Most people who become drafters have experience with legal practice, and they will have special training in drafting. Their usual task is to convey what their clients want as clearly as possible, and in “judge-proof” words (that is, words that the courts will understand in the same way the drafters do). In some legal traditions, notably those of Europe, there is no profession of legal drafting; drafting is usually done by legally qualified civil servants.

In constitution-making, drafters have a more demanding task. Understanding what the clients want may be harder when those clients are the people rather than a ministry's lawyers. A

constitution also touches on all sorts of other laws, and the drafters will need to be aware of these implications. Finally, it is particularly important that a constitution be written in clear, even eloquent language. It is important to understand that a drafter is not concerned only with the words. One has said, “To express an idea clearly within the constitution the drafter must first understand the idea and its place in the universe of constitutional ideas.” This sort of drafting is the art of:

- applying imagination, logic, and reason to legal problems;
- matching policy choices to functional purposes;
- designing legal instruments to achieve those functions;
- crafting each legal sentence in a formulation appropriate to its particular function; and
- choosing the best words to communicate those functions effectively and economically.

Drafting the constitutional text

It is tempting for people involved in preparing a new constitution to look at other countries and “cut and paste,” and a lot of this occurs. But it is important to understand not only that a constitution must be understood in the particular historical and political context of the country, but that there are different styles of drafting. We might distinguish:

- the “what is technically necessary” approach; this is the traditional approach, of including only legally binding provisions, and drawing a clear line between what is appropriate for a constitution and what should be reserved for “regular” legislation;
- the “didactic” approach, which is how one might describe the approach used in Papua New Guinea, where the drafters were aware that running a government was something that most Papua New Guineans had no idea about; the result is a constitution that may be the longest in the world (for a few million people) but is a detailed “user’s manual” for government;
- the “explanatory principles” approach, which was used in South Africa, where many of the chapters are prefaced by some principles designed to show the politicians and the officials, and the public, the purposes of the provisions;
- the “reaching out” approach, in which the language is directed as much to the people as to the institutions and individuals charged with operating the constitution; and
- the “let’s put it all in” approach, which has been used in some Latin American countries; it offers great detail, especially on some current issues such as the rights of indigenous peoples (and might be used to describe the constitution probably forthcoming in Nepal).

Differences may arise due to local political and legal traditions, to citizen involvement in the process, to the use of international instruments, to degrees of trust or mistrust in institutions, and to individual drafters’ input. Although there is a general trend toward similarity across countries, traditions, expectations, and practices may change in any given country.

Issues in drafting

The following points will not be new to drafters, but they should be remembered by those who have to explain what they want to drafters, and have to try to understand the drafters' art.

Language

Most countries have a small number of official languages—often only one—and laws may not even be translated into all of these languages. The constitution, as the basic law of a country, is one that ought to be in as many languages as possible. Drafters find that the need to be able to translate affects—and simplifies—the style of drafting in the original language.

In order to help drafters, it will be necessary to develop a glossary of words so that the same word or phrase is always translated in the same way.

The need for legal certainty means that one version of a law must be the authoritative one. Often this will be the one in force when the drafting was done, because it is then that the expert legal input occurs.

A decision will have to be made about when to translate, and whether to translate all drafts. It may be wise to translate the existing constitution for use as a civic education tool. And if this is well done, it will help in future translations. (See part 2.3.9.)

“Plain English”—or other languages

Modern trends have been toward using simpler language in legislation. In South Africa [1996] a legal drafter was appointed specifically to ensure that the final draft was in “approachable” language. But that drafter insisted that although “simplicity, precision, and clarity” are desirable, they are only tools for the achievement of the overarching objective of predictability.

Inclusiveness and approachability

Especially in the English tradition of drafting, there was a “masculine” tendency in constitutional language, and the word “he” was to be read as including “she.” It is possible to draft in ways that avoid this clumsy and sexist tradition. Other languages do not raise the same issue, but there may be other ways in which language can convey certain assumptions about who holds office. The word “president” in Hindi and Nepali literally means “husband of the nation,” which has been controversial. Language carries all sorts of cultural implications, and the drafters need to be sensitive to them.

Length

Many people argue that short constitutions are better. They should not be longer than needed; excessive length may discourage careful reading, and unnecessary words may interfere with

interpretation. But length alone should not be the test; each provision should be there for a reason. Elements that make some constitutions longer include:

- more topics covered;
- more ideas;
- more words than needed;
- the role of the constitution as the “manual for government” approach—as in Papua New Guinea (see appendix A.9) and some recent African constitutions; and
- in the case of a federal system, the absence of separate state constitutions—contrast India, where the state constitutions are included in the national one, with the older federations such as Australia and the United States, where state constitutions are separate.

Constitutional structure

There are ways to organize a constitution that make it easier to understand, including putting details (especially if they may be elaborated in an ordinary law) into schedules (appendices). In some countries (e.g., Papua New Guinea) the constitution provides for special laws to address the details of government, rather than putting everything into the constitution itself. These can include elections and courts. They can be called “organic laws” and be harder to change than ordinary laws, though not so hard to change as the constitution itself.

The very order of a constitution’s chapters may be significant: is the president more important than the parliament? Are rights less important than government?

Risks and dangers

Things may go wrong at any stage in a process as complex as preparing a constitution. Even the technical drafting aspect has its risks—for the process and for the drafters. Spoilers or self-interested individuals may try to influence the drafters, to delay the process or to change the text. Precautions may be taken to:

- make sure that it is perfectly clear what has been decided in terms of substance;
- make sure that it is clear from whom the technical drafters are to take instructions; and
- guard against the risk that the “master” version of the text might get lost or be interfered with.

Some issues for the drafters themselves

This book is not written specifically for drafters, who will have their own professional expertise and experience to draw on and will go to more detailed resource materials. However, here are some important points, drawn from the writing of experienced drafters:

- It is not the role of the drafter to be the “constitutional visionary, negotiator or advocate” (Knight 2008).

- The drafter’s client is not just the group from whom instructions come, but the nation.
- A constitution should be coherent as a document, and last-minute changes should be avoided, as should cutting and pasting from other constitutions without regard to the unity of the whole (Lynch 1988).
- Constitutions should say what they mean, and not rely on conventions and fictions, especially in countries not used to them (for example, one should not say that the head of state must act on “advice” when the intention is that the advice must be followed) (Lynch 1988).

2.7 Adopting and implementing the constitution

Having discussed how the content of a constitution is arrived at, including how the people are involved, we turn to the closing tasks of a process—the formal adoption and coming into force of a constitution, and the process of making a document a reality: implementation.

Adopting turns out to be surprisingly complicated, and may involve a number of separate steps. They are all legally significant steps, but they may be full of symbolism and political significance as well.

Implementation is also a legal process—one of making laws and creating institutions that will have an impact on the country and the way it is governed. But it also is a political issue, and it is a matter of attitudes and will as much as of law.

2.7.1 Adoption, ratification, and promulgation

The most formal acts of decision in a constitution-making process involve accepting the document and bringing it into legal effect. Exactly when the constitution becomes law—when a country can say “this is our constitution”—is surprisingly different from process to process. And before that there may have been a moment when the country could have said “Now no one can stop that document from becoming our constitution.”

We can distinguish various separate acts, not all of which will occur in every process, and which do not have the same legal effect in every process. Here is an imaginary example involving many stages:

- the constituent assembly adopts the document (adoption);
- the constitutional court endorses it as respecting the principles laid down in the peace process (endorsement or certification);
- the people approve it in a referendum (ratification);

- the president signs the document (assent);
- the document is published in the national official record (sometimes called the Gazette) (this might be called “promulgation”);
- the document becomes law (which may be the moment the president signs it, or the moment it is published); and
- some aspects of the new constitution have legal effect at the moment it becomes law, but the constitution itself says that certain aspects will not take effect for a certain period or until something else happens.

In some countries one event only occurs: the constituent assembly adopts the document and it

Box 33. Bringing the constitution into effect in Eritrea [1997]: A mistake

Bereket Habte Selassie, the Chairperson of the Eritrean process stated: “It was a mistake not to fix an effective date, or at least specify a maximum period after which the Constitution would come into full force and effect” (Selassie 2003: 312–13).

immediately becomes law and has effect in its entirety, without the need for anything else to be done. This is more likely to happen in a country without an effective existing constitution. And some countries have more complex traditions on the bringing of laws into effect than others.

Adoption

It would be usual to have a rule that makes the act of adoption perfectly clear—a certain percentage of the constituent assembly or parliament must pass the entire document. Nepal’s interim constitution, unusually, provided only for the preamble and every article to be adopted; there was no procedure for adoption of the whole document. The rules of the constituent assembly say that the preamble will be adopted last, and then a vote must be taken to adopt the whole document. This may turn out to be an unconstitutional provision.

Adoption rules often require “supermajorities,” rather than the usual majority of those legislators present and voting. The support of a number of members equal to more than half of all the seats in the house may be required—or 65 percent, or two-thirds, or even 75 percent. Different majorities may be required for approval of different changes.

Adoption by the constituent assembly could be made the final act—in other words, without requirement of ratification by the people or any formal signature. In a country that is observing the principle of legal continuity, it may be that an act to amend the constitution has to be adopted

by the procedures usually followed for passing ordinary laws. This almost always involves the signature of the head of state. But in Papua New Guinea all laws are passed by the parliament alone; the speaker signs a certificate to say that they are properly passed, but is not signing the act into law. Occasionally it may be unclear whether the ordinary procedures apply to adopting the constitution, or whether some special procedure applies.

There may be requirements designed to prevent the rushing of amendments (a source of abuse in several countries); in Ghana there must be two publications in the government Gazette of proposals for amendment, with three months in between, and for certain changes six months' notice in the Gazette.

Ratification

“Ratification” is a process by which some decision made or act done by one person becomes legally effective by being endorsed by another person. This can be applied to the situation when the people approve a constitution. This would usually be by a referendum or plebiscite. (See part 3.5.) In some countries a referendum on the constitution is prohibited (as in Haiti and Portugal).

Often a referendum would involve a single “Yes” or “No” vote by the whole electorate. If the constitution is for a federal country, it may have to be ratified by the separate vote of each of the states, regions, or provinces. This could involve counting the votes separately for each state in a referendum. But the United States constitution was not effective until ratified by a vote of the state conventions—not the people—of at least nine of the thirteen states. Then the constitution would come into effect—but only for those states that did ratify it. In the end, all thirteen did.

A ratification process will involve something rather like an election campaign, with campaigners for and against the constitution. This is rather different from a public consultation process, because almost certainly it affords little chance to change the document. In the United States process, it was usual for a member of the convention that prepared the constitution to participate in the public debates.

In designing a ratification process, as in designing an election, it would be ideal for the entire country to vote at the same time. In the United States, however, each state organized its own ratification process, and not at the same time as the others. It is hard for later votes not to be influenced by the earlier results; later states may be persuaded to vote “Yes” by an earlier state vote, but equally, an earlier result may affect turnout and distort the later results. (See part 3.4.2.)

Endorsement

In South Africa the constitutional court was required to “certify” that the constitution complied with the thirty-four principles set out in the interim constitution. There may be other forms of endorsement by some body not involved in the preparation of the document. When the secessionist efforts of the province of Bougainville in Papua New Guinea ended, the peace

agreement and the (amended) constitution of Papua New Guinea provide for the adoption of a Bougainville constitution by a Bougainville constituent assembly. The Papua New Guinea constitution provided for certain matters to be included in the provincial constitution, and after adoption by the assembly it would be transmitted to the national government. If the national government approved it as meeting the national constitutional requirements, it would ask the head of state to endorse it. It would not come into force until after that.

Consultation with or the approval of some other body may be required; in Ghana, the council of state (an advisory body) must be consulted.

Assent

There may be a good reason for an ordinary law to be signed by the head of state: it happens either because such a ceremonial act has national significance, or because the head of state is given a role in ensuring the constitutionality of laws. In constitution-making the same reasons may not apply. If the people are giving themselves a new constitution as an act of sovereignty, it may seem inconsistent to ask the head of state (who may not even have been elected) to add the final, enacting touch. Possibly the head of state may not wish to sign—if the new constitution will reduce his or her powers. The South African interim constitution said the constitution “shall [which means ‘must’] be assented to by the president”—but suppose he or she refused? The constitution of Portugal also says the president may not refuse to sign a law revising the constitution. There is a legal principle that says “something that must be done will be treated as having been done”—but this is not a particularly satisfactory way of resolving the issue, and courts might be reluctant to apply the principle to so august a person as the president. So some constitution-making processes do not require the signature of any person, or they require every member (or every member who agrees) to sign the constitution.

Promulgation

The word “promulgation” has various dictionary definitions, including the following: to put into force or effect; the official publication of a new law; to make a law publicly known after its enactment; to declare or announce publicly. Historically the only way for people to know about new laws was for them to be publicly announced, if necessary all over the country. Here we use the word to refer to making the law public. Sometimes that may occur in a public ceremony. The constitution will still have to be published.

Coming into effect

In many countries the moment of signature of the head of state is the moment a document becomes a law. But it may not have any legal effect until later, perhaps when it is published in the Gazette (a word used in many countries for the official government publication that announces new appointments, laws, etc.). And the new law itself may postpone its coming into effect until a specific later date, or until something else happens—often until a minister declares that all or part of it comes into effect. It occasionally happens that a law never comes into effect.

Box 34. Adopting, promulgating, and publishing the Kenyan constitution [2010]

The 2000–2005 Kenyan process never resulted in a constitution. The 2008–2010 process was designed with this history in mind.

Parliament was to be able to propose changes, but there was no requirement that its members vote to adopt the constitution. But after the failure to pass and the proposal of amendments, the adoption was put to a vote. It was overwhelmingly adopted—but suppose it had not been? On the correct reading of the law that would not have mattered, but no doubt parliament would have taken the view that it was not adopted.

It then went to a referendum, and was passed. The existing constitution said that “the President shall, not later than fourteen days from the date of the publication of the final result of the referendum, promulgate and publish the text of the new Constitution in the Kenya Gazette.” It was not clear whether “promulgate” was the same as “publish.” The relevant act of parliament said the president must “by notice in the Gazette, promulgate the new Constitution”—which separated promulgation from publication. It also implied that nothing more than a simple Gazette notice was required. If the president did nothing, the constitution would come into effect anyway. However, clearly the president wanted a ceremony.

Many people assumed that the president would have to sign the constitution. But the law did not say that; the last act needed to make it law was the referendum. The president did sign, but he also read out a statement about the constitution and its background, and solemnly waved the constitution toward the crowd—the true act of promulgation in the traditional sense. It immediately became law (oddly enough, in the middle of the day). The constitution was published (with a “Notice of Promulgation”) in the Gazette one week after promulgation.

How about a constitution? If the constitutional change is made by an ordinary law, the usual rule will apply. Or there may be a special provision for amending the constitution that gives a different date. If the new constitution is made by some process outside the constitution, the coming into effect will probably be decided in the new document itself.

Even if some aspects are postponed, it is wise to make their coming into effect contingent on the happening of an event that is bound to happen—or on a specific date—to avoid the risk that they never will come into force. This happened in Eritrea, where the president simply did not bring the constitution into effect even though the document itself said the people “approve and solemnly ratify officially, through the Constituent Assembly, this Constitution as the fundamental law of our Sovereign and Independent State of Eritrea.”

2.7.2 Implementation

Several contemporary constitutions have failed to take root. Either they are early victims of “coups”; they are replaced by new constitutions; or large parts thereof, dealing with both values and institutions, but particularly values, are ignored. There could be several reasons, connected to the characteristics of these constitutions already discussed in this handbook, that explain why large parts of a constitution are not implemented. Broadly, these are:

- Some of these constitutions address nation-building and state-building; the former cannot be easily achieved without enlightened and committed leadership.
- Some constitutions aim at a fundamental departure from, rather than merely reform of, existing political, constitutional, and social systems, necessitating new institutions and laws.
- The scope of the constitution is wide, for the reasons given above, and there may not be either the political will or the technical capacity to address it in its entirety.
- Some provisions aim to bring about reform of social structures, which goes against the interests of elites and privileged groups.
- The emphasis on social justice threatens the interests of powerful sections of society.
- The integrity and anticorruption provisions are resented by politicians and bureaucrats.
- Many countries do not have a tradition of constitutionalism and the rule of law to anchor a constitution.

In short, unlike the more traditional constitutions, which were not only restricted to systems of government but also imposed on the rulers, contemporary constitutions seek to change state and society and are imposed by the ruled on the rulers (thanks to participatory constitution-making processes and to divisions within the political class). Resistance to implementation is therefore to be expected from several quarters. It is necessary to provide a formal process of implementation and to monitor it.

There are at least two aspects to the implementation of a constitution. One is internal to it, and it involves such issues as the coherence of the document; institutional responsibility for implementation, for example by the judiciary; and provisions addressing transitional matters and the phasing in of the new rules and institutions. The other is external; and it involves such issues as societal attitudes; empowerment of the people; preparing them to participate; internationalization of constitutional values; and the quality of leadership. This chapter is primarily concerned with aspects internal to the constitution.

Implementing, promoting, and safeguarding the constitution

The tasks directed at achieving implementation of a new constitution can be divided into three closely related but to some extent distinct elements.

Implementation

The first involves actions intended to implement the constitution, in the most obvious sense of

giving full effect to its provisions, which include:

- setting up new institutions provided for by the constitution, and providing them with the powers, personnel, resources, and general encouragement that they need to operate effectively; and
- making new laws and policies to give effect to the constitution, and repealing laws inconsistent with the new constitution.

Promotion

The second involves actions intended to promote the constitution, which means going beyond implementation in the first sense, and working to make the institutions and laws operate as the living basis for the way the state operates, which includes:

- enforcing the constitution and the laws made to implement it, and respecting the rights and freedoms of the people;
- ensuring that the institutions established under the constitution are properly resourced and otherwise supported;
- holding regular and free and fair elections (and providing the resources needed to enable them to happen);
- providing access to justice, and resolving disputes in accordance with the constitution; and
- facilitating the people's participation in public and state affairs. (See part 2.2.2.)

Safeguarding

The third involves actions intended to safeguard the integrity of constitution, which goes beyond promoting the constitution, and extends to recognizing its fundamental importance by protecting it in a range of ways, including:

- limiting the possibility of hasty amendments that detract from core constitutional values;
- avoiding practices that distort constitutional norms, including an unnecessary resort to emergency powers; and
- protecting the constitution (in extreme cases) from being illegally overthrown, for example by a military coup.

The three dimensions of implementation are closely related, in that things directed to ensuring that one of them occurs can have positive effects for the other two.

Can a constitution-making process contribute to implementation?

A key question for this part of the handbook is whether there are things that can be done during the constitution-making process that can contribute to successful implementation. With few exceptions, implementation issues received little attention prior to the late 1980s. In the wave

of decolonizing constitution-making beginning in the 1950s, for example, it tended to be assumed that constitutions largely modelled on those of the departing colonial authorities would readily be transferred and work as effectively in new contexts in Africa and Asia as they had done in Europe. In terms of safeguarding the constitution, it was assumed that the institutional accountability involved in the separation of powers and in the constitutional jurisdiction of courts (then mainly in common-law countries) was sufficient. The failure of many countries to implement significant parts of their constitutions, the overthrow of others, and the difficulties inherent in implementing and safeguarding the more ambitious constitutions emerging since the 1980s have caused some attention to be given to things that can be done during a constitution-making process, or included in the constitution itself, that support its implementation in the three senses identified above.

Design of the process—encouraging public awareness during and after

As noted in part 2.2, an open constitution-making process that includes a significant focus on increased public awareness of constitutional options and encourages popular participation in discussions of choices can be expected to contribute to increased public knowledge of, and commitment to, a new constitution. People not previously familiar with democratic values and procedures are provided with necessary information and encouraged to participate in public affairs, enforce constitutional remedies, and encourage governmental accountability. An important issue seldom examined even in constitution-making processes that have involved effective awareness campaigns is how to continue programs of awareness of constitutional issues after the process ends. In South Africa, a wide range of well-designed awareness campaigns (involving numerous rural meetings and mass-media campaigns) meant that knowledge of the new constitution was at its peak in 1996. A final step involved the distribution of seven million copies of the constitution in all the official languages. All of this activity was coordinated by a secretariat to the constitutional assembly that ceased to operate once the new constitution was adopted. As a result, the extensive experience of building awareness was dissipated, and there has been limited additional constitutional awareness work since then.

Constitutions often encourage continuing constitutional awareness after the constitution-making process is over, by such means as offering translations of the new constitution into local languages and its wide distribution (e.g., see section 4 of the constitution of the Republic of Uganda 1995, or section 216 of the constitution of the Autonomous Region of Bougainville 2004). The constitution of the Republic of Ghana 1992 goes further, providing for a national commission for civic education to create and sustain awareness of the constitution; educating and encouraging the people to defend the constitution; formulating programs for realizing the objectives of the constitution; and formulating programs for awareness of civic responsibilities. Together with other significant constitutionally established independent oversight bodies, it is now a well-respected institution in Ghana. Most such provisions have limited effect because governments give it low priority and few resources.

Content and language of the constitution—speaking to the people

Both the contents of a constitution and the language in which it is written can encourage

broad popular support for its implementation. A constitution that people see as addressing the real issues leading to the new constitution and providing a vision for the future can really capture their imagination (as Kenya [2010] demonstrates). Other examples are the constitution of Rwanda [2003], the Indian constitution [1950], and the constitutions of Papua New Guinea [1975] and Uganda [1995]. An example of a statement of governance principles directed to resolving ethnic differences is the compact contained in section 6 of the constitution of Fiji [1990].

Constitutional mechanisms for encouraging implementation and promotion

A number of constitutions passed since the late 1980s (and a few made earlier) include provisions intended to encourage and support implementation. One category of arrangements is intended to address most constitutions' tendency to state broad principles and set directions, and to rely on the legislature later to pass laws establishing new institutions, processes for enforcement of rights, and so on—which may not be passed for many years.

Some specify that particular kinds of laws—usually those needed to establish independent constitutional offices with enforcement, oversight, and similar roles (e.g., human rights commissions, ombudsman bodies, auditors general)—must be passed within a set period. The constitution of Ghana [1992] required that laws needed to establish nine such institutions (including the national commission for civic education, above) had to be passed within six months of the first meeting of the parliament after the constitution came into operation. The constitution of Kenya [2010] includes a schedule of time limits from six months to three years within which laws on more than sixty subjects were to be passed, and provided a right to petition the high court if any law listed in the schedule was not passed within the time specified. (See article 261 and schedules 5 and 6.)

The South Africa constitution [1996] provides time limits within which some implementation laws must be passed (see sections 21 and 23), including implementing rights to information (section 32) and just administration (section 33). But the constitution also includes provisions enabling enforcement of the rights in the absence of implementing laws.

Another approach similar to the latter part of the South African example is found in sections 22, 224, and 225 of the constitution of Papua New Guinea [1975]. Section 22 gives the judiciary the power, in a court case, to make such orders as may be necessary to fill any gap left by the absence of laws. Section 224 requires not only that laws be made providing for powers and procedures, and facilitating the performance of functions, of independent constitutional bodies, but that in the absence of such laws such bodies can provide for any deficiency in their procedures and have all powers reasonably necessary. Section 225 provides that it is the duty of all governmental bodies to ensure that the independent constitutional institutions are provided with the staff and facilities needed to carry out their functions—a requirement that the courts have ruled to be enforceable against the government.

Finally, there are a few examples of constitutions that establish institutions intended to oversee implementation. Perhaps the most far-reaching example comes from section 5 of the sixth schedule of the constitution of Kenya [2010], which provides for a commission on the implementation of the constitution to “monitor, facilitate and oversee the development of legislation and administrative procedures as required to implement the Constitution.”

An example of a body with less-comprehensive implementation responsibilities comes from the lengthy amendments made in 2002 to the constitution of the Papua New Guinea [1975] to give effect to the Bougainville Peace Agreement of 2001. Section 332 provided for a joint supervisory body made up of appointees of the Papua New Guinea government and the autonomous Bougainville government, which is responsible for overseeing the implementation of the peace agreement and the provisions of the Papua New Guinea constitution that implement the agreement.

Constitutional devices to safeguard (and implement) a constitution

Many modern constitutions contain devices for the safeguarding of the constitution that can be divided into two categories. The first involves internal mechanisms to promote its safeguarding in one way or another, the other to build support for safeguarding it from civil society and other sites of influence and power.

Internal devices to encourage safeguarding and implementation

Constitutions often contain provisions directed to encouraging those exercising state power to respect the constitution and accept accountability, including provisions that impose considerable limits on political leaders and administrative officials. Examples include:

Protection of the constitution from coups

Despite the obvious practical difficulties likely to be involved in the enforcement of such provisions, some constitutions make their overthrow unconstitutional (e.g., the constitution of Uganda [1995], section 3). Many call on citizens to protect and defend the constitution. Attempts are made to respond to the threat of security forces overthrowing the constitution by provisions placing the military under civilian control, and in a few cases by provisions giving representatives of the military or former combatants in a civil war strictly limited roles in civilian government (e.g., in the constitution of Uganda [1995], section 78, and the constitution of Bougainville, section 55).

Protection from hasty or damaging amendments

Many constitutions contain provisions regarding the process for constitutional amendment intended to ensure that amendments are not made hastily and are considered with great care. As well as requirements for “supermajorities,” there may be a requirement for lapses of specified periods of time between various stages of the enactment process, or even stipulations that the final stage cannot occur until a general election has taken place.

Limits on emergency powers

Under many constitutions, during a declared state of emergency, laws may be passed and actions taken that would otherwise be contrary to human rights protections, and such emergency powers have often been abused by governments seeking to control the opposition. Modern constitutions often aim to limit abuse of such powers by carefully defining the reasons for declaring emergencies; requiring prompt parliamentary approval of a declaration of emergency; providing parliamentary and judicial scrutiny of exercise of emergency powers; limiting the categories of rights that can be derogated during an emergency; and so on.

Certification of the constitutionality of legislative bills

The government and other authorities placing laws and policies before legislative bodies should be required to certify that in their view the bill or policy—particularly the bill of rights—is consistent with the constitution. This will ensure that questions of constitutionality are placed before the cabinet and other executive authorities and given appropriate attention. It will also alert the legislature to address the constitutionality issue. In the United Kingdom, the requirement for such certification regarding the bill of rights has proved most efficacious.

Judiciary

An independent, impartial, and competent judiciary is indispensable for the enforcement of the constitution and for asserting its supremacy. In civil law states, where judicial review of laws is not possible, the establishment of constitutional courts has been fundamental to upholding the constitution (as in Austria, Germany, Hungary, Poland, and South Korea). In common-law states, the final court, usually called the Supreme Court, has been critical to maintaining and elaborating constitutional principles (as in Canada, India, and the United States). Impunity for corrupt leaders, the result of executive control of the prosecutorial process and the judiciary, has caused major deficits in the rule of law and the enforcement of the constitution.

Independent bodies for accountability and redress, and politically sensitive roles

Many constitutions provide for a set of independent institutions that handle an increasing range of functions where independence from political interference is important. They include bodies with roles in relation to accountability and redress, which often have wide powers (e.g., ombudsman institutions, anticorruption commissions, auditors-general, human rights commissions), and others carrying out politically sensitive roles (such as judicial appointment bodies, public service commissions, and election boundary and management bodies). Independence is protected in a variety of ways, including requiring governments to provide them with staff and facilities (as in Papua New Guinea, above).

Codes of conduct

Enforceable codes (sometimes called “leadership codes”) set strict limits on a range of conduct by politicians and bureaucrats, including conduct that could give rise to conflicts of interest (e.g., Ghana, Kenya, Papua New Guinea, Uganda, and Vanuatu).

Direct democracy

Some constitutions seek to move away from the indirect model of democracy involved in electing representatives who make decisions on behalf of the people, and instead provide scope for citizens to participate directly in decision-making processes. They include arrangements for recall by voters of their elected representatives (e.g., the constitution of Uganda [1995], section 84), citizen-initiated legislation (Switzerland, and some states of the United States), public consultation on policies through plebiscites, and public participation in constitutional-amendment processes through referendums.

External devices to encourage safeguarding (and implementation)

Two aspects of external support for safeguarding the constitution require brief comment. The most obvious involves the people of the country concerned, who should always be the ultimate guardians of the constitution. To play such a role, the people need to be helped to understand the constitution and their rights under it. Encouraging people to play active roles in safeguarding a constitution involves the roles of civil society and social capital more than it does constitutional devices. On the other hand, constitutional provisions can support and encourage popular participation in safeguarding. The constitution can require state recognition of the roles of civil society and NGOs, as with section 15 of the constitution of the Philippines of 1986. Other potentially important provisions include ones guaranteeing popular access to courts and other constitutional bodies for accountability and redress, and provisions for direct democracy.

The second aspect of external support concerns the role of the international community, which since the late 1980s has tended to play a significant part in many constitution-making processes, and often remains involved in supporting implementation in various ways. This often extends beyond support for establishing and operating institutions and laws to various forms of support (direct and indirect) for efforts to safeguard the integrity of the constitution. Of course, there is always a need to balance the value of such support with awareness of political and other dangers of actual or perceived international interference in sensitive domestic affairs.

Part 3: Institutions, groups, and procedures

The decision to leave the discussion of institutions and procedures for constitution-making processes to a late stage in this handbook was motivated by a conviction that the design of institutions ought to be determined in large part by their tasks. However, the process is often designed the other way round: the decision is expressed as something like “We must have a constituent assembly.” Other than recognizing that the general aim is to make a constitution, what the constituent assembly will do is spelled out only later.

It is also true that, in many countries, national traditions dictate what bodies will have responsibility for the process; indeed, for some readers this part may be of limited interest, because in their countries either custom or existing law is clear on the issue of institutions and processes. However, we venture to suggest that even for those readers this part may offer some insight: for example, not all constituent assemblies are made up or operate in the same way. There are even some differences in conducting referendums, and examining the experience of another country might be useful.

Increasingly, the constitution-making process is negotiated or designed, either in international conferences (Cambodia [1993] or Afghanistan [2004]), as part of interim arrangements (South Africa [1996] or Iraq [2005], Nepal [ongoing process]), in national conferences (Kenya [2005], francophone African countries), or through “roundtable” processes (in some Eastern European countries). In recent years there have been several comparative studies of constitution-making processes. This scholarship is aimed partly—even primarily—at drawing lessons about the most effective institutions and methods. The growing internationalization of processes means that decision-makers have access to several alternatives to their traditional approaches, and conscious decisions on the design are increasingly being made. Recent years have also seen new features of constitution-making processes, such as participation of both the international community and local citizens, which require new forms of institutions and procedures. Much can be learned from the successes and failures of countries that have pioneered innovations. The South African process, generally deemed to be successful, has been studied by several countries.

Having explored what is involved in making a constitution, we now turn to institutions and procedures. Systematic analysis of these also presents difficulties. Table 2 indicates that the same tasks may be performed by a range of different bodies. And drawing lines between different bodies is not easy. A constituent assembly is different from a parliament. But some parliaments carry out the same functions as the assemblies, and some constituent assemblies serve also as parliaments. Some constituent assemblies only debate a draft constitution prepared by someone else. Some carry out civic education, consult the public, prepare a draft, and then formally debate it. A commission may be quite small and expert, or rather large and not so expert, or even small and not expert! It may or not be independent—of government or of politics.

It is possible to view the United States constitutional convention in Philadelphia in the late eighteenth century as an early example of a constitutional commission (though we tend to

classify it as a sort of constitutional assembly). Its mandate was to review and recommend changes to the confederal constitution, which would have been debated and possibly adopted under the mechanism for amendment of that constitution. (As is well known, the convention exceeded its mandate and established a new procedure for the adoption of its draft.)

We should warn against assuming that the same name indicates the same sort of animal in all countries, or that a different name indicates something different. A constitutional convention, a constitutional assembly, and a constituent assembly may be quite similar.

Box 35. Commissions or committees?

There is no real difference between these two words, at least in English. But usage may vary. In English it would be unusual to use “commission” to refer to a section of a larger body. English would refer to a “committee” of a legislature or assembly; Spanish might use “comisión.” “Commission” in English usage suggests a slightly more weighty body. We use “commission” for a separate body and “committee” for a part of a larger body.

Our concern in this part is with how these bodies are formed, including their legal basis, how they operate—and how they might operate better.

Some principles of organization are essential. We have chosen again to focus on function rather than on form. We have grouped together institutions that generally perform rather similar functions. However, they also do tend to cluster in terms of size. So we begin with the big bodies that often carry out a lot of functions. They may indeed be the only constitution-making bodies in a given process: constituent assemblies, parliaments, and national conferences.

Then we turn to bodies with the core function of preparing constitutional proposals—including an actual draft constitution. They may do other things as well, such as civic education. These bodies might be called commissions, committees, or roundtables, and they might be (and usually are) specially formed, but might be longer-term bodies.

Next we look at administrative bodies. We discussed in part 2 the processes of administering and managing a constitution-making body. Here we look briefly at the institutions that carry out this role. We use the term “administrative management body” for these, although this is not the name any actual body is likely to have. These bodies will be called “secretariats or management committees” or something similar. Although the role this body plays is critical to the success of a process, it has largely been ignored in constitutional scholarship.

A lot of other official bodies may play limited roles in constitution-making. By no means will every constitution-making process have them, and many of these bodies will not have been planned from the beginning. They are a slightly “miscellaneous” collection, having little in common other than that they have some function in connection with the constitution. They include government departments, bodies that manage elections, bodies of experts, and the courts.

Many constitution-making processes require a referendum for the final decision on the draft, and less commonly while an effort is made to resolve differences on specific issues.

How the bits may fit together

The case studies in appendix A suggest how these elements of a constitution-making process may fit together. No process will have every type of body or institution mentioned. Some may have only one official body. Here are some possible combinations:

- Constituent assembly or legislature only
- Commission → constituent assembly
- Commission → constituent assembly → referendum
- Commission → constituent assembly → legislature → referendum
- National conference → legislature
- National conference → referendum

Table 7: Comparison of a constitutional assembly and a parliament

Parliament (legislature)	Constitutional assembly
It functions by virtue of the constitution and according to the constitution	It makes the constitution—though this may sometimes be by virtue of law made under the authority of the existing constitution
It makes laws	It will not usually make ordinary laws, but it will make the constitution
It votes money for government (budget)	It has no control over finances
It holds the government accountable	It does not hold the government accountable
It is a body that represents the people—usually through elections and political parties—and functions as their representative, rarely with much active public involvement	It usually represents the people—but its members may be chosen other than through elections, or parties; it may involve the public in its activities far more than the legislature would; it is a manifestation of the sovereignty of the people
In a parliamentary system it constitutes a government (the government will usually be drawn from among its members)	It will not affect the formation of a government
Its own accountability to the people depends largely on periodic elections	It is unlikely to have any mechanism by which it is accountable to the people (other than in that decisions may be submitted to them through a referendum)

In any of these (and other possible) chains of institutions, other bodies are likely to be involved. Government departments and electoral bodies are the most obvious; special committees may be involved, as will (almost certainly) local and perhaps foreign experts. Civil society will offer input and perform a variety of roles.

Different patterns

In the contemporary period, the commission has been used extensively in Africa, including Tanzania [1965], Ethiopia [1994], Uganda [1995], Eritrea [1997], Zimbabwe [1999], Rwanda [2003], Kenya [2005; 2010], and Zambia (four times). We suggest why this may be so in part 3.2.3.

It has also been used in Afghanistan [2004], and in Pacific island countries such as Papua New Guinea [1975], Fiji [1997 and earlier], Bougainville [2004], and Nauru [2010]. States or territories associated with the United States tend to use constitutional conventions, though these may be preceded by commissions—as in American Samoa in 2010.

Asia, Europe, and Latin America have more often used only a constituent assembly. India led the way in Asia [1950] and was emulated by Nepal [1951 and ongoing process]; Indonesia had an abortive constituent assembly [1959]. France [1789] had perhaps the first true constituent assembly, and many European countries have followed suit, including Norway in 1814 and Italy after World War II, and some Eastern European countries in recent years. In the modern era, many European countries have carried out constitutional reviews through ordinary legislatures.

The USSR had a short-lived constituent assembly after the revolution. In Latin America the constituent assembly, without any preparatory commission, remains the major body.

Some francophone African countries, and a few others, have used the device of a national conference. The origin of this can also be traced back to the French constituent assembly—which again shows the difficulty of exact terminology.

3.1 Institutions with multiple roles

3.1.1 Introduction

The bodies discussed here are mostly fairly large, and they are often charged with a number of functions: educating the public, collecting views, developing guiding principles, and drafting and adopting a constitution. (Some perform only a few of these roles.)

The distinctions among the various bodies are also not precise. A national legislature has a clear role. But a constituent assembly may also be a legislature. And the boundary between constituent assemblies and national conferences also is not a clear one. In this section we consider constituent assemblies and national legislatures together. National conferences, a phenomenon largely found in francophone Africa, are addressed separately.

3.1.2 Constitutional assemblies

Here we discuss bodies that fit this following broad description: a body designed to represent the nation, assigned—at a minimum—the task of debating in detail a draft constitution of the country, and of approving that draft. It may or may not also have the task of preparing the first

draft, or have the final responsibility for passing it into law. We use the phrase “constitutional assembly” here because it is wider than the phrase “constituent assembly.” We include “regular” legislatures that are responsible for a new constitution or constitutional revision. If a comment applies specifically to legislatures, we make that clear. Comments that relate to “constitutional assemblies” apply to any representative body charged with making or revising a constitution.

The significance of the common phrase “constituent assembly” is that it refers to a body representing the people that is vested solely (or mainly) with “constituent power.” A Nigerian constitutional authority, B. O. Nwabueze, wrote “[Constituent power] is a power to constitute a frame of Government for a Community, and a Constitution is the means by which this is done. It is a primordial power, the ultimate mark of a people’s sovereignty” (Nwabueze 1974: 292). In some countries it is assumed that the people’s constituent power can be exercised by parliament; in some the tradition is that a separate body is required, and usually such a body does not have the power to make ordinary laws; the parliament alone retains that role. But views may change—especially because of the highly political atmosphere that often surrounds constitution-making. A Kenyan court in 2004 decided that a new constitution could be made only by a directly elected constituent assembly, or possibly a parliament elected for the purpose; failing this, a referendum was required—which was a highly questionable decision.

We can compare the main characteristics of a constitutional assembly and a parliament:

There is no single model of constitutional assembly, and it is not really possible to say that certain minimum requirements define such an assembly. Even names vary; many combinations of the words “constituent” or “constitutional” with such words as “assembly,” “convention,” “congress,” or even “conference” have been used to name (and describe) bodies whose primary responsibility is to change or make the constitution. In some languages there is no distinction between “constituent” and “constitutional.” But in languages that do have both terms, “constituent assembly” has a particular appeal because it implies that it is the people’s representatives who make and adopt the constitution. In Germany this phrase was rejected and “parliamentary council” was used—one of several measures designed to make it clear that it was not the final constitution for a united Germany that was being prepared.

Constitutional assemblies differ in size and composition and in how their members are chosen. They also vary in their roles, although they must at least discuss and adopt a constitution. Some are national bodies preparing a national constitution, while others are subnational bodies—such as the body that prepared the Bougainville constitution [2004], the Kashmir constituent assembly of [1956], and the assemblies of the individual states of the United States.

Legislatures and assemblies: The relationship

Possible relationships among special constitution-making bodies and “ordinary” legislatures are these:

- There is no “regular” legislature at all, and all efforts are focused on the constitution-making process through the constitutional assembly.

- The regularly elected legislature alone has the task of constitution-making or revision (and it is not elected specifically for that purpose).
- The legislature is chosen by elections in which the constitution is the only or a major issue, and it has the task of making the constitution.
- The legislature is also the “constituent assembly,” though it is analytically two separate bodies (e.g., as in India, Nepal, Papua New Guinea, and South Africa).
- All the members of the legislature are members of the constitutional assembly but there are also other members of the constitutional assembly, and the two bodies sit separately; the regular legislature as such has no role in connection with the constitution.
- All the members of the legislature are members of the constitutional assembly, but there are also other members of that assembly, and the two bodies sit separately. The regular legislature also has a role in connection with the constitution (as in Kenya [2005]).
- There are two completely separate bodies, with no (or no significant) overlap in membership, and the regular legislature has no role in connection with the constitution (e.g., Bolivia and Uganda).
- There are two completely separate bodies, with no (or no significant) overlap in membership, and the regular legislature does have a role in connection with the constitution.

If there is both a legislature and a constitutional assembly, each of which has a role in the constitutional process, how are these roles divided? The role of the legislature may be limited to forming the assembly and other organs of constitutional review. But the legislature may insist on having the last word (or a later word). So the constitution adopted by the assembly may have to go to the legislature for further approval (as happened in Kenya in [2005]). This is an unsatisfactory arrangement: if the assembly is inclusive, it is odd that its product should then go to the less-inclusive legislature. And if, as in Kenya, the members of parliament are also members of the assembly, they may be tempted not to engage in that body because they will have the chance to decide on the constitution later, in the legislature.

If one body operates as both legislature and constitutional assembly, how is the difference marked, if at all? In Ceylon (now Sri Lanka) the constituent assembly sat without a mace, the symbol of royal (governmental) authority. The two bodies could sit in separate places, but this would create logistical problems if both needed to sit on the same day. A different person might preside. The session for each might be marked by its own formalities—separate prayers, for example. The rules of procedure might be slightly different—but it would be hard to make them significantly different for similar types of activity. There is a good reason for having more demanding quorum rules for the constitution-making body.

In Nepal [ongoing process] the interim constitution provided for a committee of the constituent assembly to carry out the legislative work. The motive was to prevent the work of the constituent assembly being held up because the parliament needed to meet. However, this was never brought into effect. It seems there was an unwillingness to leave the parliamentary work to a committee. There were twenty-five parties in the assembly and all would want to be in the parliament, yet some had only one member.

Box 36. The nondeliberative constitution-making role of parliament

Parliament may have—or give itself—functions in relation to the constitution-making process other than debating the contents of the constitution. It may well have passed the laws setting up the process. It may have a role in appointing members of a constitutional commission. It may have to vote the necessary resources for the process. It may insist on overseeing the process, even if it cannot control it. In Kenya from 2000 to 2004 and again from 2008 to 2010 the legislature established a select committee that carried out these roles. The committee was important if amendments to the governing legislation had to be passed. Its makeup reflected the party composition of the parliament. In 2008–2010 the committee was also given specific roles by law (including decision-making roles about the content). The Somali process that began in 2009 emulated this model, but the role of its parliamentary committee was unclear.

Arguments for and against separating the legislature and the constitutional assembly

A constituent assembly may be seen as representing the people’s sovereignty. It may also be seen as a way precisely of ending legal continuity, marking a break with an autocratic past, or having a genuinely “home-grown,” or autochthonous, constitution rather than one that owes its legitimacy to its colonial history (as in Papua New Guinea [1975]). It has been argued that it is better to have a constituent assembly, which is somewhat different from the ordinary legislature, make the constitution, precisely because it is not the ordinary lawmaking body and does not have the same vested interest in the document that is to be drawn up; it should not “act as judge in its own cause.” This benefit will disappear if the constituent assembly turns itself into the

Box 37. South Africa: One body, two roles

Under the interim constitution, elections were held for a parliament that was also the main constitution-making body. That election was an important milestone; it was the first time most people had voted. It would have been impossible to produce a separate, more legitimate body to deal with the constitution.

This had other advantages. All the newly elected MPs could be involved in constitution-making. Only one secretariat was involved, and only one building needed. It has been observed that although the African National Congress was the dominant party, “the executive did not control the process, as it might have in an ordinary parliament.”

legislature under the new constitution (as in Timor-Leste [2002], for example). When there is significant distrust of politicians and parties, a separate constitutional body may have greater popular support (for which reason politicians may not be prepared to go along with such an arrangement).

What are the arguments against separating the legislature from the constitutional assembly? Time and expense are clearly relevant; almost certainly a special assembly will take longer than some sort of expert commission process, and probably even than a regular legislative review (although these can also be slow). It will almost certainly be more expensive than if it is parliament that has the role.

From the perspective of interested groups, one disadvantage of a special assembly is likely to be its unpredictability. People who commit themselves to a constitution-making process would like to be able to predict the outcome, in the sense of the constitution they will produce. The more “popular” the composition of an assembly, the less predictable it is likely to be. Designers of the assembly may try to make it more predictable—by bringing in members through political parties, by limiting the voting possibilities of members, and through the internal structures and rules of the constituent assembly. Results of such efforts cannot be guaranteed. Even party discipline may collapse; in the Kenyan National Constitutional Conference it proved impossible for parties to control their members, as ethnic considerations dominated.

Various constituent assemblies have exceeded their mandates. Jon Elster has written:

[T]he [U.S.] framers ignored the instructions from the Continental Congress on three crucial points when they decided to write an entirely new constitution, to seek ratification by state conventions rather than state legislatures, and to require ratification by nine states rather than by unanimity. In France, the constituent assembly decided to ignore the instructions of their constituencies with regard to both the voting procedures and the King’s veto. In Germany, finally, the constituent assembly successfully insisted on ratification by the state legislatures rather than by popular referendum. The German framers also managed to resist some, although not all, of the decentralizing instructions that the Allies had given them (Elster 1995: 375).

Bodies in some processes have been hybrids: legislators are members of the constitutional assembly, but there are many other members. This may seem to be a reasonable compromise, but has its own problems. If the parliamentarians are many, it may be impossible for both bodies to sit at the same time, which may seriously hold up the constitution-making process. They may also have influence greater than their numbers would suggest, raising risks of use of such influence for their own benefit.

Legal status of assemblies

In revolutionary or transitional times, the “legality” of assemblies convened according to the rules set forth in a previous constitution may be doubtful. American commentators have argued

about whether the actions of the constitutional convention were “illegal” and therefore reflected the founding of a new legal order. The French constituent assembly came into existence to raise revenue for the French king. But as the existing system fell apart, it transformed itself into a constitution-making body. Even in this, revolutionary, case, the body itself was convened by the existing authority. In some situations of constitutional crisis, or even vacuum, constitutional assemblies have been brought into being by actions of outside forces, whether in the form of occupying powers, such as the victorious countries occupying (West) Germany after World War II, or the United Nations in Cambodia [1993], or the United States in Iraq [2005]. In Vanuatu [1980], members of the various local parties formed their own constituent assembly, without any formal legal framework, and proceeded to make a constitution. It was accepted by the colonial powers (France and Britain) and became law.

The South Africans, as mentioned earlier, wanted to preserve legal continuity. So the 1993 interim constitution and the final constitution were made by and according to the procedures of the parliaments of the time.

Other assemblies have come into existence in more “normal” times, and have been formed by existing authorities for the specific purpose of making a constitution. Those authorities might be the ordinary legislative process (as in Kenya in the later 1990s) or military authorities (as in Nigeria in 1977 and 1988). In those circumstances it is perhaps easier to design a process and a structure for the assembly. But it is probably rare that a constituent assembly is formed without great pressures from contending forces, even if those forces are not at war. In fact, in less-fraught constitution-making circumstances, perhaps a special constitutional assembly is a less common way to make a constitution. Among the constitutions made or amended in recent times in noncrisis circumstances are those of Finland, Sweden, and Switzerland, where changes were made by the ordinary parliament. This may also reflect national traditions—though Switzerland’s individual cantons do sometimes use constituent assemblies to make their cantonal constitutions.

For the purposes of this handbook, we assume that the important consideration for constitutional process designers will be whether the constitution is acceptable to the nation, something that is likely to depend more on its content and the process of making it than on legalistic arguments about its foundations.

Design

This book is written for those who do have a chance to plan, and there are some lessons that can be learned from the past. At the least, it may be useful to have a checklist of aspects of assembly design. Some main objectives of rational constitutional assembly design are:

- legitimacy in the eyes of the public;
- a body that acts on the basis of its perceptions of public interest and not of self-interest (of its individual members, of itself as an institution, of the parties or groups from which the members come or that they represent); and
- a body that has the necessary competence (including having access to necessary technical assistance).

A purist view would be that a true “constituent assembly,” as the embodiment of the sovereignty of the people, ought to have the entire constitution-making power, subject possibly to the requirement of a referendum. In reality many assemblies have done far less. Past assemblies, on a continuum from widest to narrowest range of functions, include those in table 8.

There is no “right” set of tasks for an assembly. But there are a few considerations that may be helpful in planning those tasks.

On “civic education” (see part 2.2.2), the constitutional assembly may itself need to be educated about its task, and may be poorly equipped to educate the public. And the sort of human, logistical, and other support that the constitutional assembly will have available may not be adequate for the task. However, in South Africa the assembly did take on this role effectively by having its administration hire and train a team of civic educators.

Whether a separate commission or other body should prepare a draft is much debated. One can argue that the people’s sovereignty would be better expressed if the constitutional assembly were to carry out both these operations, because the document prepared in the first stage will almost inevitably impose some restraints on the contents of the final document. If a first draft, prepared by another body, takes account of public opinion, and the document is then revised by a constitutional assembly, it will be, in theory, the outcome of two quite different processes of ascertaining public sentiments (and, if it then goes to a referendum, of yet a third). If the first draft is prepared before the constitutional assembly sits, then one would have to ask when the “political bargaining” would take place: with the drafting commission, or left until the constitutional assembly, in which case is it public or behind the scenes?

Table 8: Functions of constitutional assemblies

Countries	Functions
Afghanistan [2004]	Approving with little discussion a draft that then requires further act of adoption
Cambodia [1993]; Timor-Leste [2002]	Carrying out or supervising the whole process designed by others from draft through promulgation
Nigeria [1979, 1999]; Kenya [2005]	Thorough debate on the existing draft, with freedom to change it; further act of adoption by another body
Uganda [1995]	Thorough debate of existing draft, but needing supermajority to amend draft; final act of adoption by another body
United States [1787]; India [1950]; Bolivia [2009]	Preparation of draft; then full debate; further act of adoption or promulgation required
Vanuatu [1980]; Namibia [1990]; Nepal [ongoing process]	Designing the whole process (other than formation of the constituent assembly, and the adoption process) and carrying it out from public consultation (if any) to draft to promulgation

If there is no other body, the assembly may have to be charged with responsibility for public consultation and provided with the necessary staff members. However, this may be a task that an assembly is not well equipped to carry out—the task requires special expertise, including perhaps computer programmers and data entry personnel. (See part 2.3.4 on the personnel needs of a process.) And, especially if the assembly is also the parliament, or parliamentarians are also members, it may be undesirable for them to conduct public consultation meetings: some of the issues the public wants to raise may be concerned with the competence and commitment of legislators generally, or even the particular members at the meetings, and the public would naturally feel hesitant to speak freely.

Size

Constitutional assemblies have a tendency to be large, often too large, though they have varied widely. (See table 9.) If dissatisfaction with parliament is one reason for having a constituent assembly, it will often be felt that representing the whole people requires a larger body. If, as in Kenya, parliamentarians are members of the assembly, the latter must be larger, and there it was decided that others should outnumber members of parliament. Realistically, if a section of society has one member it may feel some sense of satisfaction, but is unlikely to be able to influence decision-making at least by its voting force (except perhaps if a two-thirds vote is on a knife-edge, or if unanimity is required at some point). But there is another role than that of voting: articulating the issues of the various sectors of society.

Large bodies are hard to control. Decision-making is difficult, even in committees because they will also be big, unless they are numerous (in which case providing secretarial and other assistance and keeping track of what the committees are doing will be hard). With large bodies, there is more risk that members will make rhetorical speeches rather than contributions of substance.

Size will be less of a problem if the function of the constituent assembly is mainly to endorse a document prepared elsewhere (such as Afghanistan's Constitutional Loya Jirga); the body will not really have to understand the document in great detail. Most constitutional assemblies are expected to discuss the issues in detail, and even those that are not expected to may insist on doing so.

Membership

A dilemma in constructing any constitution-making body is how to balance the wishes of the people with those of the political classes, especially of political parties. After or during periods of conflict parties may not really represent the people, and the role and control of parties may be an issue in constitution-making. Political parties have interests as parties, and politicians as politicians.

On the other hand, there is a risk that a constitution that is adopted without being accepted by politicians, and even by the organized parties, will not work. A good working relationship between the politicians and the people is essential, and the final document will probably be a product of compromises between these two groups, as well as among other groups in society.

If the legislature is the constitution-making body, it will be composed according to the usual procedures (though if it is elected with a view to constitution-making, the election results may be slightly different than those in regular elections). If the constitution-making assembly is quite separate from parliament, it may seem pointless to use the normal election method, and permit the parties to campaign in the usual way—the composition of the assembly will probably largely mirror that of parliament. However, different people might be interested in standing for elections.

The composition of various constitutional assemblies is shown in table 9.

This shows that some assemblies have been designed to represent the people, sometimes to the exclusion of traditional politicians (who may be otherwise occupied with the regular legislative business, in a separate body). The categories of “people” include, and indeed often emphasize, those marginalized in the past; their demands may be the very basis of the assembly process, as in Bolivia and Nepal. One problem with such a basis is that new groups tend to emerge, demanding their place in the assembly. This was true in Nepal, where the interim constitution had to be amended to make the membership more comprehensive, and the selection process correspondingly became more complex.

Election and selection of members

Assembly members (other than regular legislators) may be chosen by:

- direct election by the people;
- indirect election by existing political bodies such as local government councils;
- election or selection by bodies, not necessarily normally politically active, that would not usually choose representatives to a legislature (such as civil society or parties—other than in a party-list system—or even an individual such as a king); or
- nomination by the chair of the assembly, or some other person or body, for reasons connected with the makeup of the body and its expertise or to repair shortcomings in its representativeness.

The arguments for and against direct election include the following:

For:

- it is democratic;
- it can lead to fair representation; and
- it is likely to be acceptable to people.

Against:

- it is expensive and time-consuming;
- if the electoral system is faulty (this may be one of the issues to be decided when debating the new constitution), the assembly may not be representative and may have an interest in preserving the faulty system;

Table 9: Composition of constitutional assemblies

Country and body	Composition	Population of country	Assembly size	Women
Bolivia [2009] Constituent Assembly	Directly elected	9 million	255	35%
Bougainville [2004] Constituent Assembly	Members of two existing governmental bodies, 36 in the Interim Bougainville Provincial Government and about 100 in the Bougainville People's Congress	185,000	136	8
Ecuador [1998] Constituent Assembly	Directly elected members	12 million	90	28.5%
Ecuador [2008] Constituent Assembly	Mixed system of some members representing provinces (100) and some citizens overseas (6) and also party lists (24)	13.7 million	130	34%
Eritrea [1997] Constituent Assembly	105 members of the legislature; the rest elected by regional assemblies or selected from representatives of Eritreans abroad	3.2 million	527	30% quota
France [1789] Constituent Assembly	291 deputies of the clergy, 270 of the nobility, and 584 of the Third Estate	28 million	1,145	0
Germany [1949] Parliamentary Council	Indirectly elected (state legislatures elected some of their members)	50 million	65	About 4
India [1950] Constituent Assembly	Mainly elected by provincial legislatures	345 million	About 300	About 15
Kenya [2005] National Constitutional Conference	All members of parliament (222): 3 elected by each district council; (no more than one councillor, at least one woman); 126 chosen by civil society; 1 member from each registered party; 13 nominated by chair to represent other aspects of society; constitutional commission members (29)	31 million	629	About 136
Nepal [ongoing process] Constituent Assembly (Constitutional Assembly in Nepali)	240 members elected by first-past-the-post, single-member geographical constituencies (2 of those elected were nonparty candidates); 335 elected on party-list system; 26 nominated through party-based consensus	26 million	601	197
United States [1787] Constitutional Convention	Elected or selected by individual states	4 million	55	0

Box 38. Members' active participation

The Kenyan constitutional commission looked at the contributions of different types of members to plenary debate. In quantitative terms they found that members of parliament made a somewhat smaller contribution than their numbers would suggest, while members of the commission that prepared the constitution draft that formed the basis of discussion contributed significantly more. Only 61 percent of the members of parliament spoke at all, while 91 percent of NGO representatives did, as did 89 percent of representatives of religious organizations. Only 46 percent of those appointed to represent “special interests” did so. These figures probably reflect the lack of belief on the part of many members of parliament that the process would lead anywhere, and the much greater commitment of civil society and district representatives. It was probably a mistake to include members of the drafting commission in the constituent assembly—they did not have a vote, but some had considerable influence over thematic committees.

- it may be dominated by political parties;
- people of competence and integrity may be reluctant to stand for election (or parties may not accept them); and
- elected members may feel compelled to stick to their mandate and be less prepared to compromise.

Many assemblies are made up by a combination of methods.

It has been argued that, whatever the usual electoral system, broad representation of the people in the constitutional assembly would be best achieved by a list system of proportional representation, with a low threshold, to ensure that even small parties are present. In some countries a national proportional representation list system has been adopted (in South Africa, for example), or a list system but using smaller constituencies (as in Namibia). The system adopted for the Nepal constituent assembly was a mixture of single-member geographical constituencies (240 members) and party lists (335 members). It did not rely on the natural tendency of proportional-representation systems to be more inclusive (because people did not trust the political parties to be inclusive in their selection of candidates) but imposed rigid requirements in terms of gender, caste, and ethnicity for the lists and the seats. In Bolivia a party could not necessarily hold all three seats from a district even if it won sufficient votes to do so: if there was another party with at least 5 percent of the votes in the district, it would take the third seat. This was designed to protect small parties. But proportional representation systems do give a great deal of power to political parties.

However, some assemblies have included members drawn from lists not put together by parties. For example, half the lists for the election to the Geneva constituent assembly established in 2008 were party lists, with the other half being lists of people with particular interests (such as

homeowners, women, and retired people), including one list put together by a federation of 480 local organizations of all sorts). It is common for a proportional representation list system to provide that a party will only have any members elected as members of parliament if it achieves a certain threshold percentage of the votes cast—at least 1, 3, or even 7 percent. The aim here is to prevent fringe, even extremist, parties from winning seats. But the threshold might be lower for a constituent assembly precisely in order to encourage inclusion of a full range of national interests.

Entitlement to vote in an assembly may be wider than for parliamentary elections. In Eritrea some members of the assembly were elected by Eritreans abroad (though in some other countries, claims by the diaspora of the right to vote have been rejected). Afghans in refugee camps in other countries were also to vote for the Constitutional Loya Jirga. In the case of a country emerging from serious conflict there may be many exiles, but tensions can exist between exiles and those who remained. In Kenya a court held that prisoners could vote in a referendum; they were debarred from voting for parliament. A similar possibility might exist for voting for a constitutional assembly—depending on the words of the existing constitution; if there were no constitution, an expansive view of the right to vote might be possible.

Some other selection process by civil society has been used in a number of constituent assemblies, including Afghanistan [2004] and Kenya [2005]. There are risks in such a system, including those of undue influence or even bribery in “small-circle elections” resulting in new sorts of distorted representation. But if the alternative is that elections are exclusively dominated by unreformed parties, this may be a risk worth running, and in a system where civil society is genuinely responsive to society those risks may not be realized.

Nomination of a small number of members could be designed to bring in representatives of groups and sections of society that are underrepresented or individuals whose experience will add weight to the deliberations or legitimacy to the body. Such a nomination could be made by the chair of the body (as in Kenya, where the chair used the power to appoint some persons from the business sector, including media). But in some instances the chair is not identified in advance. It could be by agreement among parties, as in Nepal, but there the parties to some extent undermined the understood purpose (to bring in expertise without regard to party affiliation) by sharing out the slots among the major parties and not necessarily using them to bring in experts.

Relatively few countries make voting a legal duty. It has been suggested that, even in a country with a practice of compulsion, this should not apply to elections for a constituent assembly. But in New Jersey in 1966 only about 3 percent of the voters voted for the constituent assembly members, which rather makes nonsense of the idea of people’s participation.

Campaign

If public funding is usually available for election campaigns, arguably it should also be available

for campaigns for election to the constituent assembly. But there may be many nonparty candidates in such an election. It has been suggested that there should be a publicly financed information sheet to educate the public about all candidates. A few countries have banned separate party rallies and campaigning, providing only for joint, publicly financed election meetings (e.g., Tanzania in the one-party state period). That plan might be worth considering for elections to constitutional assemblies.

Federations or federating countries

Indirect elections (usually by a lower-level legislature) are common in federating countries, as in the United States at the time of the constitutional convention, and to some extent in India in 1946. The shortcomings of this approach are that:

- it may make the assembly a process of bargaining among units and not a process of the people; and
- it may mean that the assembly mirrors distortions in the makeup of the federal state—the very distortions that may be involved in the disputes underlying the demand for a new constitution.

Should representation of units be based on equality or population? The former favors smaller units. Issues of representation should be looked at in the light of voting arrangements, among other things: what number of votes is needed to carry a motion and what number is needed to block one?

Qualifications of members

One might argue that to make the assembly as representative as possible there should be no requirement other than being a citizen, and perhaps a registered voter. Some countries might consider allowing members of the national diaspora to be members of the assembly, even if they are not citizens. They may have left the country against their own wishes, under oppression or conditions of insecurity, and may not have given up aspirations to return to it.

Qualifications imposed in actual cases have included Nigeria's requirement in 1977 that members be "indigenes" of the state they represented (meaning that their tribe is one that "belongs" in the state). Nigeria excluded traditional paramount rulers in 1988. Both Nigeria and Nepal (2007) excluded current public servants, and Nepal precluded payment to anyone from government funds. Nigeria in 1977 and 1988 required that a person have paid taxes for the previous three years (which might discriminate against women); while Nepal excluded anyone owing the government money. Nepal's concern to exclude the corrupt led it to bar anyone convicted of crime involving "moral turpitude" or corruption, or of any electoral offense in the previous two years. It went to the extent of barring those blacklisted (under law) as defaulters to banks. And Nepal also barred those under twenty-five years old—thus excluding the voice of youth.

Having a large number of candidates can be confusing for voters. Requirements to show a certain level of support may reduce those numbers. In Nigeria in 1977 the number required was

ten. In Nepal in 2007 only a proposer and seconder were required. Another device for discouraging frivolous candidature is to require a financial deposit. In Nepal an individual standing for a geographical constituency had to put up a deposit of 3,000 rupees (about \$45 in United States dollars) and a party putting forward a list for the proportional representation election 20,000 rupees (about \$300).

Experts as members?

Elster has suggested that experts should not be members because the constitution should be the outcome of bargaining between the representatives of the people, rather than an expert affair: “Lawyers will tend to resist the technically flawed and deliberately ambiguous formulations that may be necessary to achieve consensus” (Elster 1995: 395). But experts have the same right as any other citizens to stand for election, and this exclusion may produce a distortion of expertise. Some countries have provided for specific seats for persons with certain expertise, while in many others some members will have expertise, with lawyers often being prominent. In India political parties sought to ensure that some leading experts were included in the constituent assembly.

Nonmembers with special relationships

In Kenya [2005], certain observers were permitted to attend, and to interact with members informally during breaks. These were drawn from civil society, and were selected by a committee (from thousands who applied). One principle was to allow groups that had important potential input, but were not formally included in the assembly, to be present. The observers could attend plenary sessions (as could other members of the public) and were assigned to relevant committees (unlike members of the public), but could not speak or vote in either. Twenty-eight organizations were also accredited, which meant they could lobby members, distribute literature, and hold meetings on the grounds of the constituent assembly.

In other contexts, government observers have also been included—perhaps unwisely. In Afghanistan [2004], constitutional commission members who prepared the draft were included as observers along with the transitional cabinet and the heads of the judicial and human rights commissions. They did not have the right to vote or express an opinion unless they were asked a question by one of the members of the Constitutional Loya Jirga.

Payment of members

If constitutional assembly members already hold paid public positions, perhaps as legislators, there is little reason to pay them more for their constituent assembly roles. But in some countries legislators are adept at claiming allowances for everything they do. People who otherwise would not be paid, or not paid much, would have a legitimate claim to be paid for this public service. Ideally, salaries should not be fixed by the members of the constituent assembly themselves. This could lead to abuse, discrediting the assembly.

Structure of the assembly

It seems unnecessary to have a second chamber for a purely constitution-making assembly. It is meant to represent the entire people, and it does so in one chamber. Conflicts with any other body should be avoided. The one purpose that a second chamber could serve would be to prevent a body that is otherwise not subject to any realistic constraints from straying beyond its mandate. To be able to do this, the second chamber would have to have great public legitimacy—which might falter under the strain of disagreement.

Committees

It is common for much of the work to be carried out in committees. In addition to committees to discuss substantive issues, there will probably be some addressing administrative matters. Some may resemble the committees often found in legislatures (on the discipline of members, for example). Others may be needed because the assembly is a new body without an existing structure. For example, there may be a committee concerned with the welfare of members, their housing, transportation, and so on. And the special nature of the work of the assembly may necessitate special committees such as those on civic education, the collection of views, and the education of members. Committees have included:

- a capacity-building and resources-management committee and a committee for public opinion collection and coordination in the Nepal process; and
- a staff and finance committee, a credentials (members') committee, a house committee (concerned with housing, library, and other facilities), a press gallery committee, a steering committee, and an order of business committee (to plan the future course of the constituent assembly) in the Indian assembly.

How should topics be assigned to committees? Sometimes the structure of the existing constitution may be used as the model. This has the disadvantage that the structure of that constitution may be dictated by that of the old, because of the committee structure. Sometimes the committee structure closely reflects national concerns, as it did in the Bolivian constituent assembly, which included committees on “education and interculturality,” “hydrocarbons, minerals, and metallurgy,” “water resources and energy,” “integrated Amazon development,” and “coca.”

The South African assembly was divided into the following committees:

- Committee I—Democratic state (preamble, citizenship, equality, supremacy of constitution, elections, freedom of information, accountability, separation of powers);
- Committee II—Separation of powers, legislative procedures, constitutional amendment, structure of government at different levels, legislatures, electoral system, traditional leaders, executive;
- Committee III—Relationships among levels of government;
- Committee IV—Fundamental rights;
- Committee V—Judicial and legal systems; and

- Committee VI—Public administration, financial institutions, transformation, security services.

The following criteria might usefully be borne in mind:

- Committees should be no larger than about thirty members if the benefits of having a smaller body are to be realized.
- Though it is useful to have expertise in committees, it is not practical to give members a free hand to choose their own committees—committees will become uneven in size. Also, it is often important to have nonexperts on committees as well as experts; the whole idea of a constitutional assembly is to have the people’s voice, rather than only experts, involved).
- The membership of committees should be balanced in gender, ethnic, and other terms, if possible.

If parliament is in charge of the process, the committee structure may be different. Parliament has many other functions to perform, and other committees will exist. Parliament may therefore decide not to assign all its members to the constitution-making process, but to set up one committee with that responsibility. That committee may operate essentially like a constitutional commission.

In Zimbabwe [ongoing process], a parliamentary select committee had an oversight role in the constitution-making process. It appointed seventeen “thematic committees” with 30 percent legislators and the remaining members drawn from “stakeholders” outside parliament.

Place

It may seem natural for the assembly to have its main seat in the national capital for symbolic reasons, and because that is likely to be the most accessible town. There may be good reasons for having it sit elsewhere:

- to be away from the seat of the national legislature;
- to symbolize the break with the past;
- to avoid a place still affected by turbulence; or
- to avoid the constituent assembly being subjected to undue pressure from the people and organizations of the already powerful capital city.

Similar factors may suggest not using other cities. In Bolivia the constituent assembly sat in Sucre, an old colonial capital, but not the current national capital where the parliament sits. But to some extent the constituent assembly became hostage to the demands of the Sucre people about the city’s constitutional status.

It may also be necessary to strike a balance between protecting the security of the members and ensuring that the security forces are not in a position to overawe them.

Even if the assembly sits in the same town as the legislature, it would be best for it not to sit in the same venue. But it may not be easy to find a place large enough for the assembly, which must have not only a hall for plenary sessions, but many rooms for committees, for support staff and facilities,

and (if public access is to be permitted) for public facilities. The Kenyan body sat in a large hall designed for dance performances before tourists (chosen in preference to a city-center conference hall to minimize the risk of delegates slipping away to their offices or to shop). It was not easy to see or hear delegates in the spectator seats; a shortage of rooms was to some extent solved by the use of tents, but this meant that secrecy of deliberations was impossible. In Nepal the use of a conference center meant that the chair was on a stage, and the stage was the only part of the hall visible from the public gallery. In Afghanistan, a large tent was erected.

Support and facilities

The constituent assembly will need:

- an administrative management body—which will probably require staff members with a wider range of skills than a normal legislative secretariat (see part 3.3 on establishing this body);
- logistical arrangements for members (possibly including housing);
- printing facilities of its own, or access to good facilities elsewhere;
- communications (radio, computers, TV studio, and the like);
- vehicles or access to vehicles if it is to travel; and
- security arrangements.

(For a more in-depth consideration of what is needed, see part 2.3.)

Duration

Predicting how long it will take a constituent assembly to complete its work may sometimes be hard—especially if the assembly has the entire constitution-making role. If it is set up to debate a full existing draft, a clear timetable may be possible—especially by limiting the life of the constituent assembly in order to limit its role.

Time limits prevent groups with more patience (but not necessarily more concern for the national interest, whose interest may be in financial gain) from obtaining advantage. On the other hand, an assembly composed partly of people unused to deliberative work of this type may take some time to understand and feel comfortable with its role. If the process is too rushed, more experienced members (probably seasoned politicians) may have the upper hand.

What happens to an assembly once it has finished its task?

It is important that the law (if any) should be clear about what happens when the assembly finishes its task. The interim constitution of Nepal is a little unclear: “The term of the constituent assembly is to be two years from the first sitting” but “on the day of the commencement of the Constitution promulgated by the constituent assembly” its task is to come to an end.

Turning the constitutional assembly into the first legislature under the new constitution may not be desirable. The assembly may be quite different in its makeup from a regular legislature,

as we have seen. But it is not easy to prevent this by existing law if the assembly is perceived as having full constituent power—in other words, it creates the new legality, which overrides existing law.

Conclusion

The context, as well as national tradition, may often define the choices listed above. Designers of the process need to follow models of other countries with care, and to learn from their own country's past efforts and experiences.

3.1.3 National conferences

National conferences (sometimes called national conventions) are usually large, unelected bodies composed of representatives nominated by a wide range of interests established to discuss constitutional and other options for the future in situations of intense national crisis in the period of transition from authoritarian (single-party or military dictatorship) regimes to more democratic regimes. They were established mainly (but not only) in French-speaking countries in Africa from the late 1980s to the early 1990s. They were usually established rapidly, in response to a crisis, and often provided the first opportunity in two or three decades for wide-ranging public discussion of the issues facing the country. Their proceedings were generally broadcast live on television and radio.

In addition to government representatives, most national conferences consisted of representatives selected by interest groups such as opposition political parties and civil associations. They tended to be much larger than constituent assemblies; the national conference in the Democratic Republic of the Congo, 1991–1992, had more than three thousand participants. In terms of the constitution-making tasks that they performed, a minority of national conferences developed and adopted a constitutional text, in much the same way that some constituent assemblies do. More commonly, however, the main constitution-making roles involved development of principles and proposals that were shaped into a constitutional text by a transitional legislature established by the national conference. And in part because they often declared themselves sovereign and replaced the existing national executive and legislature, many national conferences had extensive roles beyond constitution-making.

Organizing and managing a conference could be difficult due to the combined effects of such factors as the speed with which conferences were established; the emerging opposition to the existing regime being weak and disorganized in many cases; their large size; and the many groups represented in them.

Origins of national conferences

The origins of most national conferences can be found in intense fiscal and political crises, some involving the collapse of banks; the inability of the state to pay the salaries of public

servants; national strikes; and violent clashes of unions and opposition groups with military forces. Such crises have usually been exacerbated by international community pressure—from the mid-1980s, for structural reform of economies, and from 1988 to 1989, for political reform. The extent of the crises meant that the government had little or no legitimacy and so was unable to advance reform through existing institutions. Further, in most cases, political parties had long been banned or were extremely weak, resulting in little support for establishing a new national legislature or an elected constituent assembly as the way forward. There needed to be some other institution that enabled a national government with little legitimacy to engage with a wider set of interests that had not coalesced into a legitimate opposition party or group.

The best-known national conferences are those that were held in French-speaking Africa, the first being in Benin in February 1990. Subsequently they were held in Gabon, Republic of the Congo, Mali, Niger, Togo, Democratic Republic of the Congo, Madagascar, and Chad in the period from 1990 to 1993.

French and other influences

The choice of the national conference as a constitution-making institution in so many countries in crisis in French-speaking Africa was partially influenced by the ongoing connections of those countries with France, which had been the colonial authority in all cases, and continued to maintain close links in most. The significance of an institution that was to be seen as a model for the national conference—the États Généraux, which had met in Paris in 1789 on the eve of the French Revolution—was highlighted in the 1989 bicentennial celebrations of the French Revolution held in France and widely reported in French-speaking Africa. The education of the elites that organized the national conferences in France or in French colonial schools had emphasized the importance of the revolution and the États Généraux.

On the other hand, there were other influences than French links. In particular, large gatherings with some similarities to national conferences were also part of political reform processes developing in other parts of Africa from the late 1980s in countries without a French background, including Ethiopia, Namibia, Somalia, and South Africa. Further, not all French-speaking African countries established national conferences, though there were strong calls for them in the early 1990s from opposition groups in some such countries, for example, Burkina Faso, Cameroon, the Central African Republic, Côte d'Ivoire, and Mauritania.

It is also true that the national conference has not been solely a phenomenon of French-speaking Africa. The first one in Africa was in formerly Portuguese São Tomé and Príncipe, where a December 1989 conference of about six hundred mainly ruling party members had a limited constitution-making role. (It made recommendations for political reform to the ruling political party.) In part because the possibility of using an institution such as the national conference was opened up as a result of the experience of French-speaking Africa in the early 1990s, countries from other historical and cultural backgrounds have also established bodies with some characteristics of national conferences. Examples include Sierra Leone [1991], Russia [1993],

Indonesia (1999–2002 process leading to amendments), and Rwanda [2003] (though most of these might better be regarded as “hybrid” bodies, as discussed below).

Some features and problems of national conferences

Some closely related features commonly found in national conferences, and some associated issues and problems arising in their operation, require brief comment. They concern:

- processes for making initial decisions about establishing such a body;
- the variety of roles and tasks that they carry out, with particular reference to their constitution-making tasks;
- the large size, the composition by representation of interests, and the short duration of the conferences, and some difficulties associated with those characteristics, in particular
 - difficulties in their acting as effective deliberative bodies; and
 - management difficulties, including translation; and
- issues about chairing national conferences and the importance of a forward-looking perspective.

All of these features and issues can readily be considered in light of the experience of the nine national conferences held in French-speaking African countries between 1990 and 1993. Some basic information about those national conferences is summarized in table 10.

In addition, brief comments are required on the constitutional outcomes of those same national conferences.

Processes for establishing national conferences

The haste with which crises forced (usually) reluctant authoritarian governments to establish national conferences meant that there was seldom any detailed agreement negotiated between the government and the loose opposition groups about the goals, composition, and operation of the conference. The lack of such agreements made the work of some of the conferences particularly difficult, with government and opposition groups taking antagonistic stands and failing to cooperate. In Togo, soldiers supporting the president surrounded the conference venue on various occasions, enforced a presidential order to suspend proceedings, and later held the transitional legislature hostage.

The main preparatory work was usually limited to establishing preparatory commissions that decided which groups would be represented. In general, they played no role in selecting representatives of such groups, it being left to the groups to decide their own selection methods. Benin was an exceptional case, where a roundtable process was established in advance of the conference in which the government and the main opposition leaders negotiated basic agreements on the process and some initial principles that the constitution to be developed by

Table 10: National conferences in French-speaking African countries, 1990–1993

Country	Dates/duration	Participant numbers (approx.)	Role: Preparing constitutional principles or proposals, with transitional legislature established by national conference to develop and adopt new constitution	Role: Preparing and adopting draft constitution, usually requiring approval by legislature, head of state, referendum, or a combination of these
Benin	1990, 10 days	488	Yes	No
Gabon	1990, 3 weeks	2,000	Yes	No
Republic of the Congo	1991, 5 months	1,202	Yes	No
Mali	1991, 15 days	1,800	No	Yes
Niger	1991, 4 months	1,200	Yes	No
Togo	1991, 52 days	962	Yes	No
Democratic Republic of the Congo	1991–1992, 17 months (intermittent)	3,000+	?	?
Madagascar	1992, 10 days	1,400	No	Yes
Chad	1993, 3 months	830	Yes	No

the conference would follow. In the process, a degree of understanding was established among key actors in the conference, something that probably contributed to the success of that conference compared to most others. (A case study of the constitution-making process in Benin can be found in appendix A.2. Roundtable processes are discussed in part 3.2.2.)

Roles and tasks

National conferences were multipurpose bodies. Concerning their constitution-making tasks, there were two main variations. Most of the conferences developed some proposals about guiding principles for, or recommendations about, the text of a new constitution. Largely because of time limitations, they then usually established a transitional legislature and executive (at the same time ousting the existing executive and legislature) and gave the transitional legislature the task of developing the guiding principles or recommendations into a new constitution. (In practice, the transitional legislatures normally delegated that work to a

committee.) In most instances the conference also stipulated that the new constitution be approved by a national referendum. In some instances, as in Chad in 1992, a preparatory commission readied the initial draft for the national conference to consider.

The other main variation involved the national conference developing its own draft constitution (usually together with other basic laws, such as a new electoral law). The short duration of the national conferences meant that in the few cases in which this occurred, most of the work of developing the draft had to be done in committees and working groups. While few developed a draft constitution, there were more that initially decided to take to themselves authority to do so, but when time pressures meant they could not meet for long enough to complete the work, they ended up being among the majority of conferences that delegated their authority to some form of transitional council. Chad was one such case. The national conference had authority to debate, amend, and adopt the draft received from the preparatory commission. But when the process took much longer than expected, the conference delegated the completion and adoption of the draft to a transitional legislature, which then took two years to complete the task.

When a conference did delegate authority over drafting the constitutional text to a transitional legislature, it could nevertheless influence the development of the new constitution in two main ways. The first was in establishing principles and proposals that the transitional legislature was required to take into account when determining the content of the constitution. The second was by determining the membership of the transitional legislature.

In addition to their constitution-making tasks, some national conferences addressed past crimes and human rights abuses. When they assumed sovereignty (as many did), they might also take on responsibility for establishing new transitional governmental institutions and planning elections. Without their functions being clearly defined, it could be difficult for participants to give constitution-making tasks their full attention.

Size, composition, and duration

The size, composition, and duration of conferences varied considerably. Table 10 indicates the wide range of numbers of participants in the nine conferences in French-speaking Africa, from a low of 488 in Benin to a high of more than 3,000 in the Democratic Republic of the Congo. Six of the nine cases had more than 1,000 participants. The numbers are approximate because official membership lists often changed, and because there were often many observers without voting status.

Participants were not selected through elections (as is usually the case with members of a constituent assembly). Rather, they were generally nominated to represent an institution, a political party, or an association of some kind. A huge variety of groups was represented, including labor unions, students' and teachers' organizations, human rights groups, professional associations, traditional leaders, religious communities, women's and farmers' groups, and educational institutions. The number of parties, groups, and associations represented varied from

as few as about fifty (Benin) to about five hundred (the Democratic Republic of the Congo).

Generally speaking, a broadly representative organizing body (usually called a “preparatory commission”) would consult before determining the parties, sectors, and groups to be represented, and the number of seats to be allocated to each. It would then be a matter for each party, association, or group to decide on the method of appointment of the delegates to fill the number of positions allotted to it. Some political parties and associations were newly established in the weeks or months before the conference was set up, sometimes primarily for the purpose of getting conference representation. Jennifer Widner reports that it was easier to select representatives of associations and interest groups in countries where there was a tradition of national level “peak” associations, as in Europe, than it was in countries with a decentralized interest group model of the kind more common in British Commonwealth countries. The former were seen as legitimately selecting representatives, while in the latter cases every small association wanted its own representatives. In general, despite claims of national conferences being representative (in Benin the president claimed that the conference would represent “all the living forces of the nation”), the membership selection process resulted in overrepresentation of the political class and the educated elite in countries where the vast majority of the population was neither (Widner 2008).

The duration of the public sittings of conferences included in table 10 varied considerably, but most sat for much shorter periods than is usually the case with constituent assemblies. Six of the nine sat for periods of three months or less, and two for just ten days. These are remarkably short periods for a body intended to negotiate new constitutional arrangements intended to respond to deep crisis and conflict. Among the reasons for this phenomenon is the large size of the bodies, which can make them difficult and expensive to administer.

Issues arising from large size, complex composition, and short duration

The large size and short duration of national conferences are characteristics that could place obstacles in the way of their being effective bodies to deliberate on major constitutional questions. Such problems could be exacerbated where conferences have not been preceded by roundtable processes encouraging initial understandings between opposing groups. Further, short durations sometimes contributed to a tendency to rush the process, making it difficult for opposing interests to enter real negotiations at the conference. There was pressure on allied groups to make agreements and prepare draft texts in advance, or for the conference to delegate most responsibilities for developing the constitution to another body.

Large size and short duration also tended to reduce the opportunity for careful consideration of and negotiation about difficult and divisive issues. Indeed, it was often hard to organize the time needed for all delegates to speak, although there was usually pressure for that to occur. The more time that needed to be allocated to speeches by individual delegates, the less was available for serious debate about reform proposals. Further, there are particular difficulties in

managing deliberation and negotiation in large bodies, especially where there is a high degree of public scrutiny (as was the case with most national conferences). In such circumstances, with little time to speak, participants are often under pressure to take polarizing positions. The pressure can be worse if elections are likely to follow, as participants may then be under pressure to stake out clear positions that appeal to potential constituents, something that in itself can encourage the adoption of polarizing positions.

The size, composition, and short duration of these institutions can also give rise to difficulties with their management. Locating the funds needed to run large conferences was difficult, especially in situations of financial crisis (so this was a factor in the short duration of the majority of the conferences). Their large size and composition through representatives of groups contributed to their unwieldy nature. Tasks such as the registering of participants were sometimes extremely difficult. It was common for unaccredited participants to slip into parts of the proceedings. Short durations made it difficult to arrange basic services such as translation of documents and speeches, something often critically important in a multiethnic situation. In Chad, a divide that developed in the national conference between French-speaking and Arab communities was made worse by delays in translating proceedings and documents into languages other than French.

Chairing, and looking forward

The chairing of national conferences was critically important. Where chairs were positive, inclusive, conciliatory, and forward-looking, they made valuable contributions. But in circumstances in which the chair placed heavy emphasis on the conference's role of addressing past crimes and human rights abuses, there was a tendency to look backward, with extensive airing of grievances and demands for revenge, rather than looking forward to what a new constitutional dispensation could have to offer. This was a particular problem in the Republic of the Congo and Togo, and one that was avoided (in large part by effective chairing) in Benin.

Constitutional outcomes of national conferences

While most national conferences did play important parts in processes that resulted in the adoption of new and more democratic constitutions, research by Jennifer Widner shows that the new constitutions offered lower levels of rights protections than countries that used constituent assemblies (Widner 2008). Further, they tended to fail at a higher rate (in the sense that there tended to be a return to higher levels of violence or suspension of the new constitution). Hence there is little evidence that national conferences have had a particularly positive record in terms of outcomes in constitution-making. On the other hand, it is not easy to determine the extent of the contribution to such outcomes of the constitution-making process as opposed to the kinds of economic and political circumstances existing in the countries in question at the time of these constitution-making processes.

Practical tips

This survey of the experience of national conferences gives rise to some practical suggestions for consideration by anyone considering developing an institution such as a national conference:

- Careful consideration would be required about whether the circumstances are such that a national conference with features similar to those discussed here would be the most appropriate institution for undertaking significant constitution-making tasks. The institution has attractions mainly in a deeply divided crisis situation, where pressures for resolution of the situation are urgent and where there are limited aggregations of interest in established political parties. There are other institutions or procedures that can be used in some such circumstances. One is the roundtable, though it tends to be used where opposition groups are more clearly defined than has usually been the case preceding national conferences.
- Given some of the difficulties experienced in operating many national conferences, in advance of establishing such an institution, a process similar to a roundtable (see part 3.2.2) should be used in an effort to establish some initial agreement on process and on the principles to be followed by the new constitution, and some political understandings among the parties involved.
- The size of the membership of the conference should be kept as low as is practicable in the circumstances, as this can reduce management problems and improve the prospects of the conference being effective as a negotiating and deliberative body. Because processes of negotiation and reaching compromise can be undermined by rules and other arrangements under which all members are given time to make opening statements (often creating pressures on speakers to take polarizing positions), it may be preferable to give members opportunities to speak in committees and working groups. Further, if the conference is large, it is necessary to ensure that as much as possible of the negotiation and decision-making about constitutional issues is conducted in broadly representative (and competent) committees.

If associations and political parties are to be represented in a national conference, then to avoid problems with such bodies being established purely for the purpose of representation in the national conference, every effort should be made to agree on basic preconditions to accreditation for representation, including such things as the period for which such a body should be required to exist and the minimum number of members it must possess before it can be accredited.

Every effort should be made to ensure that the chair of the conference is a highly respected figure who is able to keep the work of the conference focused mainly on what is required for development of future arrangements that will reduce conflict and resolve problems, rather than focusing on how to address past abuses by government (there being other processes available to handle past wrongs).

3.2 Institutions that develop proposals about which final decisions are made elsewhere

In this section, the main distinction is between roundtables, which are generally relatively

informal bodies, often formed in situation of crisis to put together constitutional proposals, and commissions and committees that are already in existence and are given that same task, or are specially created (usually by law) for that purpose. What they have in common is that they are not like legislatures (though they may be committees of legislatures) because they do not have any power to enact a new constitution.

We have also included here parties to peace processes; we are not concerned with their peacemaking roles, but with those aspects of their roles that relate to the content of a new constitution. It is an important assumption of this handbook that in constitution-making after (or even during) conflict, making a constitution may be an important part of the peace process. Where parties to a conflict are divided over an essentially constitutional issue they are unlikely to give a free hand in constitution-making to a commission or a freely elected constitutional assembly.

As is often the case, the boundaries may not be clearly defined. For example, a roundtable may be a peace process. Because a peace process will usually begin before more formal institutions can be set up, we begin with this topic.

3.2.1 Parties to peace processes

Peace processes intended to end violent conflict often have close links to constitution-making processes, especially when the cause of conflict has been access to state power. Such links can make the parties to a peace process significant, even dominant, actors in the constitution-making process. These parties can have interests and modes of operation different from those of parties involved in the more specialized bodies and processes that usually have the main roles in constitution-making processes.

There can be risks and opportunities in linking conflict resolution and constitution-making. Among the major risks are dangers that, in a situation of violence and insecurity, communities may draw inward, resulting in increased sectarianism, pursuing short-term solutions that protect sectarian interests or that constitutionalize and perpetuate divisions (as, for example, in Burundi). Further, there can be a strong tendency to try to exclude noncombatants. (Some specific dangers involved in that situation are discussed below.)

On the other hand, getting parties to a violent conflict to consider constitutional issues may present opportunities. Where conflict has resulted from perceptions of exclusion, putting the possibility of constitutional change on the table may be one of the few ways to get serious consideration for the idea of ending violence. It does so by creating space for political discussion that may open up possibilities for better understanding of opposing positions and of the possibilities for compromise. Constitutional debate can help opposing parties redefine their concerns. For example, the 2005 Comprehensive Peace Agreement in Sudan redefined the issues from a violently contested demand for Southern independence to how best to meet opposing concerns through constitutional arrangements for autonomy and a deferred referendum on independence. If it is possible to involve leaders of opposing armed groups in discussions with

other groups and interests as part of constitution writing (though, as discussed below, this does not always occur), this can expose those leaders to a broader range of needs and concerns, and help moderate polarized positions.

Formal statements of the links between a peace process and a constitution-making process are usually found in the peace agreements made as part of conflict-resolution efforts. The extent to which peace processes have links with constitution-making varies greatly. A peace agreement may set out a road map for the peace process, which often includes the road map for making a new constitution and may not go any further (e.g., toward determining the contents of the constitution). Some peace agreements do deal extensively with constitutional content, in a variety of ways. Some set out guiding or immutable principles upon which the proposed new constitution should be based. Others state quite detailed proposals either for changes to the existing constitution or for a new constitution, usually leaving it to some other body or process to enact the proposals. In a few cases the peace agreement is in fact a constitution, as was the case with the interim constitution of South Africa of 1993. Alternatively, a completely new draft national constitution may be attached to the peace agreement, as with the constitution for Bosnia-Herzegovina attached to the Dayton Accords of December 1995.

Peace agreements are usually intended to be binding on the parties, and so often contain sequencing and other arrangements intended to encourage implementation by the parties (including implementation of provisions on constitutional process or content). In addition, international community actors are often involved in the development and signing of peace agreements (as mediators, facilitators, parties, or witnesses). Such roles may subsequently involve them in encouraging or even actively supporting implementation of the constitutional aspects of the agreements.

The links among conflict-resolution processes and constitution-making in any particular case vary greatly, depending on the nature of the conflict and the goals of the main parties. Such variations can have significant effects on demands about the constitution-making process and the roles parties seek to play in it. Examples of peace processes where key parties may seek to define changes to the constitution but not seek major roles in important aspects of constitution-making include efforts to end secessionist conflicts in which neither the national government nor the secessionist rebels have won a clear victory. In such cases the secessionists may be interested mainly in seeking agreement on the details of constitutional change needed to provide autonomy for the secessionist region, and in a few cases also a deferred right to a referendum on independence, as with New Caledonia in relation to France in 1998, Bougainville in relation to Papua New Guinea in 2001, and South Sudan in relation to Sudan in 2005. In those cases, the peace agreement defined agreed-upon constitutional changes, and left the process for making those changes to the existing national legislature.

The situation can be quite different in cases of conflict involving attempts by a party expressing grievances about previous marginalization and so seeking to capture control of the state. The rebels may be less interested in providing for the content of the final constitution in the peace

agreement, and more concerned with obtaining both a commitment to complete replacement of the constitution and a guarantee of a significant, even dominant, role for the rebels in the process of making the final constitution. Where an interim constitution is involved, the rebels can also be expected to have a strong interest in determining its contents. Thus in Nepal (in the case of the Maoists) and South Africa (in the case of the African National Congress), the peace agreements provided for interim constitutions (in South Africa providing guiding principles for the final constitution), which guaranteed the Maoists and the African National Congress significant control of or influence over the interim governments and the processes for making final constitutions.

The different interests and modes of operation that parties to a peace process may have in relation to constitution-making when compared to groups operating within more specialized constitution-making bodies can have significant effects on a constitution-making process arising from the peace process. Several interrelated potential issues (some of which have already been touched upon) require brief discussion, including possible responses to problems that may arise.

First, issues of sectarianism, short-term thinking, and resistance to compromise in situations of violent conflict and insecurity have been mentioned already. The closely related difficulty of limiting participation in the constitution-making process to combatant groups can be a particularly strong tendency when negotiations occur in a situation of ongoing conflict. In such circumstances the parties to the peace process may concur that a lasting agreement will be more likely if confidentiality and secrecy are maintained and the process is controlled by and restricted to the leaders of the warring groups. Further, there could sometimes be risks that opening a negotiating process at an early stage could empower groups and interests without real power or status, and could contribute to substantial elaboration of the agendas of issues. While these may be real dangers that do contribute to the difficulty of the decision-making process, there are usually other important issues involved. In particular, injustices can be done to significant groups that are excluded, something that may exacerbate social divisions. (An example of this is Sri Lanka, where the exclusion of Muslim and Indian Tamil communities from successive peace processes where constitutional issues were a significant part of the process has had ongoing divisive effects.) Limiting those involved in constitution-making decisions to combatants has other dangers. They may lack legitimacy in the eyes of the wider community. The success of any new constitutional arrangements may rely too much on the commitment of the narrow group of negotiating parties, and may fail to respond to broader social needs. The new constitution may then lack the social foundations needed to gain the widespread support it requires to be sustainable.

A second, related set of problems arises because in a constitution-making process linked to conflict resolution, the issue of who has seats at the table will be seen as determining access to power in the long term, through decisions on the constitution. So access to seats in the process becomes critical. The result can be splits in fighting groups, or even the emergence of new groups. Alternatively, because so much is at stake, leaving out any faction can result in the emergence of spoilers.

Problems of both these kinds are sometimes handled in a two-stage process, the first involving mainly the warring parties, which is intended to build confidence and establish order, and the second, more participatory stage, in which the “final” constitution is made. The access of parties to the first stage (usually involving negotiations of peace process matters and short-term constitutional arrangements) can be flexible. Thus in South Africa, the interim constitution (inclusive of guiding principles) was negotiated mainly among the key parties, with some parties joining quite late in the process. The constituent assembly process that developed the final constitution was more participatory. Another approach could involve provision for a mandatory review, within a specified period, of a constitution negotiated between limited parties.

Third, problems can arise from the privileged roles of combatants as parties to the peace process contributing to demands for constitutional provisions that maintain their privileged status under the new constitution. For example, the army or security forces of the state may seek provisions that give them special constitutional roles or protections. Rebel groups may seek incorporation into the state’s armed forces. Another danger concerns a narrowing of the range of constitutional issues that may be considered as part of a constitution-making exercise based on a peace process. There may be a tendency to limit them to issues of major concern to the parties to the peace process, contributing to a lack of balance in the constitution and undermining its wider legitimacy.

Fourth, parties to a peace process can usually be expected to understand well the political context they face, it being that which usually drives them to demand particular constitutional concessions. There is often a tendency to focus mainly on issues about access to political power under a new constitution, and a lack of proper attention to other vital issues. Further, parties may have limited interest in, or even understanding of, the longer-term legal implications of their constitutional demands. Combatant parties to peace processes (especially, though not only, rebel groups) sometimes have limited constitution-making expertise. They may have limited ability to express their grievances and concerns in terms of constitutional issues. Further, they may see constitution-making as just one of many possible strategies for achieving their goals, and keep open the possibility of a return to violence.

As a result, there can be special needs for helping parties to peace processes better understand what is involved in constitution-making. Legal advisors to parties in peace processes may need to be involved early in order to help the parties frame their concerns as constitutional issues, something that can often help redefine issues and transform conflict. (This has occurred in many peace processes, including Bougainville, New Caledonia, South Africa, and South Sudan.) Facilitators of peace processes should give special attention to the need to encourage continued commitment to the constitution-making aspects of the peace process.

A fifth set of issues arises because increasingly, even in peace processes responding to conflicts internal to a particular country, third-party mediators and international actors play significant roles. Often it is their timetable concerns and other agendas that tend to dominate the process. Such actors may be concentrated on resolving the violent conflict, and have a limited understanding of constitution-making processes or issues. These difficulties suggest a need for

improved understanding of and training about constitution-making on the part of international actors involved in the many peace processes that are associated with constitution-making.

3.2.2 The roundtable

Roundtables are informal consultative processes sometimes used to negotiate initial steps in a constitution-making process during a period of transition from an authoritarian to a more democratic regime. They usually occur in situations of national crisis, where the existing national constitution does not provide a legitimate basis or adequate guidance for a workable constitutional reform process. Pressure to escape the crisis results in members of the national government consulting the political opposition (and sometimes other interests) about the steps needed to initiate and advance a solution to the crisis, including agreement on constitutional reform that is then usually undertaken in accordance with the requirements of the existing constitution.

The roundtable process therefore usually enables the maintenance of legal continuity, which can be important in situations where those controlling the existing regime remain powerful and would consider a break in legal continuity illegitimate. In this respect, a roundtable is different from many national conferences (institutions also often used in situations of national crisis) where loss of the legitimacy of the existing regime and the extent of the national crisis are often so great that the national conference seeks a break in legal continuity by declaring itself sovereign and establishing transitional constitutional arrangements while a new constitution is being developed. (See part 2.1.9.)

The use of the term “roundtable” in relation to constitution-making processes is a relatively new development. It is most commonly used with reference to the processes in Hungary and Poland in the late 1980s, both part of transitions from authoritarian socialist regimes. (The case study of the constitution-making process in Poland—see appendix A.10—provides an overview of how a prominent example of a roundtable process operated in practice, and also outlines subsequent steps in the constitution-making process in Poland that began with the roundtable.)

The term has also been applied to other processes in Eastern Europe from the late 1980s—particularly those in Bulgaria, Czechoslovakia, and the German Democratic Republic (Eastern Germany)—as well as some in Latin America (notably Chile in 1989 and Colombia in 1990) and to processes in Spain (in 1976) and South Africa (in the early 1990s). Similar arrangements have been used in many other processes without being described as roundtables. Examples include the processes used to establish some of the national conferences (see part 3.1.3) held in French-speaking African countries from 1990 to 1993, the best known example being Benin. (See the case study of the constitution-making process there, in appendix A.2.) The process in pre-independence India from the 1930s for consultation among local actors about decisions on constitutional progress toward independence might also be classified as involving a roundtable.

Roundtables themselves usually involve at least two major steps. First, government and opposition groups engage to decide on structures for negotiations (numbers of representatives,

chairing arrangements, working groups, and so forth). Such negotiations can take time—six months in the case of Poland. Second, meetings of the agreed-upon roundtable structures are held, and can often (though not always) be completed in quite a short time—just a few in the cases of both Hungary and Poland. The structures used vary greatly from case to case, there generally (though not always) being a high degree of flexibility in the arrangements, for example concerning criteria for public participation, determining the agenda, and setting decision-making rules. Some roundtables are less flexible. For example, in Hungary in 1989 a three-tiered structure was established. There was also agreement among the nine opposition groups that participated in the process that all their decisions would be made by consensus. One result was that each opposition group had a veto on decisions on joint opposition positions, and hence considerable influence on the roundtable process. Much of the work is usually done in committees and working groups and informal consultations. The work of the roundtable often occurs in secret, or at least without any media or involvement of members of the public.

Because a roundtable has no basis in constitutional or other legal rules, there is usually no hierarchy among the participants, no formal rules for its operation, and no preassigned status even to its most fundamental decisions. When the process starts, the participants will often be quite unclear about the direction in which things will go. The key point is that public participation in the process represents a commitment to negotiating a solution peacefully rather than using the alternative of resort to open conflict and violence.

The main reason why the period within which the roundtable itself meets is quite brief is that the roundtable process is used only to negotiate limited initial steps in a reform process; the legal steps will be taken elsewhere, in institutions with a legal basis. There are cases, however, where roundtable processes take far longer, usually because either the changes being negotiated in the particular case are far-reaching or because the government tends to see itself as still negotiating from a position of strength.

South Africa is an example of far-reaching change being negotiated through such a process. There the process was used to negotiate the concept and content of the interim constitution. The negotiations to establish it, along with the negotiations held to determine transition arrangements, constituted the roundtable phase. The negotiations to establish those processes began in the 1980s, while the negotiations on the arrangements eventually incorporated in the interim constitution were undertaken through the Convention for a Democratic South Africa (CODESA 1 and CODESA 2) and the multiparty negotiating process that ran from 1991 to 1993. In Chile, the government installed by the 1973 military coup continued to see itself as in a fairly strong political position, despite the defeat of the dictator, Pinochet, in a presidential plebiscite in 1988 held under a constitution imposed by the military in 1980. But that unexpected defeat created pressure for political and constitutional change that resulted in almost ten months of intense negotiations among the military government, the main opposition political parties, and political parties that supported the military. Although ultimately successful, the negotiations came close to collapse on several occasions.

After the roundtable has completed its work, the constitutional change agreed to through the process happens elsewhere. In a majority of cases the agreement covers the details of constitutional amendments and also the idea that the amendments will be made through an existing constitutional reform process. That was the case in Chile, Hungary, and Poland, where liberalizing amendments to be made by existing but undemocratic parliaments were agreed upon. Similarly, in South Africa, the contents of the interim constitution were agreed upon, as was the use of the existing parliament to adopt it (thereby providing the legal continuity of such importance to the ruling party). In a few other cases, and especially in preparations for a national conference, a roundtable is less focused on details of constitutional amendments than on the next steps in a reform process. The roundtable process in Benin, for example, did agree on basic principles that should be met by any new constitution, but was much more concerned with agreement on the need for and structures and other arrangements for the national conference.

The high degree of informality and flexibility involved in a roundtable makes it quite different from most peace processes and from legally defined constitution-making institutions such as constitutional commissions and constituent assemblies. There can be advantages to informality (which is often accompanied by secrecy) in that the participants can avoid loss of legitimacy or stature if the process does not achieve particular outcomes. They can then be freer to make some other move to initiate change than would otherwise be the case. There may also be advantages in the flexibility regarding possible outcomes that is permitted by a roundtable process, as this can include arrangements for incremental progress in reforms that can be revisited as the fruits of initial progress are tasted.

On the other hand, where the roundtable marks the beginning of a process that continues to have limited popular involvement (as was the case with the process in Hungary for many years after 1989), secrecy and the lack of public involvement in the roundtable process can contribute to a lack of legitimacy of the constitution resulting from the process.

There can be immense pressures on those involved in attempting to establish or operate within roundtable processes in situations of deep crisis, where there is a grave risk of violence in the event of failure, as was the case in Eastern Europe and Latin America in the late 1980s. Final responsibility rested with those actors. This was a different situation from that of pre-independence India in the 1930s and early 1940s, where most Indian actors felt that the British colonial government had final responsibility, and they could afford to remain relatively disengaged.

Roundtable processes can sometimes offer other advantages in situations involving extremely undemocratic and repressive regimes where inflexible constitutional arrangements have made liberalizing reform difficult to achieve. First, the process can provide legitimacy for a reform process in a situation where the existing regime has little legitimacy, by enabling an inclusive process in a situation where democracy was absent. It allows inclusion of a wide range of actors in a process intended to reach common agreement on the way forward. Second, in situations such as Hungary (and many others) where there is no coherent opposition, a roundtable can provide a framework within which opposition groups can emerge and learn to cooperate,

negotiate with the government, and participate in constitutional decision-making, in preparation for participation in government. Third, it can provide a form of limited power-sharing arrangements (between the government and the emerging opposition) where none was possible under the existing constitution. Fourth, it can permit concessions to be made by groups in opposition to the old regime (as was the case in Chile, Hungary, Poland, and Spain) without those concessions necessarily being incorporated into final constitutional arrangements. Instead, the opposition groups remain free to engage in developing more permanent constitutional arrangements when the agreed-upon reforms have worked to change the balance of political forces, thereby opening possibilities for more significant change to occur. Fifth, it can provide for learning (by both the old regime and emerging opposition groups) about constitutions and constitutional limits. Sixth, a roundtable can help develop cooperation among opposing factions (government and opposition) and their leaders that can contribute in many ways to progress in later stages of reform processes.

Practical tips

The following practical tips are offered for anyone considering making use of roundtable arrangements as part of a constitution-making process:

- A roundtable is mainly restricted to use in situations where there is both an authoritarian regime that retains a reasonable degree of authority but is becoming open to the possibility of reform, and also some coherence and leadership in the opposition groups that enable them to cooperate effectively.
- It should normally be as inclusive as possible, in terms of elements in the existing regime and the various opposition groups. Only by being inclusive will it give sufficient support to the reforms agreed on through the roundtable process.
- The practical arrangements for the roundtable process should normally be flexible, and permit the parties to work together in whatever way enables the process to make progress.
- In addition to working toward agreement on constitutional change and next steps in the constitution-making process, a roundtable should aim to contribute to the development of understanding and working relationships between government and opposition leaders.
- There are often advantages for opposition groups if a roundtable process agrees to a limited degree of reform that may open the way to more extensive reforms later. There can be a risk for opposition groups that agreement upon too much detail at the roundtable stage may lock in concessions that offer little advantage to them at a later stage of the reform process.

3.2.3 Constitutional commissions, committees, and other specialist bodies

In the introduction to this part, we drew attention to two types of bodies that have been central to drafting and adopting constitutions. One, legislatures and constituent or constitutional

assemblies, was discussed in the previous section. The other is constitutional commissions, committees, or similar bodies. These bodies have limited, specific functions related to the constitution-making process. They can vary from the important task of drafting the entire constitution to providing specialist advice (for example, on financial aspects of a decentralized system, or on the independence of the judiciary) to another body, which will prepare or adopt the draft constitution.

Here we use “constitutional commission” to refer to a body (other than a committee of the assembly, or “parliamentary committee”) that is formed for the purpose of preparing a draft constitution for consideration or adoption by another body. So we are drawing a distinction among three types of bodies that are charged with this responsibility:

- special constitutional commissions/committees;
- committees of a legislature; and
- bodies with other responsibilities that are for a while given constitution-drafting responsibilities.

In this section we shall also look briefly at other committees and commissions that may have more limited roles.

Commissions are different from the legislature or the constituent assembly in at least three ways: function (they do not make final decisions on the constitution, being advisory), qualifications (primarily expert, rather than political or representative), and size (small, and therefore with different dynamics from assemblies). The effect of these differences is evident from the precise mandates, independence, and procedures of the commission and the assembly.

The range of tasks assigned to a commission will vary from process to process, but it may include:

- carrying out (or coordinating and supervising) civic education;
- collecting and analyzing public views;
- preparing a draft constitution;
- seeking and collecting public views on the draft constitution; and
- organizing and being part of a constitutional assembly (a rare role for a commission, and an unsuitable one).

Whether to have a commission

There are two main issues here: first, what the general arguments are for and against having a separate commission as one of the elements in a constitution-making process, and second, what the complex of factors, some logical and some more a matter of tradition, is that leads individual countries to adopt or not to adopt this model. We are here talking of a commission, not of a committee of the legislature or assembly.

General rationale for independent commissions

Although the use of independent commissions, at least those with responsibility to prepare a

draft constitution, is limited, it offers considerable advantages, most of which follow from its expert membership and political independence.

- It can do considerable preliminary work for the deciding body, and for this reason the work of the assembly can be accomplished relatively quickly.
- It can promote civic education and knowledge of the constitution-making process and constitutional issues.
- It may be a more efficient body to receive and analyze public views and recommendations.
- It brings appropriate constitutional experience to bear on public consultation and decisions that may be beyond the capacity or even the interest of most politicians.
- There are greater chances that a commission will put the national interests above sectional interests than would a parliamentary committee. Because it is relatively more disinterested, it is also likely to be more effective in building a national consensus; its small size and expertise are more likely to allow a deliberative process than would an assembly. An analyst of the Brazilian process [1988], in which the constituent assembly, which started without a prior draft, had 559 members divided into 24 thematic committees, concluded that this made a coherent constitution nearly impossible, in particular given the weak presidency and party system.
- There is also the advantage in the division of labor: one body to propose the draft and another to debate and adopt it, based on the notion that technical and professional expertise is required to draft, and a more political process is needed to adopt, the constitution.
- There is considerable suspicion in most countries now of both the intentions and the competence of politicians, so an independent commission restricts choices open to assemblies and forces them to consider recommendations of a broader cross-section of society. A commission that is not independent, such as that of Afghanistan [2004], will often be chosen to represent government interests, thereby thwarting the benefits of a commission.
- The chances that the commission will produce a draft are quite high, and in this way the process will be sustained despite acute differences between political and social interests.
- An independent commission seen to be both neutral and expert, which discharges its responsibilities conscientiously and transparently, can legitimize both the process and the outcome.

Some weaknesses

It is also necessary to be aware of the drawbacks of a commission. It is likely that politicians may have more sense of ownership if the draft is prepared by them or on their behalf by a parliamentary committee. Learning opportunities for politicians may be lost, including those that come from hearing firsthand the views of the people during public consultation. There is the danger that the commission may isolate the constitution-making drafting process too much from the politics of the day. It may not succeed if there are significant differences that must be resolved directly by parties to the previous conflict. And as we have already noted, the commission can be manipulated by the government or other powerful interests. Although the work done by the commission may relieve the assembly of some of the load, the overall length of the process is likely to increase due to the overlong conduct of civic education, the receipt and analysis of

public submissions—and the self-interest of the commissioners. And under pressure from the members of the public, who are unlikely to have a proper understanding of the appropriate function of the constitution, the commission may include recommendations that may be considered by many as unsuitable for a constitution, such as matters of policy. (See part 2.2.) A recent comparative study undertaken by the United States Institute of Peace of nineteen constitution-making processes observed that of those processes that used commissions, these bodies did not seem to produce a better result than those using a constituent assembly or parliamentary drafting committee with experts. However, this was a limited sample of cases.

Explaining the use of commissions

The prevalence in Africa of the use of commissions may be due partly to the resistance of politicians to political reform, and doubts about their competence. But it may be a response to the lack of an organized civil society, which results in an uninformed public and provides few channels for the expression of views. Few African countries have effective or ideological political parties that might play a leading role in the process (unlike in countries where the assembly process can be used, such as in Europe). Parties tend to represent only themselves as politicians in Africa, while in developed democracies, political parties represent social, class, regional, and economic interests—and in this way represent the larger society.

Committed to a participatory process, these countries find that an essential preliminary is civic education, best carried out by an independent commission. Moreover, traditional systems of governance, with which some people may be familiar, are not seen as relevant to a modern multiracial state. Foreign experiences become a source of ideas, mediated by an expert commission.

Important exceptions to the English-speaking African tradition are Namibia and South Africa. South Africa used no commission, perhaps because the conflict was too serious to be resolved in this way; direct negotiations between political parties were inevitable to break the deadlock that would have ensued otherwise. Multilateral talks that led the way forward and proceeded to draft what became an interim constitution, sometimes referred to as a roundtable process, also had elements of a commission, although it was dominated by political parties. In Namibia the absence of a commission can perhaps be accounted for by the active role of the United Nations and the need to negotiate with South Africa on independence, and also by several informal meetings and conferences having developed sufficient consensus to facilitate a formal process (under principles established by the United Nations Security Council).

An independent commission is more likely to be established if civil society is involved in the negotiations leading to principles and procedures for a constitution-making process. On their own, politicians are less likely to want an independent commission. Although one was proposed in Nepal [ongoing process], there was great resistance from key political parties. (It is likely that a commission might have greatly facilitated the process, especially given the rather unsophisticated and disorderly procedures followed in the constituent assembly.) In the former Communist states of Eastern Europe, the Communist and democratic leaders preferred direct

negotiations, mostly in the form of roundtables. (See part 3.2.2 on roundtables.)

Designing an effective commission

Many of the advantages suggested above depend on the commission being expert and independent, and having enough resources for its tasks (which can be multiple). It is useful if the commission is also representative of different interests, without compromising integrity. However, these conditions are not often met. There have been allegations that most African commissions were not independent, either in their method of appointment or in operational autonomy. Various methods of appointment have been used, some more conducive to independence and competence (a competitive and transparent process), others less so. (In most countries the appointment has been by the executive or political parties.) The government and political parties have not been able to resist the temptation to influence or even instruct commissioners (especially in Afghanistan [2004]). Nor have the commissions always been sufficiently funded; some commissions had to secure funding from foreign sources to complete their tasks.

So to get the best results from the commission, it is best to ensure its independence. In some countries commissions are appointed by the executive under a general law for commissions of enquiry—legislation designed more for enquiries into administrative or policy issues than for constitution-making. Such a law gives the executive the power to define terms of reference, appoint and dismiss the commissioners, terminate the commission before its task is done, or refuse to publish its recommendations. These qualities have discredited commissions in Zambia and Zimbabwe, and complicated the goal of new, acceptable constitutions.

Another aspect of independence is the relationship of the commission to the legislature. Sometimes a legislature has a role in the appointment of the commission (often on the basis of party deals), but it is important that once appointed, commissioners should be left alone to do their jobs. In some countries, commissioners have to swear an oath that they will exercise their functions without any influence from political parties—and indeed may be required to sever relations with political parties. Parliament may appoint a select committee for liaison with the commission—and there will be need for this, but care must be taken that the select committee does not start to give instructions to the commission.

Similar issues arise in relation to funding and staffing. Enough funds should be provided, but, subject to the normal official procurement rules, the commission should be allowed to manage the funds. It should also be entitled to appoint its own staff, subject possibly to some general rules of inclusion, particularly in multiethnic states. In practice, commissions have seldom been allowed autonomy in all these matters.

Membership

In some countries, foreign experts have been appointed to enhance both the expertise and the independence of the commission (in Fiji [1997], the chair; in Kenya [2010], three of the nine

members). Otherwise the issues are whether the commission should be expert (and exhibit what sort of expertise) or representative (at least of different aspects of the nation), or whether it should try to combine both features.

Normally the commission should be restricted to a small size (say from twelve to twenty-five or so, to ensure the range of skills and representation) so that there can be proper deliberations. But in Fiji [1997], the commission consisted of three, one a foreign actor (too small a commission, especially too small to be representative, including of women), whereas the commission numbered five hundred in Zimbabwe [2000] (too large).

Legal framework

Commissions in some countries are established by special legislation, sometimes enjoying constitutional entrenchment, which sets out the essential components of the whole process of constitution-making (as in Kenya in the 2000 and 2008 laws, although the 2000 law was not entrenched—a serious omission that was rectified in the 2008 process). In Britain, considerable use has been made of royal commissions, in some respects similar to commissions of enquiry mentioned above. Generally the royal commissions enjoy great prestige and independence, though their terms of reference are decided by the government. A major review of the British constitution was undertaken by a royal commission from 1969 to 1973, with a focus on devolution.

Many countries, especially within the common-law world, have laws about commissions of enquiry, which are ad hoc bodies appointed to inquire into a particular matter. Commonly a commission is appointed by the government (perhaps even personally by the president). It may comprise one or several members, and the commission will usually take evidence from people and produce a report—which it usually has to deliver to the person or body that appointed it. In many countries there is no guarantee that any report will be published. And the appointing authority may simply stop the proceedings at any time.

In 2001, Uganda set up a constitution review process using its Commissions of Inquiry Act. Zimbabwe used this vehicle for a constitutional review in 1999–2000 (it called it the “constitutional commission”). The large number of people appointed to the commission shows the flexibility of the institution. But one international NGO noted that under the act, the constitution was under the control of the president and potentially reversible by the government.

Many countries have permanent bodies with the mandate of considering proposals for reform of the law—whether those suggestions are generated by themselves or by the government (sometimes called the “law reform commission”). One advantage of making use of such a body might be that it already has a library, staff members, including researchers, and (often) legal drafters. On the other hand, law commissions usually face the issues of law and practice that concern lawyers, rather than issues with broad social and political implications. The Indian commissions have produced reports on the appointment of judges (at least twice), a constitutional bench in the Supreme Court, and the appointment of prosecutors. These issues

all have constitutional dimensions, but they are narrow, and not the sorts of issues that are likely to divide a country in conflict.

In Malawi [1994], there is provision in the existing constitution for a law reform commission, but for reviewing its constitution Malawi formed a special law commission under that article, comprising lawyers and judges, church people, academics, and others.

The Indian National Commission to Review the Working of the Constitution was appointed pursuant to a government decision in 2000. It came under the Ministry of Law, and did not have independent research facilities, which were provided by the ministry but supervised by the commission. It had its own funding, which came through the ministry. The government appointed the members and set the deadline.

At various stages Nigeria has set up bodies by order of military governments, whether formally (by law) or by governmental order. One of these was the “fifty wise men” constitutional commission that proposed the shift to a United States-style system, adopted in 1979. The dynamics of constitutional reviews are different under military (and other undemocratic) regimes. Legal form matters relatively little when the government is not accountable. One commentator on the 1979 commission noted that the Nigerians were not told where the commission’s instructions came from, or why their parliamentary system had been changed to a presidential one.

Separate commission or committee of the legislature or assembly?

The type of drafting commission discussed in this section is similar in some respects to the committee often set up by the assembly or legislature in order to undertake some preliminary functions on its behalf, including public consultation and preparing a draft constitution.

The two types of bodies (commission and assembly committee) are different in important respects. The constitutional commission is based on assumptions about the virtues of a separate and independent body; the other is pragmatic, making up for deficiencies of the assembly as a large and deliberative body. There is an obvious difference in the composition of the two bodies (though in Zimbabwe [ongoing process], the parliament set up thematic committees that include those who are not members of parliament. (See part 3.1.2 on constitutional assemblies.) The status of the draft produced by a commission is often higher than that of a committee, over which the plenary has complete control. The commission may be a more effective body for civic education and public participation, but the committee may be more effective for transmission of public views to the assembly—often the ultimate decision-maker. The recommendations of the committee may carry more weight with the assembly, as they are often the result of negotiations between political parties represented in the assembly. The rules by which the committee makes rules (normally a majority) may be different from the rules binding the commission.

Box 39. Questions to think about when establishing a commission or committee

- Does the mechanism being proposed allow for the members to use their expertise to deal with a wide range of issues, including politically sensitive issues, or is it dominated by lawyers or some other group?
- Will the body be perceived as being representative of the people (and is that important for this body)?
- Is it sufficiently independent?
- Is the body able to invite and evaluate large numbers of public submissions?
- What happens to its reports—are they necessarily published, and is there any machinery for ensuring that they are considered?
- Are the body’s resources sufficient for the major exercise of constitution-making?
- Can the work of the body be stopped at any time by those who set it up?
- Is the body genuinely being used to advance reform, or is it really a mechanism for NOT doing something?

What happens to the commission draft?

The primary function of the constitutional commission is to prepare a draft constitution for consideration and adoption by another body. In many countries a commission could claim to have reflected the people’s preferences more accurately than politicians do. Generally, people place importance on values and principles, and politicians on institutions. There is some danger that values and institutions may not converge, creating internal inconsistencies and tensions. So it is desirable that commission drafts should be protected to some extent from ill-informed changes. One way this might be achieved is if the commission establishes a good rapport with the people and wins their confidence. Perhaps if the Fiji commission [1997] had involved the people to a greater extent than it did, the parliamentary committee would have found it harder to resist its recommendations; as it was, the committee made several changes to the draft, driven by political expediency rather than by principle, so that the document became a bit incoherent. Another way is to make it hard to change the draft; see the note on Uganda and Kenya below.

Most often a commission’s draft goes to a constitutional assembly or the legislature. But most unusually, the interim charter of the Somali Republic (2004) provided that the draft of an independent commission would be referred directly to a referendum. Generally it is thought wise to provide for some political “vetting” of the draft (if only because of the need for party acceptance).

Even when the draft goes to an assembly or legislature, there is no standard pattern. In Kenya

[2005], the draft was to be debated by the public before the National Constitutional Conference began its deliberations. The draft approved by the conference was to be submitted to the national assembly “for enactment within seven days.” (Since the constitutional provision on constitutional amendments applied, enactment would have to be by a two-thirds vote, and parliament could reject, but not amend, the draft.) A further twist was added by a dubious decision of the constitutional division of the high court that a referendum was also needed. A referendum held a year later clearly rejected a draft that the legislature had changed in some fundamental respects from the conference’s draft.

The route to the draft in Kenya [2010] was even more complicated. The expert committee, whose principal task was to produce a “harmonized” or consensus draft, had to submit this draft to the public for debate and discuss it with a reference group (consisting of civil society actors). On these bases, it had, if necessary, to revise the draft. The revised draft was to be submitted to the parliamentary select committee for comments (the law was somewhat unclear what to do with the committee’s comments, but the expert committee took the view that, on contentious issues, it had to accept them). After further revisions, the draft was taken to the legislature, which could propose amendments by a two-thirds vote. Finally the draft was submitted to a referendum and was adopted.

In Uganda [1995], the draft went to a constituent assembly elected as such; the commission’s draft could be amended only by a two-thirds vote, and the assembly had the option to refer any matter for final resolution to a referendum, but a referendum as such was not required for approval. In Eritrea [1997] the draft was submitted for public debate, and then sent to the national assembly, which could amend it. It then underwent another round of public debate before it was put to the public in a referendum. In Zambia [2010] it went to the president and the cabinet, which issued a white paper (rejecting many provisions), and the revised draft was submitted to and approved by the legislature. The president of Zimbabwe made major changes to the draft (although the commission was largely handpicked by him). It then went to a referendum in 2000, where it was rejected.

In Afghanistan [2004] the commission was not independent and the draft was heavily revised by the transitional government through a process of horse trading among political leaders, warlords, and clan leaders. It was then submitted to the Constitutional Loya Jirga established to approve the draft. Further horse trading and demands made by the United States and the United Nations, as well as by women and minorities, resulted in further significant changes to some parts of the draft. The government made changes even after the draft left the Constitutional Loya Jirga.

In Fiji [1997] the commission’s draft went to parliament, which referred it to a joint committee of both legislative houses. There was a period of public debate before the committee began deliberations, but it was not officially organized and did not reach many people. The proceedings of the committee were secret even from the expert advisors to the parties.

In Iraq [2005] the draft produced by the parliamentary commission (which was extended to include some Sunni nonparliamentarians, as few were elected to the assembly due to a Sunni boycott) was ignored by party leaders who, under pressure from the United States, negotiated fundamental decisions and completed the draft in secrecy.

This account shows that the drafts created by commissions have an uneven record of success. This assessment assumes that the aim of the drafts is that they be adopted with as little change as possible. But it can be argued that the aim of the draft is to start or reinforce a nationwide debate on a set of proposals, provide some orientation or direction, or identify crucial issues on which decisions must be made through democratic procedures. And commissions perform other functions besides producing a draft. They have to conduct civic education with the people and increase public awareness of democratic values and the capacity to participate in national affairs.

Other, specialist, bodies

Commission-type bodies have been used to perform specific tasks short of producing a draft. Their role may be to produce ideas that may streamline specific proposals. A two-person committee was set up in Papua New Guinea to propose details of a provincial government; likewise in South Africa [1996], the assembly was helped by experts to design a provincial government. The South African assembly was also assisted by a panel of constitutional experts to clarify interpretations of proposed provisions or to resolve differences, and another body enabled it to draw in a greater number of the more recalcitrant Afrikaners into the process. The Eritrean commission was assisted throughout by a fourteen-member board of foreign experts, lawyers, historians, political scientists, and anthropologists. Other areas where assistance has been sought from specialist bodies include fiscal federalism, boundary adjustments, and the electoral system. A special kind of commission was used for the independence constitution of Malaysia—composed entirely of foreign experts, in the search for an objective analysis of problems facing Malaysia and looking for a consensus. (See part 3.4.1.) In part 2.5.2 on dealing with divisive issues, we discuss briefly the formation of special bodies to address particularly divisive issues in a constitution-making process.

Conclusions

It is perhaps less likely that a commission would be established when there are effective and representative political parties, which may prefer to negotiate the principles and procedures for review (most likely through the legislature). A parliamentary committee may then be used to negotiate the detailed provisions. When parties lack clear policies and the degree of public support is uncertain, or when the divisions are ethnic or sectarian, a commission may provide both direction and ideas, and help develop some sort of consensus. It can also give visibility to the process and promote public debates. Its civic education role has often been most significant (as evidenced by constitution-making processes in Uganda [1995], Eritrea [1997], and Kenya [2005; 2010]). A commission is perhaps the most effective way to engage the public. Sometimes

it has given shape to the process through its own dynamics, and had played a critical role in the management of the entire process (as in Kenya [2005]). Commissions on special topics, such as fiscal, environmental, electoral, and decentralization issues, often outside the knowledge of traditional constitutional experts, can make important contributions and help constitution-makers avoid errors that may later turn out to be quite costly or administratively problematic. Although it is not indispensable, the use of commissions should be considered by those responsible for designing the process.

3.3 Administrative management bodies

In many processes, the administration and management of the process have been afterthoughts and have been handled in an ad hoc fashion. This has led to confusion and disagreements about who does what—and even to the failure to perform key tasks. Because of the dozens and even hundreds of tasks that need to be coordinated and managed, some form of an administrative management body is usually needed. (See part 2.1 for examples of the range of tasks this body may handle.)

For the purposes of this handbook, we have used the term “administrative management body” to take into consideration the wide range of experiences of administering and managing the process. We have defined an administrative management body broadly to include any organization, business, institution, committee, unit, or small group of administrators that implements the policies and plans of the constitution-making process and provides technical support. Such a body can range from a two- to three-person management committee for an uncontroversial reform process to a secretariat with hundreds of staff members to support a participatory process. In this section we discuss how these bodies are established, their roles and powers, who directs them, and how they are structured and managed.

Establishing the administrative management body

A decision should be made at an early stage about whether a new administrative management body should be created or whether an existing body can serve the purpose, and when to establish the body. In countries with a standing parliament, the secretariat or a similar body sometimes becomes the administrative management body. In Brazil [1988], the senate’s information and data-processing center, which supported the standing legislature, also supported the constitution-making body. While this may be convenient, there can be drawbacks. The existing body may not have staff members with the skills required, such as civic educators. The staff members are also responsible for sensitive tasks such as analysis of the public views and the technical task of drafting the text. There may be questions about the degree to which government actors in general can maintain a position of impartiality toward all interests, groups, and individuals. In South Africa [1996], some constituent assembly members viewed parliamentary staff who had served during apartheid with deep suspicion. If the constitutional reform is noncontroversial and parliamentary staff members are sufficiently qualified to support the process, this can be a

convenient option (as in Finland [2000]).

In postconflict countries there may not be any existing institution able to serve the function of an administrative management body. In both Afghanistan and Timor-Leste, a new secretariat was put in place before the main constitution-making body to hire and train staff, plan activities identified in the mandate, and handle any procurement, infrastructure, or logistical tasks needed to prepare for the process. In a context where infrastructure has been destroyed and both human and material resources are scarce, simply finding office space and hiring staff can be time-consuming. Designers of the process need to plan sufficient time to get the administrative management body up and running in these situations.

In some processes, multiple administrative management bodies have been established. In Uganda, a secretariat supported the Uganda Constitutional Commission from 1988 to 1993 and was disbanded and replaced by an entirely different secretariat that supported the work of the constituent assembly from 1993 to 1995. However, in processes that engage in civic education and public consultation and use more than one constitution-making body, having a single administrative management body can more effectively ensure continuity and coordination of all the “moving parts.”

Administrative management bodies have hired or been linked to external organizations, ministries, or businesses to assist with some of their core tasks—in particular, civic education. The tasks can also be divided among more than one body. In South Africa [1996] the logistics, catering, flights, and accounts were managed by the Independent Business Council—a local business-sponsored nonprofit organization regarded as politically neutral. In Zimbabwe [ongoing] the secretariat linked with advertising agencies to assist with producing public information materials. An administrative arm of the constituent assembly was also established to manage research and drafting as well as tasks associated with public participation. In Afghanistan [2004], the secretariat performed all tasks except for finances, which were handled by the United Nations Development Programme.

Depending on its role, the administrative management body may need a certain level of independence from the executive arm of government (including the cabinet, ministers, and public service management bodies). Otherwise it risks being perceived as biased in favor of governmental interests.

Role and powers

Generally, the leaders of the constitution-making body (such as an executive committee, or government actors) make policy decisions, and the administrative management body plans for and implements these policies. For example, a constitutional commission may decide that civic education and public consultation will be held in all regions, and then the administrative management body implements the decision. In practice, the role and powers of the constitution-making body and the administrative management body (if separate) may not be clearly defined by law or any other means.

A lack of clarity regarding roles and powers has led to serious tensions. In Timor-Leste, the secretariat to the constituent assembly did not have a clear mandate or reporting lines. This resulted in the president of the constituent assembly firing the first director for making decisions that the assembly members felt were beyond her authority.

Directing the administrative management body

The director should be impartial and independent of government and parties or other key stakeholders. The chairperson of a commission or constituent assembly can also direct the administrative management body (e.g., as was the case in Eritrea [1997] and Kenya [2005]).

Box 40. Nepal [ongoing process]: A poorly planned management structure

The constituent assembly in Nepal in 2008 set up several committees to handle different tasks, but without an overarching coordination mechanism. There was a secretariat that provided limited administrative support but that did not resolve the disagreements among the committees about which was to do what and when. This led to planning problems such as launching a public consultation process without a strategy for how the thousands of views would be analyzed and shared with the assembly members.

There are potential drawbacks associated with a chairperson directing both the political tasks of the process and the day-to-day administration and management tasks:

- A chairperson or president of the constitution-making body is typically chosen to lead the constitution-making body because of his or her political skills or acceptability to all key power brokers. He or she may not have the requisite management skills also to direct the administrative management body.
- The chairperson or president of the constitution-making body will have significant responsibility for overseeing the political and intellectual tasks of preparing the constitution; the administrative and management tasks may become a distraction from this role, or he or she may not pay the administrative and management tasks enough attention.
- The chairperson or president of the constitution-making body may not be impartial, and may manipulate the outcomes of certain tasks so that they favor his or her party or group. For example, he or she may ensure that the analysis of the public consultation process favors his or her views and interests.

For these reasons, it can be helpful for the director of the administrative management body to

be someone who is not a member or leader of the constitution-making body. He or she can then be hired, seconded, or appointed specifically for his or her management expertise and acceptability to all stakeholders. Headhunters have been used to find experienced and acceptable managers. Some designers of the process have held wide-ranging public consultation to ensure that the director was acceptable to all key stakeholders. It may take considerable work to identify the right person.

If no local actors are appropriate, foreign foreignactors could be an option, but ideally their role should be to mentor local actors. In Timor-Leste [2002] the secretariat was headed by a Brazilian, through the United Nations. Relationships are likely to be more delicate if the administration is foreign, or partially so. In many countries there is little experience of constitution-making and sometimes even little experience of constitutions. National participants may lack self-confidence; at the same time they have been given an important responsibility. Careful management is necessary to ensure that national participants feel respected and in charge of the process, even if their management experience is limited. It may be hard for experienced international managers to watch things being done inefficiently, but in the long run it is likely to be counterproductive for them to try to take things over. There can also be charges of undue international influence. At least in Timor-Leste, a local actor could have been found to do the job just as effectively or more, and an opportunity was lost to develop local capacity.

The director typically reports to the leaders of the constitution-making body, but he or she could report to the executive or some other governmental body if the constitution-making body is not independent. Here are some of the conditions that lead to tensions between the leadership of the constitution-making body and the director of the administrative management body (if they are different persons):

- The director is not involved during the decision-making process and is directed to implement policy decisions that are not feasible because of lack of resources or time, or logistical constraints.
- The director of the administrative management body may make decisions that do not reflect or support the policy decisions of the constitution-making body or other relevant body.
- The powers, duties, and reporting lines may be unclear, which can lead to confusion about what has been decided and what is being done. For example, in Afghanistan, the director of the secretariat had reporting duties to the United Nations, President Karzai, and the chair of the constitutional commission. At times each would direct him differently and he had to manage these tensions. In particular, the chair assumed he could make decisions about establishing the Constitutional Loya Jirga although he had no formal role and was not involved in the decision-making process being guided by the executive and the United Nations.
- Corrupt members of the constitution-making body may try to influence the director to provide additional resources to them, or to give contracts to family members. Or members will simply demand a role in procurement and budgetary decisions. The legal mandate or a code of conduct could specify that members should not be involved in procurement or budgetary procedures and specify the powers of the director in this area, as well as how oversight will be provided. (See part 2.3.3.)

- The administrative management body may be requested to resolve tensions or disputes between the leaders or members of the constitution-making body that could jeopardize its role as an impartial provider of technical and support services (e.g., Albania [1998]).

Clear reporting lines, powers, and duties, as well as regular meetings between the director and the constitution-making leaders to discuss issues as they emerge, can resolve some of these tensions. Other problems will simply require strong diplomatic skills. A mechanism should be established that would allow the director to report corruption or conflicts of interest on behalf of constitution-makers attempting to influence administrative and management decisions.

Creating specialized units or departments

An administrative management body that undertakes a number of complex tasks is often divided into specialized departments or units named after each core function. There is no preferred model for how to structure an administrative management body. Funding and the availability of resources will place limitations on the number of departments and positions that the body can afford, if any.

In South Africa, the constituent assembly administration was led by a directorate (with an executive director and two deputies) that oversaw the following departments: the secretariat, the law advisor's department, and the research, finance, administration, media, and community liaison departments (the last of which also handled civic education and public consultation). Some of the departments also hired consultants to assist them, such as external evaluators and caterers. Many administrative management bodies have also included field offices to assist with outreach to the rest of the country (as in Eritrea [1997], Afghanistan [2004] and Kenya [2005]).

Here are some generic potential departments or units, with brief descriptions of what they might do. The list is not exhaustive in terms of the departments or their functions; it is a tool to assist in planning for what may be needed to administer and manage a complex process.

- **Office of the director**—implements policy, manages all units and field offices, and ensures that all tasks are carried out in a timely, ethical, and professional manner. Reports to the constitution-making body or other body as specified in its mandate.
- **Personnel**—assists with recruiting and hiring staff, develops or adopts any needed staff policies, develops job descriptions and terms of reference, sets salaries, and helps with any problems that arise.
- **Financial administration**—prepares the budget and maintains all budgets for donors, ensures that budgets are spent according to donor or governmental requirements, prepares necessary financial policies or procedures and trains the staff as necessary to adhere to policies and procedures, oversees cash-flow projections, approves all cash and wire transfers and maintains cash, controls and tracks expenses, prepares and makes payments for payroll, reports on how the funds are used, and works with external auditors as needed. Engages with and coordinates

donors, responds to donor queries, writes or coordinates donor reports, and advises on compliance with donor requirements.

- **Administration**—manages large conferences or other bodies, and organizes all interpretation and translation services, printing services, secretariat (minute taking, secretarial services) and general services, infrastructure, logistics, and procurement.
- **Communications and outreach**—is responsible for civic education, public consultation, and media and stakeholder relations. One manager should oversee these three interrelated tasks because careful coordination is needed so that each task is carried out in a timely way. For example, media campaigns and civic education should precede and support a public consultation meeting.
- **Security**—advises the director on security issues and creates, if necessary, basic security procedures or adopts those of a similar institution already established; creates and enforces safety procedures (specific protocols for travel to insecure areas, communication, fire, bomb threats and detonations of explosive devices, gunfire, theft, physical assaults, health issues, and evacuation); establishes liaisons, where appropriate, with national police, local security personnel, intelligence units of the national government, peacekeeping forces, embassies, and other relevant actors to ensure security at various events or at the main constitutional bodies; produces regular security briefings where necessary; and manages hired or seconded security staff and other security officers.
- **Legal and research department**—drafts constitutional provisions and other documents as instructed by the constitution-makers (the administrative management body may or may not have responsibility for drafting), maintains the official electronic version of the draft constitution in a secure environment with version control, researches requested issues, and advises on all legal questions or aspects related to the draft constitution as well as issues relating to rules of procedure or any codes of conduct or other legal issues. Could also assist with the public consultation process and analyzing, collating, and reporting on the views of the public.
- **Archiving and documentation**—prepares guidelines and procedures for documenting the proceedings; establishes a system for sorting, coding, storing, and archiving text and nontext-based materials, including committee meeting minutes, reports, voting records, audio and video recordings, and photographs. Also may handle collecting, collating, and entering into a database all of the public views gathered, and transcribing oral views.
- **Information technology**—advises on the technical needs for the process and provides computer services and maintenance, network services, user support and training, data processing services, and technical solutions. This may include supporting an election or voting process, creating the system for entering into a database the public's views, or helping establish an official website for the process.
- **Capacity development**—assesses the skills needed to carry out all core tasks and plans and conducts training to ensure that all staff members are adequately prepared to perform their roles.
- **Field-office coordination**—assists in establishing field offices and coordinates with all other

departments and units to ensure that the field offices are supported and linked with the head office. Communicates regularly and visits field offices to ensure proper functioning.

The departments can be subdivided or combined in any number of ways. Some specialized tasks could also be outsourced. (For a discussion of how these tasks should be administered, see part 2.3.)

The need for an organizational chart

An organizational chart for larger processes is useful when defining the lines of authority and reporting, both within the administrative management body and between it and the constitution-making body or any other body or institution to which it reports. Regardless of how it is structured, it will be important to view the organizational chart as flexible, depending on what is needed at any given phase of the process. For example, departments may need to be expanded, reduced, or added.

Practical tips

- Establish the administrative management body early enough in the process so that the staff members are not scrambling to try to support a process with too little time to do all the required tasks—in particular, civic education and public consultation.
- Create well-defined mandates, duties, and reporting lines as well as organizational structure.
- Schedule regular meetings between the director and the leaders of the constitution-making body as well as between the director and the staff to ensure that proper coordination and communication are ongoing.
- Allocate sufficient resources and funds to the administrative management body.
- Don't usurp the work of the constitution-makers. It is better that the administrative management body try to work with the actual constitution-makers rather than against them. It is likely to be more effective to try to bolster their self-confidence and make them feel that they are in control of what is happening and the document that will emerge is their document, so they have some pride in their work. Otherwise there is the risk that they will rebel and may simply not turn up.
- Be transparent. In South Africa, journalists were invited to sit in on the administrative management body's planning sessions; others have posted their budgets and work plans online.
- Consider the level of independence for the administrative management body. Structural independence can be provided for in the legal framework establishing the mandate, but it can take many forms, depending on the context of the process.
- Create an impartial administrative management body. The public should trust that the administrative management body will not unfairly advantage any group, political party, or governmental interest but will seek to balance all interests to the greatest degree possible. The director should not express opinions on or promote particular constitutional or political agendas or accept gifts from any stakeholders in the process.

3.4 Specialist or technical input institutions

An undertaking as complex as making a constitution inevitably involves a large number of specialist bodies and individuals. Here we look at aspects of arrangements as experts (who may come as single “spies” or in battalions), bodies that run elections and referendums, government departments, and courts. In the previous section, under commission and committees, we noted briefly that special committees may be constituted or used in constitution-making processes.

3.4.1 Experts

History

Experts play critical roles in constitution-making. But the roles have changed over a long period, as have the types of experts. The roles depend to a considerable degree on the relationship of experts to the constitution-makers. Until recently, lawyers, often academic lawyers, played a central role. They would draft constitutions on behalf of monarchs. With the rise of parliamentary institutions, the role of experts became that of advisors to political parties, who made the final decisions. During the decolonization period, academics in the metropolitan states would be recruited to advise on, and often draft, the constitution. Sometimes the whole process would be dominated by the expert, within the overarching aims of the colonial power or the newly emerging elite. With the shift to mass participation, the locus has moved, not disregarding experts but reducing their role increasingly to technical matters. Mass politics and mass participation have dented the mystique of experts and their monopoly on knowledge.

Changing roles of experts

The roles and types of experts have also changed with the changing nature of the constitution. The contexts of constitution-making have altered significantly in the last fifty years or so (after the wave of decolonization). Many constitutions have been made in the wake of, or to settle, internal conflicts. In such circumstances, the skills of the traditional advisor, whom we may call the “generalist,” covering all aspects of the constitution, were not sufficient. The specialist entered the field. The need for specialists increases when the constitution-making process is embedded in complex processes of peacebuilding and the sharing of power (as in Bosnia-Herzegovina, Northern Ireland, and Sudan); they must address such issues as what to do with weapons disposal, merger of armed militias, return of refugees, and transitional justice. There are now competing theories of how peace and harmony are to be achieved, and of the negotiating process (each with its special jargon). Some constitutions, in the post–Cold War period, aimed at democratization, have been dominated by theories of transition to democracy.

Another change is in the scope of constitutions. The lawyer-generalist sufficed when the focus was on systems of government, informed by the theory of the separation of powers, particularly the independence of the judiciary, and occasionally the protection of minorities, restricted to civil and political rights. The lawyer-generalist was often not well versed in the policies or intricacies of electoral systems or the politics of ethnicity, the complexity of land issues, or concerns with

social justice. For the most part these were omitted from the constitution and left to the political process. Today people look to a constitution to solve a myriad of political and social problems, including representation (of women, the disabled, minorities), exclusion (when the state is dominated by one or two communities), social justice (perhaps through affirmative action), power sharing (including decentralization), identity (particularly in multicultural states), social reforms (for example, addressing oppression within society), environmental sustainability, accountability of security forces, and tighter financial and budgetary processes. Increasingly these require specialist knowledge, and so the range of experts who become involved in advising on the constitution has increased exponentially. And the coordination of these experts becomes critical.

A further development is the enlarged role of the international community (defined to include participation of other states, regional or international organizations, and international NGOs) in national constitution-making processes. This may come about because of the collapse of a state or other serious circumstances that require international help and assistance (such as in Cambodia [1993], Bosnia-Herzegovina [1995], Timor-Leste [2002], Afghanistan [2004], and Kosovo [2008]). The role of the foreign expert has been facilitated by the desire of some countries to play an international role, the emergence of international norms whose incorporation in a constitution is deemed to require specialist help (indigenous peoples' rights, gender issues, environmental sustainability, transitional justice), and the rise of international NGOs, funded mostly by Western governments, which can be sustained only if they generate business. International institutions such as the United Nations Development Programme also seek to play a role. Consequently a class of professional experts (as opposed to other types, who are at best part-timers) has arisen, assuming the dimensions of an industry, with an interest in conflict.

The internationalization of constitution-making processes also means that experts come from many different legal traditions. Few are comparative lawyers; certainly few common lawyers know much about civil law systems, and the converse is also true. This may make it difficult for them to work well together, because approaches, concepts, and preferred institutions may vary among them. A commentator on the Dayton process for Bosnia-Herzegovina noted the clash of legal traditions and styles, and said that cultural differences among lawyers (some from the United States, some from Europe, some from the Balkans) slowed the drafting but also allowed ideas to be examined carefully and provided for cross-fertilization among traditions while keeping Yugoslav notions foremost (O'Brien 2010: 337).

Presumably the varied background of experts matters less in more technical areas such as security, environment, and electoral systems. The role of experts has also been greatly affected by the rise of the participatory process. No longer is it the case that experts are invitees of the government. International agencies bring their own experts, without clearance from the government. Many experts come on the invitation of local NGOs, but they are usually funded by grants from outside. Both special groups and individuals consider that they have the necessary expertise to negotiate and decide on constitutional issues; many want to draft the text. These groups and individuals do not generally operate under the auspices of political parties, and thus it is difficult to bring them under "control." The tendency to usurp the role of experts

is accentuated if the legislature or the constituent assembly sets up thematic committees for decision-making. And there is serious danger of poor drafting and an overall lack of coherence in the document.

Functions of experts

Experts perform different functions. Some transmit foreign examples, in the hope that there is something to be learned from what has occurred elsewhere. (An advantage of this is that the experts do not need to show any knowledge of the local scene—but they should be careful not to suggest that institutions from other countries can necessarily be copied, and their listeners should scrutinize those experiences carefully.) Some perform a more exalted role; they may be experts in conflict resolution. Some play their most effective role as negotiators (often in postconflict situations). In South Africa, apart from experts brought in by local groups, the constituent assembly appointed a panel of local experts to advise it on interpretations of the draft constitutions and to help resolve differences, particularly on legal issues. Frequently experts' views are sought on a draft constitution before final revisions and adoption (as in Eritrea, Kenya, Nepal, and South Africa).

Experts, particularly perhaps generalist lawyers with a range of legal knowledge, can play a useful role if they have a good understanding of the local context (including culture) and can establish a good rapport with their clients (for more discussion of such issues see the discussion of foreign advisors more generally, in part 2.3.6). Sometimes parties who are negotiating an issue are not really well acquainted with the issue and are afraid to take a position, which they fear will disadvantage them. If the other party suffers from the same syndrome, negotiations can be complicated, drawn out, and bitter—full of suspicion. But if each party has an expert whose advice it respects, a lot of issues can be addressed, leaving the critical questions to be resolved at the level of principals. South Africans used experts from political parties to great advantage in this way.

Some experts come for a specific task: for example, “Tell us what electoral system will ensure that more women or more marginalized groups or more persons with disabilities can be elected to the legislature.” Or “What shall we do about land?” Some advise on how to plan and administer civic education, or analyze public views given to the constituent assembly. Some may be asked to advise on the actual design of the constitution-making process. Many experts may appear only as speakers at workshops. A useful role for experts may be at the start and at the close of the process, the former for an idea of what may be entailed in a good process and some useful comparative perspective, and the latter for comments on the draft constitution before it moves to final approval and ratification. Sometimes experts can be of great help when the issue is either controversial or complicated (such as devolution or federalism); here a panel of two or three experts may show the way forward as well as warning of risks and dangers.

Some experts are closely associated with decision-makers, as advisors to political parties or to the constitutional commission or the constituent assembly. Others operate at the periphery,

nested in a local or international NGO. Many come unsolicited, often without a clear role, and offer their services on arrival. Some experts are part of teams and some operate on their own. A foreign expert backed by her government may enjoy privileged access to decision makers.

Local versus foreign experts

In recent years, foreign experts have begun to play an important role in advising on constitutional issues. At the same time, the number of nationals with knowledge of comparative constitutions has increased. What are the comparative advantages of foreign versus local experts?

Sometimes foreign experts are seen as better able to provide objective advice. When Malaya's independence constitution was to be drafted, agreement seemed difficult due to local political differences. Consequently a panel of international experts was set up to make recommendations, which were largely, but not completely, accepted. Similarly, Namibia's constitution was drawn up, at the request of the constituent assembly, by three foreign experts, within a broad set of principles agreed to among the political parties. The foreign experts were South Africans who were acceptable to all key political and other interests. In 1996, when Fiji had to draw up a new constitution, the process was held up for several months, as one side wanted a person to serve as chair of the constitutional commission, but that person was distrusted by the other side; progress was possible only after an agreement was reached on a foreign dignitary to serve as chair. And in a situation such as Sri Lanka before the government unleashed an all-out war on the Liberation Tigers of Tamil Eelam, or in the negotiations between the two parts of Sudan, the role of foreign advisors (at the political and technical levels) seemed inevitable. Since the 2008 political election violence in Kenya, most commissions established under new processes intended to resolve deadlock on constitutional and political issues have included foreign members in order to provide objectivity and impartiality.

If experts are sometimes necessary, it is also generally more important for them than most other categories of foreign advisors (see part 2.3.6) to be well informed about local history and contemporary circumstances. Those who are not attuned to local circumstances may tend to rely on what they feel has worked successfully in other countries, in which case some local factor of critical importance is likely to be overlooked. The chances that there are solutions that will work universally are slender. Local experts would generally have a better understanding of local circumstances and nuances. Third World experts, who would have a better understanding of local social and political circumstances, have been not favored by international agencies, much less Western governments.

Practical tips

Experts have important roles to play in constitution-making and implementation processes. With increasingly participatory processes, it is necessary to work out the precise role of experts and the modality of their contribution and participation. The role of the generalist (often a lawyer) as a person to integrate different inputs and ensure the coherence of the constitution needs to be recognized.

With the proliferation of “experts” and their sponsors in some processes, it has become evident that control and coordination become necessary, although neither is easy. Competition among states and international organizations to provide experts (and advocacy of their national models as the answer for another country’s problems) has often undesirable consequences. And to increase the usefulness of foreigners, the suggestions made in part 2.3.6 in relation to foreign advisors generally should be applied with rigor (that is, such foreigners should either already have extensive knowledge of the local context or be required to take courses or be given prescribed readings in local social, political, and constitutional history, demography, and economics. (For more on the role of the international community, see part 4.)

3.4.2 Electoral management bodies

Elections are managed by different bodies, sometimes by a government department and, increasingly, by separate bodies. There are basically two models of electoral commission: those that are designed to be independent of government and parties (a bit like courts), and what might be described as “balanced” commissions, in which each major party nominates members.

Usually the same body will have responsibility for any referendum; indeed, some bodies are officially named “commissions for elections and referendums.” In Ireland there is no electoral commission, and a separate commission is appointed every time a referendum has to be held. In some countries—usually in the civil law tradition—the courts also have some responsibility in connection with elections, including certifying the results.

An electoral management body may find itself involved in a constitution-making process:

- when an election is needed for a legislature that will have the task of making a new constitution or for a constitutional assembly with the sole task of making a constitution; or
- to conduct a referendum on either the adoption of a whole constitution or one or more specific issues.

If the electoral management body is a “balanced” body, designed to be fair to all parties, it may not be the most appropriate body to carry out these functions, especially if elections for the constitutional assembly are not to be conducted on ordinary party lines.

Election issues

The first resembles the ordinary work of an electoral management body. However:

- the timetable may be different from that applying to normal elections;
- the electoral system may be different;
- those entitled to vote may be different for a specifically constitutional assembly (for example, even if nationals overseas are not usually able to vote, the diaspora may be entitled to vote; in Kenya [2010] prisoners could vote); and
- civic education on voting for a body to make a constitution may present different challenges.

Box 41. An election for a constituent assembly

In 2008 Nepal elected its constituent assembly—to make a new constitution, and also to be the national legislature. The challenges that faced the electoral commission included:

- the commission itself being totally new, the old one having been viewed as consisting of supporters of the old and discredited regime, and disbanded;
- the need to register new voters;
- the need to operate a new electoral system (with not only 240 single-member constituencies, as in the past, but 335 members to be elected through party lists);
- political maneuvering, which meant that the details of the system (including numbers of seats) changed perhaps three times; and
- the need to carry out voter education that recognized that this was about a constitution (but would also lead to the formation of a government).

The elections were postponed twice, once because the commission felt it was not ready. When the election was held, a huge number of ballot papers had to be printed in a short time. (About forty million were printed.) And this election having been part of an internationally monitored peace process meant that there was great international interest, and all sorts of foreign advisors.

Because of the historic importance of a constitution-making process, an electoral management body might be able to get more assistance (indeed, might find more assistance thrust upon it) than is available for a regular election.

Referendum issues

Some countries have had referendums only on new constitutions. In some ways organizing a referendum may be simpler than running an election: the whole country may operate as one constituency, and the ballot paper may be simple. On the other hand, the range of actors in the campaign may be quite different from that involved during an election campaign. Parties may not be organized for a referendum campaign. Even if they are, there may be many other groups that wish, or are permitted to campaign that would not do so in an election situation. The Kenya [2005] referendum campaign demonstrates some of these issues.

There will likely be a separate law that deals with administration of referendums. Conducting a referendum may be quite different from conducting an election. Instead of being asked to choose between individuals and parties, the electorate is asked to choose among two or more ideas—unfamiliar ideas for many.

Issues of framing the question are addressed elsewhere. (See part 3.5.) We should note here that

sometimes this is the responsibility of the electoral management body itself, and sometimes of other bodies.

3.4.3 Government departments and agencies

In this section we discuss the range of governmental authorities (ministers, and departments and other agencies) that often carry out specialist, technical, coordinating, and support roles in relation to constitution-making processes, which roles may be extensive. They can include taking legal and administrative steps needed to establish constitution-making bodies, providing and managing funding for the process, organizing aspects of the process such as civic education or public participation, organizing transportation and meetings for a constitution-making body undertaking public consultation, providing security, providing legal advice or legislative drafting support, and developing and introducing into parliament laws to implement the constitution. Such roles on the part of a wide range of government authorities can be critically important to constitution-making processes. These roles do not usually involve direct public participation in making decisions about the constitution. They can, however, open the way to attempts to exercise influence, sometimes giving rise to tensions and conflict with constitution-making bodies. Further, government authorities do sometimes participate directly in constitution-making processes, for example through ex officio representation in constitution-making bodies.

Box 42. Oranges and bananas - Kenya [2005]

Kenyans were invited to vote on whether to adopt a draft constitution. The main campaigning groups were not political parties, but they were not civil society organizations. The Election Commission had to assign a symbol to the Yes campaigners and the No campaigners—just as they would to parties or candidates in an election. They gave the Banana to “Yes” and the Orange to “No.” There is no reason to suppose that this was other than random. But an orange proved an easier symbol to use than a banana—though both are local fruit. In fact the orange (symbol of the group that won the referendum) inspired the name of a totally new political alliance).

In truth the issues in the campaign were less the constitution than the performance of the government and ultimately ethnic loyalties.

Governmental authorities and the roles they play

There are great variations among different constitution-making processes in terms of the extent to which different kinds of governmental authorities carry out specialist, technical, coordinating, and support roles. There are some processes where there is little or no role for such authorities. Examples of these include situations where international actors play the roles in support of the

Box 43. Ministers of constitutional affairs

The laws providing for Uganda's constitutional commission and its constituent assembly (the two main consultative and decision-making bodies in that process) provided key roles for a minister of constitutional affairs, supported by a public service department (the ministry of constitutional affairs). The minister and his department were established in 1986, and largely developed the policy and legislation providing for the constitutional commission and later the constituent assembly. The Uganda constitutional commission statute of 1988 then gave the minister a number of significant roles in relation to the commission. They included roles in the selection, nomination, and appointment of the twenty-one-member commission, determining if the commission should submit interim reports, extending the period within which the commission was required to complete its work, approving employment of consultants or experts by the commission, and determining (in consultation with the minister for finance) the allowances payable to the members and staff of the commission. There was only one mention in the statute of the ministry of constitutional affairs: a provision requiring the funds of the commission to be "administered and managed by the Accounting Officer in the Ministry for Constitutional Affairs." The constituent assembly statute of 1993 also made provision for important roles for the minister. In addition, it provided for a commission for the constituent assembly, which not only conducted the elections for the 288-member assembly, but was also required to convene its first meetings, provide administrative support for the assembly, and (if necessary) conduct any referendum that might be required under the statute to resolve any contentious issues that the assembly could not resolve. There was no provision in either statute guaranteeing the independence of the constitution-making bodies. Considerable tensions developed among the constitutional commission, the minister, and his ministry. To an extent, this reflected that the establishment of the constitutional commission reduced the public stature of the minister. There were also other tensions, mainly over what the minister saw as the excessive time the commission was taking to do its work, and concerns by the commission about control by the ministry of funding for the commission's work to a degree that adversely affected that work.

Another case in which special authorities were established to both coordinate and support the constitution-making process was Albania [1998]. A parliamentary constitutional commission was established as the main constitution-making body. A ministry of institutional reform and relations with the parliament was established to assist the commission by organizing the consultative constitution-making process envisaged by the parliament. Lack of financial and other resources saw the minister responsible for that ministry cooperate with several donors to establish an independent agency (the Administrative Centre for the Coordination of Assistance and Public Participation). Its function was to act as a liaison between Albanians and international actors to facilitate

the widest possible participation of citizens and NGOs in the process. In doing so it worked in close cooperation with both the constitutional commission and the ministry.

The Albanian arrangements were developed on an ad hoc basis, and were not the subject of statutory provisions. The Uganda arrangements are unusual in the extent of the detail in the statutory provision about the roles of supporting authorities, and in the extension of the roles to the point of giving the minister and his department extensive control of the process. It is more common for existing ministers and departments such as the attorney general or the Department of Justice to provide support roles. Those roles seldom give as much control over a process as was vested in the Ugandan minister for constitutional affairs.

Among the difficulties with arrangements giving government authorities key roles in establishing constitution-making bodies is that those bodies then take center stage. The previously important minister and department are left with little of significance to do. This experience can contribute to tensions between a minister and a supporting department, on the one hand, and the constitution-making body. If the minister retains important powers of control over the constitution-makers (as in Uganda) there is then the potential for conflict over timetables, directions in the work of the constitution-making body, and control of funds and other resources. Where differences over substantive constitutional issues arise, attempts to interfere in the operations of the constitution-making body may occur. In some constitution-making processes, provisions about the independence of constitution-making bodies are included in the statutes or other documents that establish them. In part, such provisions are intended to reduce problems with interference by ministers or other government authorities.

constitution-making process that governmental authorities would normally play. These include situations such as those in Afghanistan, Cambodia, Iraq, Somalia, and Timor-Leste, where conflict prior to the constitution-making process has largely destroyed state institutions. There are also other postconflict situations where, although state institutions may exist, for one reason or another international community support for a constitution-making process extends to providing all or most of the support the constitution-making process requires, as in Namibia.

In the more common situation where government authorities—both political (e.g., cabinet ministers) and administrative (e.g., public service departments)—do carry out specialist, technical, and support roles, the authorities and the roles they play can be categorized in many ways. The following discussion divides them into three main categories.

Authorities established mainly to provide support for the constitution-making process

In some processes, special authorities are established to undertake particular roles in

establishing, coordinating, and supporting constitution-making bodies in various ways. They can be both political and administrative authorities. Such authorities can sometimes have responsibilities that extend to regulation and exercising a degree of control over the work of the constitution-making body. The laws establishing the main constitution-making institutions for the Ugandan constitution-making process from 1988 to 1995 provide an example.

Preexisting authorities that are given additional roles providing support for the process

In processes where new and specialized constitution-making institutions are required, it is common for authorities such as existing ministers and public service departments to be given the kinds of roles in establishing those institutions that the minister for constitutional affairs carried out in Uganda. In Kenya, for example, it was the attorney general who was required to submit to the president names of nominees for appointment to the Constitution of Kenya Review Commission.

Beyond their involvement in establishing institutions, existing ministers and departments play many other specialist, technical, and support roles. Police departments or other agencies may provide security for the process. The department of finance provides funds and perhaps manages the accounts. The department responsible for government information, and district or provincial administrations, may help provide civic education, and perhaps also help organize public consultation meetings about the people's views. The department of justice helps the constitution-making institution prepare the constitution-makers, and perhaps aids in analyzing views. The government's legislative drafting service usually provides the legislative drafter who develops the draft constitution in accordance with the instructions of the constitution-making body. More generally, the public service commission ensures that the constitution-making body is provided with the staff needed to carry out its work.

Sometimes such roles are the subject of provisions contained in the law or other document establishing the constitution-making institution. For example, it is common for statutes establishing constitutional commissions or constituent assemblies to make provisions about public service commissions providing necessary staff. But often the support and other roles are carried out because such work is regarded as part of the general responsibilities of the authority asked to provide the support.

Most, if not all, such roles can be of great significance in a constitution-making process, where the specialized constitution-making institutions will seldom, if ever, have all the resources available needed to operate independently of other governmental institutions. Almost always there is a need for close cooperation with other authorities, both political and administrative. At the same time, the need for support means that outside authorities may gain the ability to block, interfere, and politicize the process. While provisions guaranteeing the independence of the constitution-making body may help, they can seldom solve all potential difficulties.

External authorities that can influence or participate directly in the process

There are various situations where external authorities may influence, or participate directly in, the constitution-making process. An example of external influence concerns government control of appointments to constitution-making bodies. There are situations in which it is accepted that political considerations should determine the composition of a constitution-making body. Examples involve committees of a parliament (whose membership often reflects the numbers of seats that political blocs hold in the parliament) as well as constitutional conferences, roundtables, and peace processes. But when constitution-making bodies purport to be expert, neutral, or broadly (rather than politically) representative bodies, there can be risks in appointment processes controlled by government authorities. In politically charged postconflict situations, processes for appointing members of constitutional commissions, or particular categories of nominated members in constituent assemblies, can readily be heavily influenced by political factors. In the process, the credibility, and often the actual capacity, of the constitution-making body may be damaged.

As for direct participation, sometimes key government agencies have *ex officio* representation in a constitutional commission. In Kenya, the attorney general was *ex officio* a member of the Constitution of Kenya Review Commission and of the later committee of experts. (See appendix A.7.) The twenty-one-member Uganda Constitutional Commission included two *ex officio* members, one a senior army official and the other a senior official in the ruling party secretariat. Similarly, in some instances constituent assemblies have included members nominated to represent government authorities. The 284 members of Uganda's constituent assembly included ten to represent the army and ten "appointed by the president in accordance with the advice of the cabinet." Further, the chair and deputy chair had to be elected by the assembly from a list of five names submitted by the president.

The most obvious dangers arising when particular governmental interests are represented directly in constitution-making bodies involve pressure to protect governmental political interests generally, or pressure to protect the interests of particular parts of government (for example, the interests of the army, or of the attorney general, where a senior army officer or the attorney general holds a position *ex officio*).

Direct participation can also occur through government authorities making submissions to the constitution-making bodies. This can be dangerous, particularly if a government authority making a submission is particularly influential. On the other hand, when submissions of views are encouraged from all sources, it will be reasonable that government authorities use this avenue for seeking to influence the process.

Relations between constitution-making bodies and other authorities

On the basis of the discussion of the roles played by government authorities, it will be evident

that the main potential problems concern possible political interference by such authorities in the work of constitution-making bodies. The extent to which such dangers arise varies considerably. There are many factors that may influence the extent of the danger in any particular case.

As already noted, there are constitution-making processes in which political influences can be expected and will tend to be open (e.g., parliamentary processes, constitutional conferences, and roundtables). With constitutional commissions and constituent assemblies, there may be less open political interference, but processes for appointment or nomination of members may lead to such influence being exercised. Whether such influence occurs depends to a large degree on the extent to which both the political and the bureaucratic arms of government are unified, well structured, and organized. Where a government is dominated by a well-organized and tightly structured political party with a clear ideological position, it may well seek to influence any constitution-making process in order to achieve its preferred outcomes. On the other hand, where the ideology of such a party supports democratization, conflict resolution, and peacebuilding, there may be far less pressure to interfere. By contrast, where a country has numerous political parties that tend to be dominated by narrow agendas of their leaders or a narrow ethnic base, there may be multiple motivations driving efforts to influence appointments to and decision-making by constitution-makers.

The following practical suggestions for ways of establishing constitution-making bodies so as to reduce problems in relations with other government authorities have particular relevance to bodies that are intended to be neutral, broadly representative, or expert:

- Where practicable, when there are provisions for the appointment of members, the founding legal documents should avoid politically dominated appointment processes, and endeavor to provide for neutral or bipartisan processes.
- Statutes and other foundation documents should provide for the independence of constitution-making bodies from political direction and control, and should also include independence in codes of conduct for members of constitution-making bodies.
- As far as practicable, constitution-making bodies should be empowered to manage their own resources, so as to reduce the need for dependence on support from other government authorities.
- In general, statutes and other founding documents should avoid giving ministers and other external government authorities legal control over resources and work programs of a constitution-making body.
- Where international community actors are providing funding and other support to the constitution-making process, they should do so in ways that encourage and support the independence of the constitution-making body.

3.4.4 Courts

Courts may also be important in constitution-making. Sometimes a role for the courts is designed in the process, or even required; sometimes that role is an anticipated possibility, and sometimes courts play an unexpected role. It is more likely that a subnational constitution will

be challenged. It is not a supreme law, but must be compatible with the national constitution—and national constitutions sometimes state this specifically.

Courts with integral roles in constitution-making

Occasionally a constitution-making process cannot be completed without some involvement from the courts. The role of courts in certifying compliance with certain principles as to content, and perhaps procedural requirements, has been discussed in part 2.1.8.

In some countries, courts have a role in elections; they sometimes serve as the electoral management body, and sometimes have the function of certifying compliance with the law. That role might include certifying the result of a referendum on the constitution, as in Burundi [2005]. This sort of role for the courts is more common in the civil law tradition.

Courts with the possibility of blocking change

It is somewhat more likely that the courts will be invited to declare that a constitutional change is improper than that their positive approval will be required. And it is also more likely that amendments to a constitution will be challenged on the basis of procedural failures than that the substance cannot be validly introduced.

A constitution or peace agreement may specify certain principles on content of the new constitution without requiring a court, or any other body, to certify that the requirements have been satisfied. The only way to use such a provision may be to bring a court challenge to the document. A few such cases have gone to the German constitutional court, including one arguing that an amendment to agree to the creation of the European parliament was unconstitutional. Various constitutions say that certain parts may not be amended at all—and a challenge may be mounted to amendment on that ground. The Turkish constitutional court has ruled that an amendment to say that people's rights to higher education could not be restricted "because of their apparel" was invalid because it infringed the unamendable secularism provision. The background was the intention to permit women wearing the "Islamic headscarf" to attend universities.

The South African interim constitution provided that one-fifth of the constitutional assembly could refer any proposed draft provision to the constitutional court for a ruling on whether it complied with the thirty-four principles, rather than waiting for the complete draft constitution. No such challenge was made.

There is no limit to amendment specified in the constitution of India, but the Supreme Court created the principle of the basic structure of the constitution, according to which certain features may not be changed. It has spelled out what these are in later cases, but in no case so far has it held an amendment ineffective. Courts in a few other countries have adopted a similar approach, including Bangladesh, and in one case Sierra Leone.

Courts and referendums

Various constitutions permit courts to block constitutional change because they can, or must, rule on the constitutionality of a referendum. This is true of the Turkish constitution, and the Albanian one. In the latter the court must review the constitutionality of issues put to referendum within sixty days—including whether the issues relate to constitutional provisions that cannot be changed.

In 1992 the Russian constitutional court declared that a referendum planned in Tatarstan (one of the Russian republics) was unconstitutional, because it essentially declared Tatarstan to be sovereign and a subject of international law. The Tatars ignored the court and held their referendum, but later renegotiated their relationship with Russia.

Special roles in implementation

In addition to the role played in most legal systems by the courts in implementing the constitution—by adjudicating on violations of rights and on the constitutionality of laws and acts of the authorities—some more specific roles have been given to the courts under constitutions. In countries where much of the law is made by judges (essentially the countries of the English common-law tradition), the courts may be directed to develop the law in a way that furthers constitutional objectives. (The South African constitution is an example.) The Kenyan constitution [2010] also provides for the possibility of the chief justice advising the president that laws have not been enacted as the implementation provisions require, and that the parliament should be dissolved and elections for a fresh parliament held; in that case the president would have no choice but to dissolve the parliament.

Problems

The risks of court challenges holding up constitution-making may be considerable where the process is controversial and political litigation is common. In Nepal, there have been court challenges to the interim constitution. In Kenya there have been many court challenges—some undoubtedly politically motivated, essentially designed to sabotage the process. This is not true of all instances, though; in one the court held that prisoners were entitled to vote in the referendum on the constitution.

Substantive challenges raise other issues. The courts may rightly view themselves as the guarantors of the constitution. But some existing constitutions are not genuine products of the people's will, and there is a risk that the courts may stand in the way of that will being reflected in a new constitution.

In a country in serious need of constitutional overhaul, the courts may not be independent—of government, politicians, or business. Even if they are, assessing the contents, as opposed to the process, of constitution-making may require skills that the existing courts do not possess, because reliance on courts for constitutionalism has been limited.

In most countries there is the possibility on the one hand of “judicial activism” and the other of excessive “judicial restraint,” both of which may be politically motivated.

The Turkish “headscarf” decision has been roundly criticized as violating human rights, especially those of women. It takes a broad view of the implications of secularism, and is probably unconstitutional because it deals with the substance of the amendment, while the constitution says constitutional changes can be challenged only because when specified procedural irregularities have occurred. The constitutional court continues this activist approach, requiring the government to change some of the 2010 constitutional amendments—those relating to appointment to the court itself and another body that appoints senior judges.

The constitutional court of Kyrgyzstan in 2007 declared unconstitutional various amendments to the constitution hastily passed in response to popular demand. When the dictator Bakiyev was finally ousted in 2010, the interim government, under a new constitution, simply scrapped the constitutional court, in reaction against its earlier activism.

On the other hand, when the constitutional court in Albania “lost the opposition’s complaint” about a referendum and did not use its power to take a case about it on its own motion, there was suspicion that this decision was politically driven. (Some judges resigned in protest.) Otherwise, restraint may reflect division within the court—or a genuine reluctance to get involved in political matters.

Even discussion about the role of the courts is often politically charged. Allowing the courts to interfere with constitution-making is obviously controversial, even if the courts can be trusted to be neutral politically. They are impinging on the most fundamental act of people’s sovereignty: determining how they will be governed.

Special courts

Fear of court challenges has led the designers of some processes to create special courts. The South African constitutional court was designed to bring in a new style of judging; it was not created only for the purposes of the process. In Nepal the interim constitution provided for a special court merely to hear cases about elections to the constituent assembly. In Kenya [2010] a special court was created to hear cases about the process with both Kenyan and foreign judges. One reason for this was probably the expectation that the new constitution would include a provision involving the removal or at least the scrutiny of all existing judges, who had been subject to much criticism on the basis of both their competence and their independence.

Practical tips

A few points to bear in mind about designing a role for courts in constitution-making:

- When designing a specific role, such as certification, for the courts, it is important to be sure why this is being done—what will be achieved?
- Can the courts be trusted, and will their decisions have broad legitimacy?

- If a special court is created, it may be necessary to amend the current constitution to legitimize taking jurisdiction away from the regular courts.
- Strict time limits should be imposed to prevent litigation holding up the process indefinitely.
- The courts should not be expected to sort out woolly thinking on the part of the designers of the constitution-making process about the way it should go.
- The courts themselves should be prepared to recognize the limits of their own powers and competencies, act with restraint, and not thwart the will of the people unless that will clearly violates human rights.

A final point: a provision in a constitution that says “This constitution may not be challenged in court” contains a logical contradiction, namely that if the challenge is to the legal validity of the constitution it is a challenge also to the “no challenge” provision. A court may rationally decide that such a provision is ineffective.

3.5 Referendums and plebiscites

3.5.1 Approving and ratifying the constitution

The constitutional referendum is but one form of the referendum; others include referendums on secession or merger with an existing state, legislation, treaties, and policies. The focus here is on the constitutional referendum on fundamental changes to an existing constitution, or the adoption of a new constitution.

Two important elements in designing a constitution-making process are the institutions and rules for making decisions on the constitution. Often the choice is dictated by political and legal traditions. An obvious distinction is between unitary and federal states; the constitution of a federation affects more than the federal government, necessitating a more complex set of institutions and rules for voting. In many cases, the deliberative body that made the draft, usually the legislature or the constituent assembly, also adopts and ratifies it. Britain and some former colonies dominated by the notion of parliamentary sovereignty leave constitutional issues to the legislature. In civil law systems, there is a preference for a referendum (though there are a number of examples of parliament making the final decision). In states under some kind of international trusteeship or custody, there is likely to be a constituent assembly or a referendum (such as in Iraq [2006]), unless there have been recent general elections to the body making the constitution (as in Cambodia and Namibia).

The purpose of this section is to examine the necessity and desirability of a referendum for the adoption of the constitution. Rules for decision-making by constitutional commissions, legislatures, and constituent assemblies have been discussed in previous sections. As a rule, a referendum ratifies a decision made by another body, usually a political body, the legislature, or the constituent assembly. (An exception is the current Somali process, in which the draft

constitution is required to be submitted directly from a constitutional commission to the people under the Somalia Transitional Charter—though this is unlikely to be feasible in the current circumstances in Somalia.) In principle it is desirable that the draft constitution should be considered and approved by a more deliberative body prior to the referendum, since the referendum does not normally provide a proper opportunity for the canvassing of views on issues in the constitution, or the accommodation of different perspectives. And the only choice in the referendum is “Yes” or “No,” not a nuanced answer.

Uses of referendum

It is possible to use the referendum to resolve a particular controversy about the design of the process or a substantive issue. It has been used, particularly in Latin America, to ask the people if they would prefer a constituent assembly to draft the constitution, or to secure the mandate for negotiations on a new constitutional order (as in the referendum of the white community in South Africa), on the mandate of the constitution-making body (as in France in 1957), or on secession and independence (as in Saint Kitts and Nevis in 1998; Timor-Leste in 1999; Bougainville, Eritrea, Montenegro, New Caledonia, South Sudan in 2006; it is also a possibility for Canada, in relation to Quebec, as result of a Canadian Supreme Court decision on the subject). A similar referendum in Kurdistan in 2005 on independence was held by the regional authorities, to secure, as expected, a big “Yes” vote to strengthen its negotiating position on autonomy with respect to the rest of Iraq. The referendum to settle a contentious issue is best exemplified by the decision of the Special Majlis (constituent assembly) in the Maldives to adjourn its proceedings to refer the major contentious issue—the system of government—for resolution by the people. Both the Uganda [1995] and Kenya [2005] processes provided for similar possibilities, but these were not taken up, either to put pressure on the constitution-making body to reach consensus, or because they were daunted by the complexity of the issues. But Uganda used the referendum five years after the constitution to settle the outstanding question of whether the country should move to a multiparty system. Decisions on the retention or abolition of monarchy have been made by referendum in several countries (such as Greece, Italy, and colonial Rwanda).

Our principal concern, however, is with the referendum for a new constitution or major amendments, for at least two reasons. First, for the purposes of constitution-making, the referendum makes people a key institution, whose approval is necessary to bring the draft into force. This role of the people flows from the sovereignty vested in them, and is a manifestation of the fundamental component of the principle of self-determination. Second, for certain constitutional changes, the direct participation of the people in the referendum is seen as a necessary condition for the validity of constitutional change. Courts in India and Kenya have held that fundamental constitutional changes cannot be made by the ordinary process of constitutional amendments, especially when undertaken by the legislature. And, a fortiori, a constitution cannot be replaced by the ordinary amendment process. These defects can be perhaps be cured if an assembly has been elected democratically for the express purpose of amending fundamental features or of bringing in a new constitution. A referendum, it follows, would put the attempt beyond doubt.

Prevalence of referendum

Professor Markku Suksi, a foremost authority on the referendum, notes that more than half of the constitution-making processes from 1998 through 2007 used the referendum to decide on new constitutional text. But at the level of states (ignoring subnational entities), new constitutions, or constitutions that seem to be the result of a more specific constitution-making process rather than a regular amendment process, have been decided by means of the referendum only in some fourteen cases (Albania [1998], Sudan [1998], Venezuela [1999], Qatar [2003], Rwanda [2003], Cyprus [2004], Burundi [2005], Iraq [2005], Kenya [2005; 2010], Democratic Republic of the Congo [2006], Serbia [2006], Kyrgyzstan [2007], and Thailand [2007]). Suksi also estimates that at least half of the world's constitutions require a referendum for constitutional change (Suksi 2008).

Status of referendum

Apart from the subject matter, referendums can be categorized by their status. A referendum may be mandatory, required by the constitution or some other law. In these cases the results of the referendum are usually binding. A referendum may be advisory, to enable the government or parliament to gauge public opinion. In countries such as Britain in which referendums are neither mandatory nor binding, there may nonetheless exist an unwritten convention that certain important constitutional changes will be put to a referendum and that the result will be respected. The Kenyan referendum [2005] was probably advisory (if positive, the actual change to the constitution would have required parliamentary approval), but the rejection effectively killed the constitution-making process.

Some countries have elaborate rules on who may call a referendum, and when; a referendum can have a constructive or a disruptive influence on politics, and can certainly be used in a partisan way to undermine regular political institutions and processes. Sometimes it is necessary to get the permission of the courts to hold a referendum (as in Hungary). A court in Zimbabwe has held that the president can call a referendum at any time (and submit any draft constitution). Since only the legislature has any constitutional amendment power, the referendum can only be advisory. (As it happens, the Zimbabwe draft was rejected and the president made no attempt to take it or an amended version to the legislature.) For the purposes of constitutional amendment or replacement, the rules are normally relatively straightforward, and compulsory.

Rules regarding voting

How are the results of the referendum computed? On this critical matter, there is no single answer. In most systems a simple majority of those voting suffices (but in the Republic of the Congo, an absolute majority of those voting is required, and in Lithuania some provisions, touching on the character of the state, require a three-quarters majority). Some laws prescribe that a minimum percentage of registered voters must have voted, and many referendums have

been lost even though the majority of those who voted said “Yes,” because of low turnout. (Ireland and Italy are among the countries that require a minimum turnout.) A few, particularly federations, require that apart from an overall majority, there must be a significant spread of support throughout the country. This rule was applied in the referendum in Kenya [2010], requiring an overall majority of those voting and 25 percent support in five out of eight provinces. (Kenyan provinces have ethnic dimensions.) In the Iraqi referendum of 2005, the requirement was both a majority of “Yes” votes nationwide and that not more than two governorates (out of eighteen) have a “No” vote by two-thirds or more of the registered voters. (This figure was chosen rather than the original and less onerous requirement of two-thirds of the actual voters, the change giving a veto to small, but compact, groups—a rule originally meant to help Kurds in their negotiations for autonomy, but which nearly enabled the Sunnis to torpedo the constitution.)

Debating referendums

With the above framework for referendums, the question is what role should there be for the referendum? We need to ask questions about such issues as: how important is it to give the final word on constitutional issues to the people; about the place of the referendum in what is often a long and complex process covering a variety of issues, some controversial; the nature and fairness of the referendum campaign and process; the fairness of the referendum; and its impact on politics and nation-building. Is the referendum about the constitution, or is it really about other issues? Are there particular circumstances when a referendum might be particularly valuable—and others when it is unnecessary, even counterproductive? In order to answer these and other pertinent questions, we look at the advantages and disadvantages that are commonly advanced about referendums.

Arguments in favor of referendum

People’s sovereignty and democracy; conformity with international norms—self-determination

The preamble of most constitutions says, “We the People give ourselves this constitution,” or something to that effect. Modern democratic theory and emerging international norms, such as self-determination, proclaim that the sovereignty of a nation is vested in the people. Since the constitution is the supreme law, a manifestation of national sovereignty, it is appropriate that the final word should rest with people.

People’s participation

Closely connected with the above point is the right of the people to participate in the constitution-making process. (See part 2.2.1.) Traditionally, the entire scope of people’s participation was the referendum, generally after the constitution was made in considerable secrecy, by a few men drawn from the upper classes. Today, as we know, people participate in many ways, but often they play a small role in decision-making—except when there is a referendum.

Check on constitution-makers

The final word is often a commentary on, or an assessment of, the results of preceding efforts. If the process has been participatory, people have a chance during the referendum to decide whether their views have been sufficiently taken into account. There are several examples of people rejecting the constitution: Albania [1998], Zimbabwe [2000], Kenya [2005]. Sometimes the rejection kills efforts at reform, but more often it leads to a better process, as in Albania and Kenya (although after a lapse of some years).

Accountability of constitution-makers

The referendum can be a mechanism of accountability. It provides an opportunity for wide-ranging debate, and if the sponsors of the draft, usually members of the government, lose, they are expected to resign. In practice this has not happened. In Kenya [2005] the president dismissed the “No” faction of the cabinet; in Zimbabwe the president intensified his oppression of the people; in Albania the government stayed on and rigged the next election. But it is likely that the regime loses some moral and political authority.

Incentives for compromise to ensure general support of all ethnic and other communities

It is possible that if the process includes a referendum, this leads to caution on part of constitution-makers involved in earlier stages of the process, making them more sensitive to views of the people and more inclined to resolve differences among themselves. It is possible that in South Africa [1996] the provision for a referendum if the constituent assembly was not able to agree (by a two-thirds vote) might have persuaded the National Party to make more concessions to the African National Congress than it might have done otherwise, and equally that the African National Congress might not have wanted the agreement with the National Party, negotiated over a long period of time, to collapse through extremist influence on the referendum. However, it does not seem that the Kenyan politicians, acting through the parliamentary select committee, were particularly concerned about the reaction of the people (even shortly before the 2010 referendum was due), but the committee of experts, realizing that the last word lay with the people, felt emboldened to restore some people-oriented provisions that had been removed by the committee.

Change after careful consideration

Insofar as the referendum provides another opportunity to reflect on the draft constitution, and involves people who might not previously have been engaged in the process, it may prevent hasty, ill-considered, or opportunistic alterations to the constitution.

People’s knowledge of constitutional matters

The referendum campaign is an intense period of concentration on political and constitutional issues, explanations of the draft constitution, and arguments about its pros and cons. This

provides an incentive as well as a wonderful opportunity for the people to learn about constitutional values and institutions, and perhaps their own responsibilities as citizens.

Nation-building

Professor Suksi remarks that several recent referendums have taken place in countries in, or coming out of, conflict. For various reasons, he says, political or military leaders in these countries use referendums to secure the broadest possible legitimacy for a new constitutional arrangement and the greatest possible visibility for the constitutional solution. The referendum may, under such circumstances, be the final resort, either due to opportunism on the part of the leaders of the state to legitimize their position or because of an honest attempt to re-create public authority by a reference to the root of legitimacy, the people (Suksi 2008).

Legitimacy—people’s aspirations: Putting the matter beyond doubt

Underlying many of the above arguments is the legitimacy that is supposed to flow from people’s endorsement of the constitution. Words such as “ownership” and phrases such as “the commitment to defend the constitution” are used frequently. There is no doubt that people who have been given, and have taken, the opportunity to vote on the constitution will feel a greater stake than they would in one bestowed on them. The sponsors and supporters of the constitution often point to the enthusiasm of the people, emphasizing the significant majority for it, while its opponents feel hesitant to criticize it.

However, there is little empirical evidence that the euphoria or the hesitation lasts for long—unless the constitution delivers—or that people would take to the streets to defend the constitution. Thailand’s 1997 constitution resulting from a highly participatory process was overthrown easily enough. Even more striking was the lack of any popular resistance to the refusal of the Eritrean president to bring the 1995 constitution, which had been crafted with full public participation, into force. On the contrary, there is the risk that if the high expectations are not met soon, the support for the constitution will disappear. The next section discusses arguments against the referendum.

Arguments against referendum

A constitution is not a one-issue matter, but a complex set of values and institutions

A common worry about the referendum is that the voters will not understand the constitution or appreciate the significance of contentious issues. They may, indeed, reject the constitution on the basis of one or two issues that are peripheral to it. It is safe to say that in few cases have the vast majority of the people understood the real significance of the constitution, or the compromises that have gone into creating it.

Danger of misleading campaigns

Most referendum campaigns are dominated, if not hijacked, by politicians. Experience shows

that many of them do not understand the constitution, and in many cases have not even read it. Ignoring the central objectives and themes of the constitution, they blow a minor provision out of all proportion, particularly if it appeals to the emotions, and they make the referendum a one-issue matter. They are not above deliberately misleading the people; the campaign becomes a tissue of lies—the antithesis of deliberative democracy. If the politicians are divided about the constitution, their supporters will follow them and make little effort to understand the true issues.

Voting for the wrong reasons

The party politicization of the campaign can infect the people, so that the motives for their votes have little to do with the content of the constitution (or even misunderstandings about it). There are, as it were, purely political party considerations that can delegitimize the sponsors, usually the government. In countries where parties are unstable and fluid, the considerations are ethnic. The 2005 and 2010 referendums in Kenya were marked by extreme appeals to ethnicity; their effectiveness was reflected in the voting patterns. The general feeling was that the campaigns were really about the 2007 and 2012 general elections. The referendums became politics by another name.

Dangers of manipulation and intimidation, and seeking spurious legitimacy

In many countries, especially in developing areas, the referendum campaigns and voting have many of the hallmarks of elections—use of official resources for campaigns; intimidation and the use of the militia; bribery and other forms of electoral corruption, including the stuffing of ballot boxes. In Rwanda the voters were deliberately given only two weeks for debate, attempts at independent assessment were suppressed, and the fear of another genocide was evoked by the government if the constitution were rejected. The situation was worse in Sudan, where the draft, as presented by the commission, was altered by the president and then submitted to a highly manipulated and controlled referendum. Recently a similar charade was enacted by the military authorities in Myanmar (formerly Burma). In none of these states was the process open or participatory; instead it was marked by censorship and coercion.

Deeply divisive or polarizing effect of referendum in multiethnic states

The points above suggest that, far from the referendum bringing people around a constitution and promoting national unity, it can be deeply divisive. The situation after the referendum can become worse than before. (This is illustrated by the experiences in Cyprus, Iraq, and Kenya.) These experiences also showed the majoritarian bias of the referendum.

A better form of public participation is at earlier stages of the process: People as decision-makers

If an objective is the participation of the people, it is more effective to bring the people into the process at earlier stages, when there are discussions about the reform agenda and preliminary decisions on the constitution are being made. This will engage them more deeply and make them the real decision-makers.

Referendum can be used to defeat the results of a fair and participatory process

The referendum is sometimes used to defeat the results of a fair and participatory process. In Sudan [1998], Zimbabwe [2000], and Kenya [2005], key government officials not in agreement with the drafts produced through predetermined procedures put to a referendum their own versions of the draft. Although in some cases the doctored drafts were rejected, the original drafts were not enacted. In Kenya it took several years, and another lengthy process, to install the original draft, and even then it was not promulgated in its entirety.

In multiethnic states, the better solution is to negotiate in good faith

In multiethnic states, the strongest argument against a referendum is that a laboriously and carefully negotiated settlement between different communities can come unstuck. These settlements are almost always controversial, yet they are the only basis on which agreement is possible. But disgruntled members of a community, particularly of the majority community, can use the referendum campaign to mobilize opposition with the use of racist propaganda. In a country with a troubled ethnic history, such appeals are likely to succeed. The result is deep resentment in one or more communities and the general worsening of ethnic relations. Equally likely is that some leaders would not even agree to a settlement, fearing that they would be accused by their communities of selling out during the referendum campaigns. The danger of referendum politics sharpening ethnic divisions is real. The recent Canadian experience in getting a new constitutional order shows the incompatibility of a negotiated compromise with the outcome of referendum.

Legitimacy comes from the fairness and effectiveness of the constitution

Some of the most successful constitutions have not had the benefit of a referendum, such as those of Canada, Germany, Hungary, India, Japan, Mauritius, and South Africa, while many constitutions endorsed by referendum have performed poorly or been replaced (e.g., those in Eritrea, Sudan, and Thailand). Fairness depends on the context; in the case of a multiethnic state it means that there is respect for all communities, and individual as well as community rights are protected within an overarching national identity. Effectiveness means that the status of the constitution as supreme law is honored and therefore the rule of law prevails.

Importance of the question

It is well understood that, deliberately or by carelessness, how the question is put can affect the result. When Australians were asked about the abolition of the monarchy, it is probable that a majority favored this step, but the question as framed faced them with a choice about how to replace the British monarch as head of state. This issue divided the republican vote. In Kenya [2010] the question “Do you approve of the proposed constitution?” was arguably less clear than one showing that the choice was between the existing constitution and the proposed one.

The United Kingdom electoral commission criticized a referendum on powers for the Welsh assembly for being ambiguous and using phrases (such as “devolved powers”) that people did not understand.

Comment on the debate

The arguments for and against the referendum show that while in theory it is democratic and basic to the sovereignty of the people, it poses serious practical problems. It may well be necessary in some contexts and unwise in others. It would be useful to make a careful analysis of the desired or expected objectives of the referendum before embarking on it, and to structure it accordingly. Meanwhile there are some obvious procedural improvements that should be instituted, particularly to make it fairer, more effective, and more educational.

Referendum reforms

- One complaint about the referendum is that it gives limited choice, expressed as “Yes” or “No.” Is it possible to offer more choices? Options that may be considered are:
 - choices on a series of contentious issues (for example on abortion or on the electoral system) before the draft is finalized; or
 - choices between two drafts (for example, one based on the parliamentary cabinet system and the other on the presidential).
- The draft constitution should be published well before the referendum date so that there is sufficient time for proper dissemination and discussion.
- The question on which the voters have to decide should be clearly stated, and announced well in advance; testing questions ahead of time to see whether they are understood would be wise.
- To avoid the hijacking of the campaign by politicians, an independent commission of eminent and respected citizens should be established to assist with dissemination of the draft, and the organization and funding of campaign activities, including:
 - promoting understanding of the purposes and procedures of the referendum, in cooperation with the electoral commission and other relevant bodies;
 - establishing or accrediting national “Yes” and “No” teams, drawn from academics and intellectuals, retired civil servants, professionals, and civil society, with appropriate gender, ethnic, and regional balance;
 - facilitating town hall-type meetings and media programs jointly with “Yes” and “No” teams to promote fair and open debate;
 - preparation, publication, and dissemination of materials to facilitate understanding of the draft, including for people with reading impairments, and in different languages where appropriate; and
 - engaging with monitors overseeing the campaigns and the voting.

- A regulatory system for campaigns and for the conduct of voting, with a code binding on all political parties and other groups active in the campaign, should be established to ensure a fair campaign, including:
 - no hate speech;
 - no bribery of voters;
 - no deliberate misleading of voters and others about the draft;
 - no intimidation or use of force against those with opposing views or voters; and
 - no use of government resources other than through the referendum commission.

- To make the referendum meaningful, the design of the constitution-making process should provide for the participation of the people in earlier stages of the process so that they become aware of the issues and the debates and are able to make an informed choice at the referendum.

Part 4: Guide to key external actors in the process: Civil society, the media, and the international community

Although parts 2 and 3 of this handbook are intended to assist anyone involved in a constitution-making process, the discussion is particularly directed to providing guidance to national actors involved in designing, developing, or undertaking such a process. Such national actors are usually connected to government in some way and often have a legal mandate of some kind. At the same time, there are also key nonstate actors that often play important roles in processes—both official and unofficial roles, and with both positive and negative impacts. Among the most significant are civil society actors, media organizations, and international actors.

In this part, the focus shifts to one of providing specific guidance to:

- civil society and the media about roles they play, either when participating in the official constitution-making process (for example, making submissions on constitutional issues) or in situations in which they do not have official roles but wish to influence the process (ideally to make it more participatory, transparent, inclusive and nationally owned; and
- international actors, particularly when they are leading or substantially influencing a process.

4.1 Civil society and the media

As discussed in parts 2 and 3, a constitution-making body may officially work with civil society and the media in various ways; in a participatory process, in particular, they often play critically important roles in civic education and public consultation activities. (See, for example, the discussion in part 2.2.2.) We suggested in part 2.3.11 that the need for a constitution-making body to engage frequently with the media makes it vital to develop a media strategy. In addition, civil society and the media will often also take on key roles and activities related to the constitution-making process on their own initiative, in many ways quite distinct from any “official” roles they play in supporting the process. These can include roles and activities closely connected with what are generally understood to be important purposes of civil society and the media—exposing and sometimes challenging state institutions, and, in the case of civil society in particular, even mobilizing people against certain state policies. So in carrying out such roles and activities, civil society and the media can sometimes clash or have tense relations with constitution-making bodies.

In this section we discuss some of their key roles and activities, including promoting or organizing for constitutional change, informing the people about issues related to elections, providing civic education, supporting or conducting public consultations, preparing submissions, researching, lobbying, and monitoring the process. In doing so we identify some of the potential problems and dilemmas that can arise in relation to such roles and activities, and offer guidance about the constructive role civil society and the media can play, in particular to promote a participatory and deliberative process.

4.1.1 Promoting or organizing for constitutional change or reforms

As discussed in part 2.1.3, under the heading “The political dimensions of starting a process,” the pressure for constitutional reform processes often comes from political action and street action, in which civil society and the media often play significant roles.

In Colombia the media linked with student groups to push for a constitutional referendum on creating a constituent assembly. (See box 1, “Colombia’s popular movement for reform.”) In Kenya, prior to the process that ran from 2000 to 2005, civil society, faced with governmental foot-dragging over starting a constitutional process, created a group of fifty-two religious and secular organizations that set up an unofficial commission to travel the country and collect the views of the people. This elicited such popular enthusiasm that the government reluctantly started an official process of review. One important lesson is that political action is more likely to be successful if civil society organizations can work together to get a process moving. Other forms of political action could include trying to get change onto the agenda of one or more parties—or even trying to create a party with constitutional reform as a main plank. This, however, is complex, and may be possible only as a long-term strategy.

In Afghanistan and Guatemala, civil society played a role during the negotiations about the structure of the process. In Timor-Leste [2002], after the constituent assembly was established, a consortium of civil society organizations became concerned about the short time limits for the assembly, the limited agenda of issues it was considering, and the lack of interest in consulting the people. Given that the United Nations was serving as the transitional administration, the consortium wrote to the United Nations Security Council to ask its members to use their influence to put the conditions in place for a deliberative and participatory process. When this request did not lead to change, the consortium demonstrated in front of the constituent assembly, demanding a more transparent and open process, and this led to changes in how the constituent assembly engaged the public, including holding regular press conferences and limited public consultation on the draft. (See the case study on Timor-Leste, appendix A.11.)

The 2006 People’s Movement in Nepal was an example of street action. It is a form of direct political action that carries its own risks: of creating instability; of physical injury or death to some, as happened in Nepal; and perhaps of undermining belief in the rule of law, thus

undercutting the whole idea of a constitution. One demand of leading groups in the movement in Nepal was a constituent assembly. The People's Movement turned what the political parties had agreed upon from an aspiration into a possibility.

It is difficult to provide guidance to civil society and the media about how best to be effective in playing such roles; much depends on the local context. Civil society, however, will generally be most effective in such roles if it is broad-based, with good networks between the various civil society actors (NGOs, churches, associations, and the like), and if civil society leaders have good links with one another, the media, and political parties. Finally, the campaigns for constitutional change need to be designed to apply real pressure to those in power.

4.1.2 Informing and educating the people about electoral issues related to constitution-making

Elections of various kinds can play important roles in the initiation and other aspects of constitution-making processes. Because of the complexity and political sensitivity of the issues relating to both the process and the contents of the constitution that so often are central in such elections, the roles of civil society and the media in providing information and civic education can often be of great significance.

The numerous kinds of elections that can have major significance for constitution-making processes include:

- a normal election for the legislature where a major issue for voters concerns whether a constitutional reform process should be initiated;
- a normal election occurring during a constitution-making process, when issues about the process, or the contents of the proposed constitution, may well be important electoral issues;
- an election to select the members of a constitution-making body, such as a constituent assembly; and
- an election for the legislature held after the new or revised constitution is adopted (which may be the first for a new legislature established in accordance with the new constitutional provisions), when key electoral issues may relate to the implementation of the new or revised constitution.

Such elections may involve issues about candidates' and parties' varying commitments to a constitution-making process, their views on the contents of a new constitution, and adherence to and implementation of new constitutional arrangements. They will therefore often be elections with unusual significance for a country. Voters may have opportunities to influence constitutional outcomes, both by voting and by participating in debates about process, constitutional contents, and implementation.

It is common for civil society and the media to play major roles in informing people about

issues in relation to elections, and in addition for civil society to play a role in mobilizing and organizing people—for example, to lobby and apply other forms of pressure to parties and candidates, and to vote in particular ways. Because of the fundamental issues about the future of the country likely to be at stake in an election connected with a constitution-making process, the roles of the media and civil society may be particularly significant.

In many countries, the voting preferences of a large proportion of the voters are set (most voters having allegiances to particular parties), with most elections decided by the “swing” votes of a minority, with a limited range of issues likely to attract the voters’ attention. But in elections connected to a constitution-making process there will usually be many issues on which the voters should focus. Voters may need encouragement to think beyond the immediate future (as is the case in a normal election) and instead think about the shape of the state and the rights of people far into the future. They may need to be helped to think of themselves not just as workers (especially when economic times are hard), parents (when education is the main issue), and patients (when healthcare is at stake). They are also people with much wider concerns; they are also citizens (who want effective and responsible government—even from “their” candidates), they are taxpayers (who want value for money and financial accountability), they are landless or landowners, minorities or members of the majority, women or men, urban or rural dwellers, and so on. A constitution will be relevant to all their concerns. And many may find that it is not their “regular” parties that have the best approach to the constitutional issues.

In countries emerging from turmoil to make a constitution, political parties may not be well established, though usually some sorts of groups of “like-minded” candidates will emerge. And a constituent assembly and even a parliament may comprise more nonparty members than does a typical legislature. So it may be important to focus on the views and capacities of the individual candidates when deciding how to vote.

Civil society and the media can play vital roles in alerting the voters to such issues. They should not rely solely on either official “voter education” or political parties. The media—to the extent that they are independent of political parties and powerful economic forces with their own interests in election outcomes—can also play critically important roles in providing information to voters.

4.1.3 Civic education

Civil society and the media can play a wide range of roles in providing education to the people about the constitution-making process and the agenda of constitutional issues arising in it. In a highly participatory process, the constitution-makers may link with civil society and the media in various ways to support the official civic education program. (See part 2.2.2.) When the constitution-makers are not committed to informing or educating the public, civil society and the media can play a key role by taking the initiative to begin the constitutional dialogue and to inform and educate the people as well as preparing them to advocate for a more people-centered

process. (See part 2.2.2 for a discussion of civic education methods and some pitfalls to avoid.) Even where there is a participatory process, with a good official civic education program, there will almost always be room for additional information and education. Some civil society groups will be able to play special roles in the provision of education or information because of the specialized knowledge they have about key problems or issues (e.g., human rights) or their special relationship to marginalized groups (e.g., poor women).

4.1.4 Public consultation

In a highly participatory process, civil society and the media are sometimes given important roles in official public consultation processes (e.g., civil society can assist with organizing and facilitating face-to-face meetings between the public or sectoral groups and the constitution-makers, and media organizations can help by advertising meetings and gathering views—see part 2.2.3). In processes where no mechanism is provided for people to have input into the official process, civil society and the media have sometimes conducted their own public consultation and then provided constitution-makers with analyses of the views submitted. The degree to which this has had an impact on the process has depended on a number of factors, including the credibility of the methodology and the institutions involved as well as the willingness of the constitution makers to make use or review the views. In such circumstances, careful thought should go into how the public consultation is carried out to maximize the likelihood that the decision-makers will be receptive to the people’s views. It may be wise to invite the constitution-makers to attend the consultation so they trust that the process is credible. Although the discussion of how to conduct public consultation and the issues to consider contained in part 2.2.2 is directed toward providing guidance to “official” constitution-makers, many of the points made there are relevant to unofficial consultation.

4.1.5 Submissions to the constitution-making body

The modern trend in constitution-making is toward popular participation, and increasingly the official process provides opportunities for public participation and will publicize how the people can participate. Civil society and the media can play significant roles in helping people better understand how to make submissions and share their views. Further, civil society groups can be expected to have strong interests in making their own submissions, particularly in relation to the constitutional issues of relevance to their fields of work and expertise. To be able to play such roles, both media and civil society will generally have to familiarize themselves with the timetables and procedures of the process so that opportunities to contribute are not missed. However:

- delays in other parts of a process may reduce time allocated to public consultation, so that it can be critically important to pay constant attention to the changing timetables of consultative activities;
- designers of official processes may have their own, rather limited, ideas of when public input

is needed, and in what form, while civil society organizations may wish to have input at different times or in different ways; and

- not all constitution-making processes are intended to be participatory, and even in such cases civil society may be able to encourage the submission of views from the people and may make its own submissions.

Further, a constitution-making body may have its own guidelines on how submissions of views should be made (e.g., the Uganda Constitutional Commission published a pamphlet on the subject). In such instances it will be important to study and understand the guidelines so that advice given to the public about making submissions is correct. However, at times the guidelines may not allow for the issues that civil society and the public are interested in presenting to the constitution-making body. Civil society and the media can then urge a broader constitution-making agenda.

An organization or an individual with a well-thought-out idea, or many ideas, about the content of the new constitution or how the process should be carried out should plan to present these views to the constitution-making body in a way that will have a powerful effect. As discussed in part 2.2.3, in a participatory process, many people or groups may make submissions in many forms. These can range from short statements at public meetings to SMS or e-mail, Twitter, and Facebook messages, handwritten letters, long written submissions, or even full draft constitutions. Brief submissions should not be discounted, as a particularly forceful statement may have a lasting impact on a reader.

Here are a few suggestions about making submissions, some drawn from the advice of people experienced in doing so, some based on common sense:

- Find out whether the existing constitution contains anything relevant on the issue of concern. If so, should the new constitution contain the same provisions, or are you suggesting changes? If you are suggesting changes, what is the problem involved, what is your alternative, and how would it fix the problem? If your suggestion is to retain the current provision, what is the issue of concern, and why is the existing provision the best approach?
- Do not simply make assertions such as “We favor a presidential system.” Instead, always give reasons for what you propose.
- Remember that research and accurate facts and figures are important. Make sure your information comes from sources that can stand up to inquiry.
- Be as brief and as clear as possible.
- Note that ideally a submission should stand out so that recipients want to read it—but usually there is no need for it to be “glossy” and expensive-looking.
- If the submission is long, begin with a summary bringing out the main points clearly.
- Recognize that sometimes a petition, or a postcard campaign in which many people are asked to sign and send in preprinted cards making a few short points, can be useful. But it is easy

for critics to dismiss such campaigns, saying that most people who signed did not understand what they were doing.

For an oral presentation (for example, at a public meeting with constitution-makers) the following practical tips may be useful:

- If the submission is on behalf of a group, choose a representative who is knowledgeable and persuasive.
- Be creative in the form of the presentation. For example, in making a case for the rights of children, including some children with particular relevant needs, or even a short film emphasizing the plight of children, may have a powerful impact, and make your submission stand out.
- Time limits set by the constitution-makers should be respected.
- Remember that presenters should be respectful of the constitution-makers—but firm in the approach they take.

For any submission, it is wise to focus on the issues of substance and avoid “flowery” or exaggerated language. Defamatory, tribalistic, or other inflammatory statements should be avoided. A little personal detail may sometimes be helpful, showing how specific issues have affected citizens.

When using the media, it is worth noting that a constitution-making body may take more notice if the media can be persuaded to give some attention to a particular submission and the issues it raises. Suggestions in relation to use of the media include:

- Take steps to ensure that the media know about a submission that is to be presented, and that they understand its importance.
- Create effective press releases.
- Remember that the press might welcome something to take a picture of—something that makes a good picture: a photogenic person, a march, a dance, a colorful event.

Unsolicited submissions

If the process does not make provision for public submissions or if deadlines for making

Box 44. Use of South Africa’s petitions [1996]

It is often stated that the South African constitutional assembly received two million submissions. But in fact signatures on cards and petitions were counted as submissions. These forms of submission were not taken so seriously as were more formal ones that argued the case of the author, of which there were only about 13,000.

submissions have been missed, it may still be possible to create opportunities to put views forward. Appropriate tactics will vary according to whether the intention is to submit views to a commission, a constituent assembly, or the national legislature. For example, to get views before a constituent assembly, a civil society organization might:

- invite one or several assembly members to a meeting;
- lobby members of the assembly, especially while the issue is being discussed in a committee or in the plenary;
- use the media in efforts to influence public opinion and the opinions of assembly members;
- hold dignified public meetings on relevant issues;
- put together a small, easy-to-read publication that can go to every assembly member; or
- introduce ideas into a committee directly or by lobbying committee members (because committees are smaller and are where much of the real work of making the constitution will be done).

In a constituent assembly with a strong party presence, or even dominance, it may be difficult to get views listened to other than through a party. That would suggest the need to focus on party members who are able to influence other members of their parties.

Sensitive issues

In almost all societies there will be some particularly sensitive issues about which provisions are potentially to be included in the constitution, and in relation to which it may be difficult to generate public support—positions perhaps favored by civil society actors informed by an understanding of the need for protection of human rights, or “liberal” perspectives of a similar kind. Such issues could include gay rights, the rights of sex workers or prisoners, women’s rights to abortion, euthanasia, abolition of the death penalty, and rights for widows. Experience has shown that there can even be a risk that if too much attention is drawn to some issues, unsympathetic groups may be prompted to try to get the constitution drafted in a manner that excludes any “liberal” perspective on such issues. But consider the following:

- On an issue such as the abolition of the death penalty, rather than confronting the issue, submissions from civil society could support introduction of a broader provision such as strong support for a right to life, opening the possibility that at a later point, the courts or the government can use that right to abolish the death penalty (as occurred in South Africa—see box 45 below).
- Civil society submissions could draw upon international experience—especially the example of a country with similar social conditions that has adopted an idea like the one being promoted.
- In the area of human rights, or perhaps the environment, submissions could rely upon the argument that the country is already supposed to do something because it has signed

international agreements. (But remember that it is quite common for resistance to be shown to international agreements as “foreign interference.”)

Timing

Once there is a full draft constitution, it may be hard to introduce fundamental changes; big ideas on major issues may have the best chance of acceptance if introduced at an early stage. Ideas of less central importance may be easier to introduce as changes to a draft, to refine it and make it more effective.

Staying interested

Suggestions accepted at some stage may not appear in the final constitution—they may meet later resistance or incomprehension, or may even be omitted by error. It is important for civil society actors with an interest in particular issues to monitor the process, reading drafts to see whether ideas have been accepted and pointing out omissions.

4.1.6 Research

Civil society has contributed in a number of constitution-making processes through conduct of research, sometimes undertaken on an official basis for the constitution-makers, and sometimes done as part of an effort to influence the process in one way or another.

Research for constitution-makers has included work intended to improve civic education efforts (e.g., on the types of media that effectively reach particular groups in society), and to assist with opinion polls and focus groups to feed information to decision-makers about the perceptions, views, and attitudes of the public on particular issues or to provide statistics or facts about the current context. Civil society and academic institutions have also seconded researchers to the constitution-making body to research any issue requested by the constitution-makers (e.g., Afghanistan [2004]).

In addition, civil society actors normally conduct research on specific issues connected to their main concerns, such as land reform or human rights protection. They often use such research to prepare submissions providing information and recommendations to constitution-makers about how key problems should be addressed in the constitution.

4.1.7 Lobbying

Lobbying is a process of dealing directly with decision-makers such as constitution-makers with a view to seeking support for a position on some issue of importance. In a constitution-making process the issues being lobbied about can involve the design and operation of the process itself as well as questions about contents of the constitution. It is common for civil society to become involved in lobbying on such matters. Here are some commonsense points

Box 45. Abolition of the death penalty in South Africa

During the South African constitution-making process, sensitivity about high crime levels contributed to difficulty in getting agreement on the abolition of the death penalty. But not long after the new constitution came into force, the constitutional court held that the “right to life” provision in the constitution meant there should be no death penalty.

on lobbying as applied to members of a constituent assembly:

- Choose the targets carefully: perhaps members who are not already committed one way or another on the issue in question, but may be persuaded to support the viewpoint held by the lobbying organization.
- Find out the official view of each target member’s party, and about the member’s interests and possible biases.
- Be prepared with all the facts and arguments.
- Be on time for any meeting arranged, be polite, and be patient.
- Be persuasive, using a little emotion perhaps, but always providing as much useful information as possible.
- Be brief—in speech and in writing.
- If the member asks a question for which you have no answer, be honest, promise to supply the information later—and do so!
- Send a note of thanks after any meeting, one that emphasizes the main points made.

Lobbying a commission or expert committee may be harder. They are not chosen to “represent the people” in the same way a constituent assembly is. It is also unwise for any civil society actor to be exposed to any risk of being seen as attempting to use unfair influence on a member. Approaches to such bodies should perhaps be open—a request to speak to the entire committee, or an “open letter” in the newspaper, for example.

4.1.8 Monitoring a process

Civil society and the media can play valuable roles by standing outside the process, monitoring and evaluating its performance and progress, and making proposals for improvement. Such roles can be of great importance in various ways. Regular monitoring can provide the basis for making regular reports that give the public independent assessments of progress. This can be particularly important where the official constitution-making body does not inform the people fully, whether as a result of a lack of “people-directedness,” a lack of resources, a lack of full understanding, or even a deliberate wish to keep the people ill informed and thus possibly less critical. Credible and regular civil society monitoring can also be helpful to the government

and to the constitution-makers by providing them with independent assessments of progress, outcomes, public attitudes to the process, and so on.

The following discussion outlines suggestions about civil society monitoring drawn from experience in a number of processes.

Establishing a relationship with the official process

To provide credible monitoring of a process, it will be helpful first to identify the civil society actors best placed to develop and maintain a good working relationship with the official process, and for particular persons in those organizations to invest some effort in building the relationships. Helpful strategies may include:

- ensuring that relevant people in the official process know of the existence of the civil society actors in question, what they do, and what their interest in the constitution is;
- developing good personal relationships with key individuals in the process, on both the management side and the decision-making side; and
- getting to know the press and outreach people within the official process.

Developing such relationships provides a basis on which information is more likely to be readily volunteered by constitution-makers, and helps views put forward as part of monitoring reports (including suggestions about improvements to the process) to be dealt with in a nonconfrontational manner.

Civil society is often regarded with suspicion by senior politicians and civil servants. In developing countries and in conflict situations there is sometimes especially strong suspicion of NGOs that receive foreign funding (due to fears that they may be doing the work of foreign interests). In such cases it may be more difficult to develop good working relationships, and it may be wise to rely on civil society actors who do not have such problems.

Keeping the pressure up

Civil society may find that there is flagging enthusiasm for the constitution-making process on the part of politicians. Building support for the process, monitoring, and lobbying may all be as necessary during the process as they can be when getting it started. Even demonstrations and other forms of direct action may be required. There can be some risks in civil society getting involved in actions to maintain support for a process, including:

- being used by political forces to achieve quite different aims, either in relation to the process or more generally; and
- that in circumstances where there is serious controversy about the process, serious disorder could be used by those in power as an excuse to stop the process.

The balance between encouragement and critique

It is sometimes easier to criticize than to praise. Like anyone else, constitution-makers may grow to resent constant comments from civil society and the media that they see as negative and unfair. If the process is to come to a successful conclusion, it may sometimes be important that key constitution-makers feel appreciated and encouraged to go on. This may apply with particular force to nonpoliticians, but even professional politicians may resent being constantly criticized.

An effective monitoring program

The word “monitoring” has a range of meanings. In this context we are referring to systematically observing and recording what is being done in a constitution-making process in order to evaluate the impacts and outcomes of the process. One definition of evaluation is “collecting information to check performance against an expectation.” Evaluation may involve comparing actual impacts and outcomes with what was expected.

Many aspects of a process can be monitored and evaluated, all depending on the interests of those doing the monitoring and evaluation. (For example, donor countries and agencies will want to know how their money is being used; agencies of foreign powers with interests in the country or the region where it is situated may want to monitor developments in the process with a view to considering whether conflict might break out again, and whether the constitution-making country is going to contribute to regional stability.) The focus for civil society would be expected to be on monitoring the process in order to evaluate how well it is making progress toward meeting the expectations and needs of the ordinary people of the country for which the process is being conducted.

An effective monitoring program should be:

- well informed;
- systematic;
- flexible; and
- consistent.

Monitoring needs to be well informed because constitution-making is a complex business. If observation of what is going on is to be useful, it is important to understand the process well. How does what has happened relate to the objectives of the process? Monitoring a constitution-making process cannot be a mechanical affair.

The monitoring must be systematic in the sense that the monitoring bodies should have a strategy for collecting information. They need to know what they are looking for.

Monitoring should be flexible, because constitution-making will be affected by all sorts of political and social factors. As a result, information may come from many sources, some unexpected. Official sources should not be relied upon exclusively.

The monitoring should be consistent. Because circumstances may change quickly, important events may pass unnoticed unless monitoring is as continuous as possible. The challenges in monitoring a constitution-making process include the following:

- It is not enough (though it is important) to check actual events against planned timetables. (The press is sometimes guilty of focusing almost entirely on questions of timing and not paying sufficient attention to the content of developments.)
- It may be difficult for civil society to have access to the variety of skills needed to carry out an effective monitoring program, for the program may need to cover many aspects of a process, including: electoral systems and election management; public procurement and finance; civic education and public consultation methods; and debates on complex issues concerning the content of a proposed constitution.
- Reading official accounts, or even newspaper accounts, of what is being done will not be enough; it will almost always be important to witness activities such as public consultation sessions, the meetings of the constitutional commission, constituent assemblies or constitutional conferences, and so on.
- Monitoring must consider far more than just official accounts of the process, some of which may not be accurate; indeed, they may contain deliberate falsehoods. (Even opinion-polling organizations are sometimes known to be linked to political interests.)
- The media may be dominated by certain political parties, business interests, or ethnic groups.

There are almost limitless possibilities for the structure of arrangements for monitoring and evaluation. An effective monitoring program would ideally involve more than one organization; a group of NGOs could usefully cooperate to watch the various aspects of the process. It may also be possible to link up with entities beyond civil society, such as independent government bodies (e.g., a human rights commission or an ombudsman) or a media organization with an established record of independence.

In terms of tasks, a civil society monitoring process could involve:

- observing (and commenting on) whether the process unfolds according to its official timetable or at a reasonable pace, and why delays, if any, occur;
- watching out for developments—deliberate or otherwise—that threaten the continuation of the process;
- watching out for and drawing attention to process “hijackers” or spoilers—groups or people who may try to take the process over to influence the outcome to their own advantage, or who may seek to damage or destroy the process;
- ensuring that the people understand when and how they can offer input;
- watching to ensure that the process is inclusive (some women’s groups have monitored processes to ensure gender equity); and
- generally assessing whether the constitution-making bodies are fulfilling their mandates.

Box 46. Civil society monitoring in Zimbabwe

The Civil Society Monitoring Mechanism (<http://www.cisomm.org>) is a collective of about forty NGOs dedicated to monitoring and evaluating the implementation of Zimbabwe's September 2008 Interparty Political Agreement involving President Mugabe's Zimbabwe African National Union—Patriotic Front and the political opposition. Among other things, the agreement provided for a constitution-making process. The benchmarks that Zimbabwe's monitoring mechanism established for monitoring the agreement include:

- transparent and timely establishment of the select committee of parliament required to conduct the process;
- meaningful representation of, and powers for, civil society within all subcommittees for the purpose of contributing to the constitution-making process;
- widespread national consultations with the public and all civil society sectors on all relevant processes and on the content of the constitution;
- full involvement of all stakeholders in “all stakeholders” constitutional conferences;
- timely publication of the report, the recommendations for constitutional change, and the draft constitution presented to parliament;
- meaningful inclusion of the public through impartial and comprehensive publicity and dissemination of parliamentary debate on the draft constitution (through broadcast and print media); and
- no substantive amendments by parliament of the draft constitution so as to deny the will of the people as expressed during the public consultation process and all-stakeholders' conferences.

Its report for May–June 2010 recorded progress, but also identified some worrying failures, such as that the Zimbabwe African National Union—Political Front had “reportedly launched Operation Chimumumu (Operation Dumbness) whereby villagers are strictly instructed that only a few select individuals will contribute during the public consultations, with everyone else remaining a passive audience.”

Some of the techniques and methods of gathering and assessing information that may be needed to carry out such tasks include:

- developing a good understanding of the structure of the process, what is supposed to happen as part of it, and when;
- studying carefully the official information that is put out—understanding it and checking on its accuracy;

- reading the press and listening to the radio carefully (especially phone-in programs, which have become important barometers of public opinion in many countries, as well as ways of putting views forward to constitution-makers);
- pulling together media (and other) reports from different sources, because any single media source can be expected to have an incomplete picture of what is happening;
- engaging with organizations that are making submissions (to get a sense of what points they are making and how the official process has responded—both whether that process has shown a serious interest in the submissions and whether those who make submissions are being treated with proper respect);
- having, if resources permit, representatives at public meetings where the official process gives out information or where the people make submissions (trying to ensure that the people’s concerns are taken seriously, and also seeking to understand how people are feeling about the constitution-making process and the constitutional issues being considered); and
- making use of contacts within the system in order to know what is really happening.

To be effective, outcomes of monitoring and evaluation need to be communicated to constitution-makers and to the public. Reports need to be made regularly, perhaps using newsletters, a website, or media reports. To do this in a sustained way over a prolonged period requires the commitment of both people and resources. Many monitoring groups have started with enthusiasm and been unable to sustain it.

Here are a few examples of monitoring activities carried out by groups working from outside constitution-making processes:

- In Timor-Leste [2002], a group of women monitored the constituent assembly meetings as well as the public consultation meetings to determine whether the process was including women and hearing women’s concerns. The group made recommendations to improve gender equity in the process. It linked with the media to inform them when there were problems in the process, and also with a large coalition of women’s groups that then advocated for reforms of the process or changes to the draft constitution based on the information the monitoring group provided.
- In Nepal [ongoing process], staff of the Office of the High Commissioner for Human Rights attended some meetings held by constituent assembly members to collect public views, and were able to make useful comments on the organization of the meetings and on their limitations in terms of who was able to participate (especially women).
- In Kenya [2010], the press reported on many misrepresentations being peddled by politicians and religious organizations in the referendum campaign.

It is also helpful to look at examples of effective civil society monitoring of government activities in contexts other than constitution-making. In the Philippines a monitoring program, undertaken by civil society with the cooperation of the government as an anticorruption measure, monitored the production and delivery of textbooks to schoolchildren, leading to the

average price per textbook being halved; monitoring of civic education materials, broadcasting, and the like could help cut corruption in constitution-making processes.

4.2 Guidance for the international community

In part 2.3.12, we defined the various categories of entities that are often included in the term “international community” in reference to constitution-making processes and also discussed how constitution-making bodies or other key national actors can manage relationships with the international community in effective ways. Because one of the goals of the discussion in parts 2 and 3 is to provide guidance to national actors undertaking a process, it deals with the need to manage situations involving various kinds of input from the international community. They include funding the process, providing foreign advisers, including experts on constitutional matters, and assisting with negotiations or mediation efforts. Often these are necessary forms of input, and their impacts are positive. In other cases there can be a range of problems involved (for example, international actors dominate, or there are too many international actors seeking to play roles, resulting in contradicting pressures on national actors).

There are, in addition, situations in which some part of the international community may be in even more direct control of processes. Usually a multilateral organization or a particular country is officially or unofficially either leading or substantially influencing and shaping the process. (See the case studies of Afghanistan, appendix A.1, Bosnia-Herzegovina, appendix A.4, and Timor-Leste, appendix A.11.) The international community takes on such roles primarily in postconflict or conflict situations in which the absence of an effective state results in international or regional organizations serving as transitional administrations, or those in which a far more powerful country with strategic interests in the area plays a leading role in the political transition or becomes an occupying power (for example, the processes in Namibia [1990], Peru [1992], Cambodia [1993], Bosnia-Herzegovina [1995], Timor-Leste [2002], Democratic Republic of the Congo [2004], Afghanistan [2004], Iraq [2005], and Somalia [ongoing process]).

But even though a particular part (or parts) of the international community may have responsibility for running the process, there will almost always be many other international actors supplying particular input into the process. In that case, many of the issues will be much the same as in a process run by local actors.

In many of the processes where international actors exercise a high degree of control, some common difficulties and pitfalls have been experienced. Some of these are related to the extent to which international community influence tends to undermine national ownership of the process. As discussed elsewhere in this handbook, lack of leadership from national actors can undermine the legitimacy of a process and of the constitution resulting from it.

In this section we provide an overview of the problems and pitfalls experienced in processes where part of the international community plays a leading role. We also assess the current guidance available to the international community in such contexts and consider the extent to

which it addresses those problems and pitfalls. We conclude with some practical tips for international actors operating in such situations.

4.2.1 Common pitfalls of processes led or heavily influenced by the international community

It is not possible here to review the full range of experience of constitution-making processes where the international community has played leading roles of one kind or another, save to note that there are conflicting opinions regarding each case and what may have been helpful or harmful forms of engagement. For example, some analysts would argue that the United States' role in Afghanistan led to undue influence over the content of the final constitution. Others would assert that without United States involvement warring factions would not have come to an agreement at Bonn and the new constitution would have been shaped largely by warlords who were not legitimate representatives of the people and who wished to create a more conservative Islamic state than was finally adopted. There are also many views in between these two positions. Each case is unique of course and the role of the international community will differ. There are, however, some pitfalls common to most situations where the international community has a significant influence on a process, either officially or unofficially.

Lack of doctrinal or practical guidance for constitutional assistance

Occupying governments or governments with a high level of influence over another country (e.g., the United States in Bosnia-Herzegovina [1995] and Iraq [2005]) or multilateral bodies playing similar roles (e.g., the United Nations in Timor-Leste [2002] or the European Union in parts of the former Yugoslavia) have largely determined their approach to domestic constitution-making in such countries on an ad hoc basis and without guiding principles. This has led to mixed results. Success or failure has often depended on the quality of leadership and decisions taken in the field without appropriate consideration of the range of options and comparative experiences in constitution-making assistance (Brandt 2005).

For example, the United Nations played key roles in the constitution-making processes in Namibia [1990], Cambodia [1993], Timor-Leste [2002], Afghanistan [2004], Iraq [2005], Nepal [ongoing process], Somalia [ongoing process], and Zimbabwe [ongoing process], but did so without the benefit of a focal point or department at United Nations headquarters to provide doctrinal guidance, access to appropriate resources, and a point of reference on lessons learned elsewhere.

In Timor-Leste (formerly East Timor), the director of political affairs for the United Nations Transitional Administration in East Timor proposed a constitution-making process similar to that followed in the United Nations-assisted Cambodia process a decade earlier—a ninety-day affair that excluded the public and even a majority of the constitution-makers and was largely conducted in secret. (See the Timor-Leste case study, appendix A.11.) The transitional

administration did not take notice of the increasing trend toward more participatory processes that had emerged in the decade after the Cambodia experience. There was no focal point on constitution-making assistance at United Nations headquarters that could reflect on the lessons of the Cambodian and subsequent experiences and highlight emerging good practices. The short time frame and lack of real popular participation in the Timor-Leste process were probably factors in the emergence of conflict soon after the constitution was adopted. Yet these deficiencies in the process could have readily been avoided (Brandt and Aucoin 2010).

The international community does not have the resources to support constitution-making processes to nearly the same degree as it has for other elements of peacebuilding and democratic transitions. This is true despite the centrality of constitutional exercises to many peace processes and their importance to achieving durable peace. The contrast with available resources for technical advice and support that is available for electoral assistance is instructive. For example, the United Nations Electoral Assistance Division exists to undertake assessments of needs; develop operational strategies for electoral components of United Nations operations in the field; maintain a roster of electoral experts; review lessons learned; and document and standardize good practices.

The failure of the international community to similarly prioritize constitutional assistance has meant that there has been little institutional learning from process to process in the United Nations and elsewhere in the international community, continued improvisation, and poor results in some processes.

The imposition of tight timetables

Some countries emerging from conflict may require relatively short political transitions because of security issues, donor fatigue, or other political imperatives. Tight timetables are not always essential, yet in highly internationalized processes the timetables are almost always short—at times as little as ninety days to draft, debate, and adopt the constitution. Such timetables usually reflect the needs of international funding and planning cycles or the desire for the international community to have an exit strategy, rather than the requirements of the local context. In some cases, timetables have been rushed because of another country's internal political agenda. In Iraq, the United States administration pushed for the process to conclude before scheduled United States national elections because it was perceived that a new Iraqi constitution would improve President Bush's chances at the polls.

Late in 2001 a consortium of civil society actors in Timor-Leste wrote the United Nations Security Council to express the view that the United Nations was rushing the constitution-making process because it needed an early end point for the process and a rapid exit from its role in establishing the new state. The letter that follows made the following points:

A Constitution is a complex document embodying fundamental choices about the type of country an independent East Timor will be. This Constitution has to be a

living document, which reflects how the East Timorese as a people see themselves, relate to each other, and finally, after many centuries, govern themselves...

For this to happen, the East Timorese people have to be provided with the information on the choices that have to be made, information on what a Constitution is, and information on the options available to them on the fundamental issues. They will then need time to consider and debate so that they are able to form opinions, time to hold discussions in order to seek consensus where opinions are divided, and finally time to officially record their views. None of this can happen in three months.

All the legitimate constitutional processes that have taken place in recent years [in other countries] were carried out over a period of three to four years. The public consultation process for the South African Constitution lasted over three years. A three-month process would rob the East Timorese of their right to contribute to the future of their country and it will alienate them from the very document that should voice their aspirations.

As this handbook emphasizes, constitution-making can provide an opportunity to undertake a deliberative and democratic process that promotes national reconciliation, public participation, national ownership of the constitution, conflict resolution, and a cohesive drafting process. Postconflict situations in divided societies are highly sensitive and, if unduly rushed, can lead to greater polarization of society rather than building peace. This can be the case if local actors view the constitution as the product of only a few key stakeholders and not as a consensus-based document that reflects the aspirations of the broader community (e.g., Timor-Leste [2002]).

Public participation that is not viewed as credible

Several nationally owned and led constitution-making processes that have been “people-driven” have been recognized as making contributions to conflict resolution and peacebuilding (e.g., in South Africa and Uganda). Significant time and resources have been dedicated in these processes to preparing the people to participate, to consult with the public and to serious consideration of the views of the public. (See part 2.2.) This type of dedication to public consultation and dialogue has not yet been seen in processes led or heavily influenced by the international community. In part 2.2 we discuss the principles and procedures that can secure genuine engagement with the public.

Although the international community often states that public participation is critical to democratic transitions, the imposition of tight timetables or other international agendas often curtails genuine public participation in highly internationalized settings (e.g., Cambodia [1992], Bosnia-Herzegovina [1994], and Timor-Leste[2002]). In Iraq [2005], it was international NGOs that largely led the public consultation process, and although thousands of submissions were received there was no time to analyze the views, in part, because the United States had pressured

the constitution-makers to conclude the process by a particular date. Although the United States could claim that the process was participatory it yielded little democratic benefit to the country, and could potentially have increased mistrust of governing elites and processes touted as “democratic.” When a process will be primarily driven by elites or politicians (even where this is justified by the political or security situation) it is better to explain that this will be the case and why rather than claim that it will be “people” driven when the conditions are not present or there is no time or plan to conduct a participatory process. (See part 2.2.)

Engaging primarily political elites or warring factions

If the international community intervenes through negotiations or mediation efforts to end a conflict, it will typically do so by engaging with the actors who are left holding the guns and with political elites. However, a constitution-making process in a divided society should promote national unity, consensus building, reconciliation, and a sense of a shared national unity. This can only be achieved through an inclusive process. Several Security Council resolutions call for more inclusive processes (e.g. Security Council Resolution 1325 on Women and Peace and Security calls for women’s full participation in peacebuilding and postconflict reconstruction). The constitution-making process can be an important catalyst for the wider peacebuilding process if it includes the broader public and not just elites. To the extent possible, even the early negotiation phase should be as participatory as possible.

An extreme example of an elite process was seen in Bosnia-Herzegovina, where the Dayton conference and the resulting national constitution negotiated in the United States excluded any input from the people of Bosnia. They were not consulted about the content or given an opportunity to reflect on the constitution contained in the peace agreement before it came into force. The focus was on ending the war and ensuring agreement among the previous warring factions. There was no room for a focus on building a culture of constitutionalism or enhancing the legitimacy of the agreement even at a later stage. (See appendix A.4 for a case study on Bosnia-Herzegovina.) Even in contexts of violent conflict there may be ways of opening up the process (albeit in a limited way) through reaching out to civil society actors, local community leaders, etc.

Treating constitution-making as primarily a technical exercise

International constitutional assistance often focuses on the technical aspects of the exercise rather than on the political dynamics or how to structure the process to best take advantage of peacebuilding opportunities. In particular, the international community has focused on the drafting and content of the constitution rather than on creating the conditions for genuine public participation, peaceful negotiations, civil society involvement, and dialogue and deliberation on key issues. This has meant that in many cases the international community’s main effort is to hire a constitutional professor (often with no experience in a postconflict environment) to advise the national actors. Such a focus can also contribute to a tendency for international experts to push for reforms drawn from their own countries rather than to support national actors

in solving their problems using solutions arrived at locally. (See parts 2.3.6 and 3.4.1.) Most importantly, this type of assistance fails to consider the broader needs of the process, such as development of the skills of national actors in other key areas such as negotiations, financial management, or public consultation skills.

Stressing electoral solutions to problems of representation and legitimacy

The international community tends to emphasize the use of elected bodies in postconflict constitution-making processes, seeing such representative institutions as the most legitimate bodies to prepare and adopt a constitution. However, particularly in the first postconflict elections, parties may be nascent and based on ethnic affiliation or linked with a particular leader or personality rather than with a set of proposals for the constitution. Groups that were marginalized during the conflict or in society (such as women, youth, or minorities) may not have access to membership in the parties. Therefore a reliance on elections alone may not lead to a legitimate body to prepare a constitution, the expression of the people's constitutional aspirations in the draft, or consensus-building. As a result, there can be advantages in considering other approaches (as discussed in part 3—e.g., using a constitutional commission or similar institution to consult widely with the people and develop a draft that is eventually debated by an elected assembly—which could also have membership through some selection procedures) (Brandt 2005: 30). The international community must reflect on the purpose of the constitution-making process in a divided society first and consult with the people about how to create legitimate bodies and processes to realize the vision.

In Timor-Leste [2002], the director of political affairs for the United Nations Transitional Administration in East Timor argued that the only way for a proposed independence constitution to be legitimate was for it to be drafted, debated, and adopted by an elected constituent assembly. Civil society and other national leaders were calling for an independent constitutional commission to prepare a draft and an elected constituent assembly to adopt it; this was a common two-stage process at the time, and arguably more suited to the Timorese national context. Indeed, as predicted a single Timorese political party dominated the constituent assembly. This domination meant that Timor-Leste lost the opportunity to promote a more inclusive process and encourage a broader set of stakeholders to seek consensus on the constitution. The constitution the assembly created was viewed by most as a one-party constitution, this being one of the reasons why violence flared up a few years later.

In contrast, in Afghanistan [2004], a constitutional commission developed a draft constitution, and it was an elected assembly (the Constitutional Loya Jirga) that considered the draft and had responsibility for deciding on and adopting the new constitution. The United Nations advised that special seats in the Constitutional Loya Jirga should be set aside for marginalized groups. The inclusion of women and minorities had an impact on the final draft of the constitution and gained them greater constitutional rights (Brandt 2005). (See part 3.1 for a discussion of the range of mechanisms for creating representative bodies.)

Failure to develop capacity of national actors and promote national ownership

A process that is rushed by the international community in postconflict environments (where many educated national actors may have fled the country) will often lead to international technical advisors taking over certain aspects of the process rather than finding the appropriate national actors to do the job. In Somalia in 2010, the United Nations imposed a deadline of sixty days for the inexperienced constitutional commissioners to deliver a draft constitution, resulting in heavy reliance on foreign expertise to meet the deadline. In Timor-Leste [2002] international actors were put in charge of directing the constituent assembly's secretariat rather than developing the capacity of a national actor to perform the task.

A process that is rushed will also limit the amount of capacity development or training available to national actors to ensure that they perform their tasks effectively. This can lead to poor results and a missed opportunity to build the capacity of national actors to lead and manage key democratic activities. For example, if civic educators are trained well these same persons can be used to conduct voter education in the future. (Related issues concerning problems in the use of foreign advisors more generally are discussed in parts 2.3.6 and 3.4.1.)

“National ownership” of a process and the constitution emerging from it involves not only government or the elites owning and leading the process. Ownership of the process should also extend to the people more generally. In a postconflict context there may be few legitimate representatives of the people. Early in the process, efforts will need to be made to understand the concerns and aspirations of the people and to take these into full account in the approach to be taken. Input from a wider range of actors can improve the prospects of the process contributing to a national consensus on the way forward.

Assistance or engagement ends with adoption of a constitution

To breathe life into the constitution, attention must be given to how it will be implemented after it is adopted (See part 2.7.2.) Funding, resources, and assistance (provided in ways that promote national ownership) are likely to be needed postadoption to encourage national actors to give effect to the constitution and to support the enhancement of a culture of constitutionalism. However, where the international community has played the dominant role in the constitution-making process, there has been little evidence of understanding of the need for ongoing support in relation to implementation.

4.2.2 Current guidance for the international community

There is little specific guidance for international actors in the constitutional-assistance field. Further, few international actors have reviewed the results of their constitutional-assistance efforts. The United Nations is an exception. It commissioned a report on UN constitutional assistance (Brandt 2005) and late in 2005, participants at a high-level meeting reviewed the United Nations' experience in supporting constitution-making processes. They concluded that while the United Nations had provided various forms of assistance to those processes, the results

had been mixed and the assistance given had been improvised. They recommended that the United Nations receive doctrinal guidance and that it establish a central agency to be responsible for the coordination of United Nations constitutional assistance. They underscored that constitutional expertise was primarily located outside the United Nations system, and that it was important for the United Nations to link with external partners. It was also agreed that a systemwide guidance note should be adopted and an address for the coordination of constitution-making assistance designated.

In 2009, the Secretary-General circulated a guidance note on United Nations assistance to constitution-making processes. The note provides the guiding principles and framework for United Nations constitution-making assistance and underscores that when such assistance is requested by national authorities it should do the following:

- capitalize on the opportunity for peacebuilding that such a process affords in conflict and postconflict countries;
- promote compliance with international norms and standards;
- recognize that constitution-making is “a sovereign national process, and that to be successful the process must be nationally owned and led”;
- promote “inclusive, participatory, and transparent constitution-making processes”;
- make available, when needed, a wide range of expertise, both inside and outside the United Nations system; and
- promote adequate follow-up after adoption of the constitution.

It also designated the Rule of Law Coordination Resource Group, supported by the Rule of Law Unit, as the convening mechanism for United Nations constitutional assistance, with the following responsibilities:

- ensure policy coherence and development;
- document United Nations experiences;
- build institutional capacity and record lessons learned;
- mobilize and coordinate the efforts among the various United Nations departments and agencies providing constitutional assistance; and
- lead a consultative process to further develop United Nations policy on constitutional assistance.

To date, the Rule of Law Coordination Resource Group has not built its capacity to implement this mandate. The authors also are not aware of any other similar constitutional assistance guidance mechanism for members of the international community. The guidance note was an important first step for the international community to understand the importance of the process of constitution-making and the broad principles that should be followed.

Practical tips

This handbook discusses and provides guidance on wide-ranging aspects of constitution-making processes. It provides very specific tips on the principles of participation, inclusion (including

the full participation of women), and national ownership. The tips emphasized here are only brief reminders of matters already discussed in-depth. However, we focus on these abbreviated points with particular emphasis on how, in processes where particular international actors play leading roles, they can improve their efforts and reduce the likelihood of encountering the problems and pitfalls just discussed:

- At all times, be conscious that constitution-making is a sovereign process, and a deeply political one.
- Seek to promote genuine public participation, inclusion, and nationally owned and led processes, and avoid imposition of conditions, such as artificial and compressed timetables, that meet the interests of international actors but at the same time generally undermine the possibility of the process being participatory, inclusive, and nationally owned.
- If asked to provide assistance, take time to understand the complex political nature, as well as the logistical and resource needs, of a process, and ensure that assistance is appropriate, promotes democratic principles, does not sideline national actors, and is provided in a coordinated manner, so as to avoid problems such as duplication of effort and waste of resources.
- Do not fund or support processes that claim to be “people driven” where the conditions do not exist to conduct a participatory process (e.g., a legal framework that puts politicians clearly in the lead, a lack of political will of the leaders to engage the public, a lack of security or the ability of the people to speak freely, or a lack of independent media). The international community may end up bolstering the legitimacy of a process that has largely excluded the people and is manipulated by only a few elites.
- Remember that the principle of “national ownership” requires not only that national actors lead the process but also that civil society and the broader public are provided with opportunities to “own” the process, as well as the outcome. This requires engagement at every stage of the process—even during early phases of negotiation about establishing the process.
- International actors should be careful not to sideline local actors through their engagement in the process. The timetable should be realistic to allow for local actors to prepare for their roles and carry them out effectively (with international technical assistance where needed and requested).
- The extent of local capacity should be assessed before bringing in foreign technical experts or advisors. Such technical experts or advisors should have as part of their terms of reference capacity development of nationals where appropriate and requested.
- When providing advice on options for the structure of the process, consider what mechanism, including but not limited to elections, will lead to a constitutional process with institutions representative of the diversity of the people to the greatest extent possible and will allow for members with specific professional skills to contribute to the process. The mode of appointment or election of such delegates should be transparent and, where possible, can even be participatory.
- Assist with ensuring the conditions for a participatory and deliberative process to take place—one that takes advantage of peacebuilding opportunities.

Appendix A: Case studies

This section includes brief case studies reflecting the range of experience of constitution-making processes. The cases provide an overview of why a new constitution was prepared, how long the process took, what institutions and processes (including referendums) were involved, whether it was broadly a participatory process, the extent of the involvement of the international community, and whether the process led to a constitution that was adopted. The cases were chosen to be geographically balanced and to illustrate the diversity of constitutional objectives, circumstances, tasks, institutions, involvement of external groups, and outcomes.

The case studies are included to help the reader in a number of ways. Although numerous examples of tasks, institutions, devices, and dilemmas are included in this handbook, we are conscious that these are not organized in a way that provides a reader with a strong sense of how institutions, processes, and tasks fit together. The reader may feel the lack of any overview of particular processes. The case studies will illustrate how these elements have been combined.

Additionally, some of the country examples that appear in the body of the handbook to illustrate particular points are drawn from the case studies in appendix A. By referring to the case study from which the example was taken, the reader will be able to understand the overall structure of the process in that country.

A.1 Afghanistan [2004]

After twenty-three years of civil strife, the fall of the Taliban presented the opportunity to forge a new consensus among Afghans to reconstruct the state. One of the first steps was the 2001 Bonn conference, held under the auspices of the United Nations, which brought together a few political factions to agree upon the political transition. Although the Bonn conference left out some key stakeholders, the political transition gradually became more representative. The international community had high levels of interest and influence in shaping the process and establishing a democratic state, in part because of Afghanistan's perceived centrality to the "war on terror."

The Bonn Agreement of December 5, 2001, provided that the Afghan Transitional Administration establish a constitutional commission to prepare a draft constitution that would be debated and adopted by a Constitutional Loya Jirga. The Constitutional Loya Jirga was to be convened within eighteen months of the establishment of the Afghan Transitional Administration. The Bonn Agreement did not set a deadline for when the constitution should be adopted, did not provide for how the members of the constitutional bodies should be elected or selected, or discuss the role of the public. The Afghan Transitional Administration, led by President Karzai and his cabinet, added a constitutional body to the structure of the process. In October 2002 a nine-member drafting committee was set up to prepare a draft of the constitution, with a secretariat to assist its work. Six months into the eighteen-month time frame

for the process, the committee gave President Karzai a draft that largely followed the 1964 constitution. The nine-member committee's work was primarily conducted behind closed doors. Civil society and others were suspicious about the process and felt excluded. Partly in response to this problem, a more representative thirty-two-member constitutional commission was mandated to carry out civic education and public consultation in each province of Afghanistan and among the diaspora.

The secretariat was expanded to enable it to assist with these tasks, and it created additional departments such as logistics, information and technology, press relations, civic education, public consultation, research and data processing, and protocol. It established offices in all eight regions of the country and in Iran and Pakistan. The secretariat partnered with civil society, which linked with approximately sixteen hundred local leaders to raise awareness about the process and key constitutional issues in all of the provinces. The mass media were also used, including radio and print. Despite the nationwide reach of the campaign, the short time frame limited its impact.

From June 8 to July 20, 2003, commissioners formed teams of three (two men and one woman) and traveled to each Afghani region, Iran, and Pakistan to hold public consultation meetings with key stakeholders: women, religious leaders, farmers, and youth, as well as village elders. More than fifteen thousand citizens gave oral suggestions and approximately a hundred thousand views were gathered through questionnaires. However, the commission was not independent, and President Karzai and influential members of his cabinet decided the content of the final draft without considering the views of the public. Unlike in many constitution-making processes, the secretariat remained operational to conduct a civic education campaign for three months on the contents of the adopted constitution.

The Constitutional Loya Jirga slightly revised the draft after negotiations among key factions, previously excluded groups, and the international community—primarily the United Nations and the United States. The 502-member body was composed of:

- 52 experts appointed by the president, 25 of whom were to be women;
- 344 delegates elected by the approximately 18,000 former Emergency Loya Jirga representatives; and
- 24 elected refugees from Iran and Pakistan, 64 women elected by women's groups (2 women per province), 9 elected Kochis (nomadic tribes), 6 elected internally displaced persons from three provinces; and 3 elected Hindus and Sikhs.

This combination of electoral processes and selection processes led to a fairly representative body, and the quotas for women, minorities, and marginalized groups, such as internally displaced persons, led to the advancement of their rights in the final draft of the constitution (through the backing of the United States and the United Nations). Although the rules of procedure were drafted to try to keep influential warlords out, a few were elected and they exerted significant influence in the Constitutional Loya Jirga, at times silencing opposing views.

Intense negotiations, in particular among powerful warlords, took place in private.

The United States ambassador to Afghanistan and the United Nations put forward constitutional positions that were non-negotiable and these were followed by the Constitutional Loya Jirga. They also used their positions to push for members to reach agreement on a draft. On January 4, 2004, nearly all of the members of the Constitutional Loya Jirga stood to approve the draft constitution. President Karzai signed and promulgated it on January 26, 2004.

A.2 Benin [1990]

Benin (Northwest Africa) was a French colony from 1893 until it gained its independence in 1960 and was renamed République du Dahomey, after which it remained a part of the French community. There was a series of military coups between 1962 and 1972, the last bringing to power Major Mathieu Kerekou, who remained president until 1990. Kerekou introduced a Marxist-Leninist one-party state. In 1975 the country's name was changed to the People's Republic of Benin.

During the second half of the 1980s, an escalating fiscal and political crisis led to Benin becoming ungovernable. By 1989, financial institutions had collapsed, the public service staff had not been paid for seven months, inflation had spiralled, and public service strikes were spreading. By November a general nationwide strike was threatened. In midyear President Kerekou was presented with reform demands by moderate opposition leaders, which he rejected. He continued to engage with these leaders, bringing one of them (Robert Dossou) into his cabinet, where he soon played a major role in coordinating a transition. In December 1989, Kerekou sought to reduce pressure by announcing the end of Marxism-Leninism and the acceptance of a multiparty system. Under intense pressure from France, he also announced a committee of ministers under Dossou that was to organize an assembly of "all the living forces of the nation, whatever their political sensibilities." Dossou developed plans for an inclusive deliberative assembly, and on December 27 President Kerekou made a public request for suggestions about how to reconstruct the country. Seven volumes of responses were later presented to the national conference. A preparatory committee under Dossou involving government and opposition members decided the composition and the agenda of the conference, and agreed on basic principles to be met by a new constitution. This body played the role of a roundtable (see part 3.2.2), and contributed much to the success of the conference by ensuring basic understandings among key opponents before the conference met. Though a reluctant reformer, the president supported the process throughout.

Membership of the national conference numbered approximately 488. About 10 percent of the seats were reserved for government supporters, and fifty-two "political tendencies" were represented. They included unionists, civil servants, students, religious groups, agricultural producers, and Beninese living abroad. Representatives of international missions and of international financial institutions attended. The vast majority of members were drawn from

the political class and the educated elite, contrary to the statement that the conference represented all “living forces of the nation.” The conference sat for only ten days (February 19 through February 28, 1990), but due to the prior agreements reached in Dossou’s committee, it was able to achieve a great deal. Its proceedings were broadcast live on television and radio, and it attracted a great deal of international media attention. It deliberated on the seven volumes of views from the public. It decided on the main issues to include in a new constitution. One of its first acts was to declare itself sovereign. It then put in place a transitional constitution, dissolved the existing national legislature and executive, appointed the members of both the transitional legislature (le Haut Conseil de la Republique, or High Council of the Republic) and the transitional executive, adopted plans for multiparty elections, and designated the High Council responsible for developing the final draft constitution. The president accepted the declaration of sovereignty in exchange for a pardon for any crimes he might have committed. The decision on the pardon helped keep the focus of the conference on finding ways forward rather than considering what punishments were needed for past wrongs.

Much of the work of the conference was done in committees, the most significant being the Commission of Constitutional Affairs, which prepared a preliminary draft text for the constitution that was submitted to the High Council, where the main drafting work was done in a constitutional drafting committee. By prior agreement, the latter body included five members of the Commission of Constitutional Affairs as well as ten members appointed by the High Council. After several months’ work, the draft constitution was finalized late in 1990 and adopted by the High Council, with two main issues remaining controversial. One concerned the strength of the executive, with most in the High Council favoring a strong president and a minority wanting a semipresidential system (a position favored by the former president). The other was age limits for the president, with the High Council supporting an age requirement of 40 to 70 years, a limit that would have excluded some likely presidential candidates. The referendum for final adoption of the constitution was used to resolve these issues. Voters were offered the draft constitution incorporating both the strong executive and the age limits, and given three ballot papers to choose from:

- A white ballot paper, signifying a “Yes” vote for the whole constitution;
- A green ballot paper, also signifying a “Yes” vote, but without a presidential age limit;
- A red ballot paper, signifying a “No” vote, which was understood as supporting the semipresidential executive system.

The referendum, held on December 2, 1991, resulted in overwhelming support for the draft constitution, inclusive of age limits for the position of president, as reflected in the following votes:

- white, 73.3 percent;
- green, 19.9 percent;
- red, 6.8 percent.

The constitution was therefore approved, and parliamentary elections were held under it in

February 1992. The two rounds of presidential elections required to deliver the absolute majority vote for the winning candidate required by the new constitution were held in March 1992.

A.3 Bolivia [2009]

In 2005 the first indigenous person was elected president of Bolivia, and he soon embarked on fulfilling a commitment to a new constitution through a constituent assembly. The assembly comprised 255 members (who could not be ministers, members of parliament, public officials, or public servants), elected in 2006. Candidates had to be sponsored by a political party or citizens' organization or represent an indigenous group. In the seventy geographical constituencies the three persons with the highest votes were elected—but if they all belonged to the same party, that party could get only two members, and the highest-scoring candidate from another party was elected. And there were nine broader constituencies from each of which five candidates were elected. The highest polling party got two, and the next three parties got one seat each. There were gender-distribution requirements for each set of candidates, but these were not designed to ensure a certain proportion of women members. (In the end, about one-third were women.) Smaller groups were excluded by this process. The president's party (the Movimiento al Socialismo, or Movement for Socialism, known as MAS) had a slight majority.

The constituent assembly sat in the old capital, Sucre. There was a separate parliament sitting in La Paz. The constituent assembly was given from six months to one year for its task, but had to extend that deadline by several months, mostly because approving the procedural rules took seven months. (The main problem involved the voting requirements for decisions on articles of the new constitution.) The assembly decided on a two-thirds vote, plus a referendum.

The constituent assembly law provided that members could express themselves in their native languages. The plenary sessions of the assembly were to be public.

Every member had to belong to one of twenty-one committees on substantive issues, each reflecting the membership of the constituent assembly. The committees had the power to collect the views of the people, including to travel around the country. Committees whose recommendations overlapped held joint meetings to resolve problems. The committees were slow to begin work. However, at least some of the members did travel and collect views, and later they submitted their suggestions to the public. There were some accounts of enthusiastic public participation.

A committee of the constituent assembly was to produce a draft from the suggestions of the committees. However, a draft prepared (somewhat secretly) by MAS was released in November 2007. A month later a draft was adopted at a meeting that had to be held away from Sucre, where there was unrest. Opposition members were largely absent, and the votes in support were not quite two-thirds.

In February 2008 MAS sent the draft to the congress and asked it to submit for a referendum a

question about the maximum size for landholdings; this was a device to get the constitution adopted. No appeal to the constitutional tribunal was possible because the congress had voted to impeach several judges and they had resigned, leaving no quorum. This was the second referendum on a specific point; at the beginning of the process there had been one on regional autonomy, which the areas dominated by nonindigenous groups wanted. This had been lost.

After the draft was adopted the whole document was submitted to the people. It was adopted, the people voting for and against in about the same proportions as they had voted for MAS or the opposition in 2006.

The whole process was rather acrimonious and divisive; it was marked by manipulation and illegal decision-making, as well as by considerable enthusiasm on the part of the indigenous groups.

A.4 Bosnia-Herzegovina [1995]

The international community dominated the processes of ending the war and making the constitution in Bosnia-Herzegovina. The territories that now constitute Bosnia-Herzegovina were the scene of bitter and cruel killings. Two of the ethnic communities—Serbs and Croats—were assisted by their coethnicists in Serbia and Croatia, who supplied them with arms and had considerable interest in continued disorder in the Balkans. The community most anxious for a peaceful settlement, the Bosnians, were least able to mobilize arms for a sustained campaign, and had limited outside support. The personal ambitions of Serbian and Croatian leaders, combined with the strategic interests of Serbia and Croatia, meant that peace and constitution-making by internal processes were highly improbable. On the other hand, the European Union and the United States had major political and military reasons to end the war and establish a stable polity out of these territories.

Distrustful of the willingness or ability of local leaders to negotiate for peace and a new constitution for what was essentially a new state, the United States took the initiative in 1995 to start a process for settlement. Its strategy was based on the assumption that the role of the international community was critical, as was the participation of the leaders of Serbia and Croatia. So a strong United States team, composed of senior political, military, and administrative staff, embarked on shuttle diplomacy, visiting key capitals in Europe, including the Balkans, to promote negotiations on a set of ideas to end the war, address its consequences (such as the displacement of people and the return of refugees), and structure the government of the new state by means of a new constitution. Ending the war and constitution-making were seen as integral parts of the process. To a considerable extent this meant that those involved in the war, local people and neighbors, would play a key role. This in turn meant that the ethnic dimension would play a significant part in the negotiations and the outcome.

After building some consensus, including a cease-fire, the United States moved to proximity talks to clear the ground for a peace conference at an air force base in Dayton, Ohio. The peace conference was held between November 1 and November 21, 1995. The United Nations and

the European Union were major participants. (Other international agencies, including the World Bank, also were present.) But there was no doubt that the conference was led by the United States, with its large delegation and the meeting at a military site. Having the conference in Dayton allowed the United States to control public participation and the agenda, and it appointed the leader of Serbia as the negotiator for the Bosnian Serbs and Tudjman, leader of the Croatian government, for the Bosnian Croats. The consequence of having only political groups in Dayton, with their investment in ethnicity, meant that the state was structured on the basis of ethnicity.

Strict secrecy was required and observed in the negotiations (this was before the ubiquity of cell phones); these were “successful,” resulting in the General Framework for Peace in Bosnia and Herzegovina (also known as the Dayton Accords). It consisted of eleven appendices addressing a number of issues, some interconnected (including human rights, peacekeeping, return of refugees, and elections). Appendix 4 contained the constitution. The constitution came into effect upon the signing of the agreement by the Republic of Croatia, the Federal Republic of Yugoslavia (basically Serbia), and the Republic of Bosnia and Herzegovina (then dominated by Muslims). No further approval was necessary, although it was taken to the assemblies of the two federal entities, the Federation of Bosnia and Herzegovina and Republic Srpska, for endorsement.

The process was rushed and there was no input from the people of Bosnia; their leaders were completely sidelined. James O’Brien notes that this procedure was more appropriate to ending war than to constitution-making: it was neither participatory nor representative, and left no time for reasoned deliberation. However, he maintains that the results are probably more democratic and durable than Bosnians could have produced themselves by the end of the war. Implementation would have required continued external engagement, and problems would thus have occurred at each step (this case study owes a considerable debt to O’Brien 2010).

A.5 India [1950]

India became independent in 1947 after two hundred years of colonial rule. It had been ruled not as a single entity but as separate princely states with a form of indirect rule, or as the directly ruled “British India” provinces (and a few colonies of France and Portugal, which did not participate in the 1947 independence). The 1935 Government of India Act, which applied to the colonies but not to the princely states, was a sort of federal constitution. Agitation not only for independence but for a constituent assembly had been going on for many years. The constituent assembly came into existence in late 1946.

Parallel with the closing stage of colonial rule and the setting up of the constituent assembly was the issue of Pakistan. When the constituent assembly was planned it was assumed that India would be one country, though with a loose federal structure, and that various entities would be treated in different ways. Even by the time the constituent assembly was sworn in, unity was fading, and most of the Muslim members never attended. By the time August 1947 came, the decision had been made that Pakistan would be a separate country, and the various princely states,

except Kashmir, had agreed to come into the Indian federation on the same basis as the colonies.

The constituent assembly was mainly indirectly elected, mostly by the recently elected provincial assemblies. The initial number was 389, but only 207 were present at the inaugural session (without most Muslim members or the princely state representatives); as Partition loomed, the number was revised to 318, and mergers of princely states with provinces led to further changes. By the end of the process there were 303 actual members (and one state never sent its 16 members). The process was rather slow getting under way because of the whole Partition issue.

Preparations had begun in advance, with the dominant Congress Party preparing schemes for the administration of the constituent assembly, and various proposals for a constitutional structure being drafted.

Soon after its first meeting, the constituent assembly adopted an “Objectives Resolution” setting out basic principles, such as authority derived from the people, a system of autonomous units (“union,” not “federation,” was the preferred word), equality, freedom of speech and conscience, and safeguards for minorities and backward groups.

In March 1947 the lawyer appointed as constitutional advisor to the constituent assembly circulated a questionnaire (incorporating examples of other constitutional provisions) to all legislators, asking for views on the structure of the national government. Few responses having been received, the advisor prepared his own memorandum, essentially an early draft constitution, for the committee on the union constitution, and did a similar document for the committee on the provincial constitution. In giving examples in his various memoranda, the constitutional advisor drew on the constitutions of the Australia, Austria, Canada, Ireland, South Africa, Switzerland, the United Kingdom, the United States and the USSR, and on the Government of India Act itself.

The constituent assembly had various administrative committees, including finance and staff; credentials (of the members); house (on accommodations for members); press gallery; and steering (the last to set the agenda and ensure the smooth progress of debate).

It had a complex arrangement of substantive committees: on the union constitution; on provincial constitutions; and on union powers. It also had an advisory committee on fundamental rights, minorities, and tribal and excluded areas. (The idea was that this should not consist necessarily entirely of members of the assembly.) The advisory committee had two subcommittees. A small expert committee on financial matters comprised nonmembers of the assembly. A states committee of the assembly met with the negotiating committee of the princes to address the entry of the princely states into the union and the constitution; a small ad hoc committee on citizenship met for a few weeks. The drafting committee scrutinized the draft constitution prepared by the constitutional advisor on the basis of the various committee reports.

An authority on the process has said that the Congress Party assembly unofficially debated

every provision and tended to decide on it before it could be considered by the House.

The constitutional advisor's draft was prepared in October 1947, and it was presented in revised form to the constituent assembly by the drafting committee in February 1948. The draft was widely circulated, though not among the public; rather, it went to legislatures, courts, and ministries. Comments were made by a wide range of bodies and individuals. A special committee of the members of the first three committees listed here met for two days in April to consider the draft.

What was submitted to the full constituent assembly for formal debate was the February 1948 draft, with amendments proposed by the drafting committee based on comments received and the views of the special committee. A general debate on principles took five days, and then clause-by-clause debate took from mid-November 1948 to mid-October 1949.

Political discussions were still taking place, and decisions on the future position of the former princely states were finalized; these necessitated changes while the draft was being debated in the full assembly. Decisions on special arrangements for lower castes and tribal groups, and on various issues of center-state relations, were reached outside the assembly plenary, and led to fresh amendments.

The drafting committee then revised the entire document to integrate the amendments, but some further amendments were needed. The act of adoption of the constitution was that of the constituent assembly. A few articles came into force right away, and the bulk of the constitution did so on January 26—since celebrated as Republic Day.

A.6 Iraq [2005]

In Iraq, the context for constitution-making determined the procedure and to some extent the outcome of the constitutional process. The United States, having overthrown the Baathist regime of Saddam Hussein, needed a formula to end its occupation of Iraq, over which it had assumed sovereign powers. It regarded a new constitution established on democratic principles with proper respect for human rights as essential to the return of sovereign powers to the Iraqis. A new constitution was also the objective of the United Nations, a view endorsed by the Security Council. Most Iraqis had high expectations of the new constitution. So a new constitution became the focus of diplomatic negotiations as well as the event that would mark the transfer of sovereignty to Iraq.

Throughout the process of constitution-making, the domestic politics of the United States played a greater role than the wishes or analyses of the Iraqi politicians or public. As the occupying power, it played a central role in defining and managing the transitional or interim arrangements. (Great Britain, as a junior partner of the United States in invasion and transitional arrangements, seems to have had little influence.) Through its Special Representative, Lakhdar Brahimi, the United Nations mediated between the United States administration and the most influential Shia

leader, Grand Ayatollah Al-Sistani, about the process for the making of the constitution. The United States had proposed two alternative methods but Al-Sistani opposed both proposals and insisted that the constitution be made by an elected assembly.

It would have been difficult to organize elections, and the process would have to be postponed. On the recommendation of Brahimi, the Ayatollah agreed that after a period of interim constitutional arrangements, an elected assembly would draft and it would be adopted by a referendum. It was promulgated in March 2004. The Transitional Administration Law was a fairly comprehensive document, covering most aspects of the state. Elections were expected to be held in January 2005, and the assembly was expected to serve both as an ordinary legislature and as the constituent assembly.

It was the expectation of the United States, the United Nations, and many Iraqis that the constitution and the process for making it could help lay the foundation for reconciliation and unity. The Transitional Administration Law itself required the national assembly to draft the constitution “by encouraging debate on the constitution through regular general meetings in all parts of Iraq and through the media, and receiving proposals from the citizens as it writes the constitution” (article 60). And in the period leading up to the referendum (scheduled for no later than October 15, 2005), the draft constitution was to be published and “widely distributed to encourage a public debate about it among the people” (article 61). Unfortunately, there was little public participation.

The time given for the drafting was limited. Elections were to be held in January 2005; the draft had to be ready by August 15 and the referendum by October 15. The voting in the referendum for a positive answer required an overall national majority, and rejection required a two-thirds vote in no more than three out of eighteen governorates. By early May the commission had not begun its discussions, and not until June did it begin its deliberations. That left it less than six weeks for drafting. Some of this time was taken by presentations given by experts on a variety of topics.

The commission made considerable progress after that, working through its subcommittees. But consensus was hard to establish as the top party leaders were not in the commission. With the swing of the dominant Shia personalities toward federalism, things were beginning to move, but time was short. Consequently, the commission decided to request the one-time extension of up to six months allowed by the constitution. At this point the United States ambassador jumped in, reprimanded the chair of the commission (who had to retract the application), and instructed the assembly that no extension was to be granted. It was also at this point that the ambassador intensified pressure on the top leaders to bypass the commission and make their own deal under his guidance.

Although the commission and the assembly were denied the extension, the ambassador’s own cabal took time, going well past the August 15 deadline. It was not until sometime in September that the draft was taken to the assembly for its approval. This left little time for analysis and

discussion of the draft constitution before the referendum. This time the Sunnis did go to polls—in order to kill the draft. They nearly succeeded. Although there was considerable national support, in three governates the poll was negative, but in one of them the two-thirds negative vote did not materialize (due to rigging, the Sunnis allege). Thus the draft became law, under inauspicious circumstances and having been rejected by one of the three major communities. The proposed amendments did not materialize in good time or in sufficient measure to satisfy the Sunnis. The constitution, which had promised so much at the inception of the process, ended in discord, and sharpened the differences between the Sunnis and others. It did not restore law and order; on the contrary, it gave further encouragement to the insurgents, and suicide bombings and other forms of violence continued.

A.7 Kenya [2005; 2010]

Kenya's independence constitution, with a parliamentary and federal system, was amended after one year to merge the offices of head of state and head of government, giving the president enormous powers. The federal system was abolished.

After years of Kenya being a one-party state, a struggle for constitutional democracy led to limited reforms, and later agreement was made through national conferences for a full review of the constitution by a constitutional assembly, the National Constitutional Conference.

The Constitution of Kenya Review Commission was set up to prepare a draft to go to the conference. The twenty-nine commission members were either lawyers or people with experience in public life. Most members, however, were chosen partly because of their links with political parties.

The commission used some NGOs for civic education, but it produced its own educational materials and did some educational work. It held at least one meeting in each parliamentary constituency to collect views. Translators were provided if the local language was different from the national languages, and sign-language interpreters were available.

Everything was recorded. The commission received thirty-six thousand submissions in writing. All submissions were statistically analyzed (over several months) and the results were made widely available. Popular participation was enthusiastic. The commissioners were much influenced by the poverty they saw and the people's critique of the system.

After three intensive weeks, the commission produced the draft constitution and a report. Public consultation followed. It had been reduced because of delays in the process, but the next stage (the National Constitutional Conference) was delayed for some months because of parliamentary elections.

There were 629 members of the conference. All 222 members of parliament were members, each district elected three members, and about a third were chosen by civil society. The chair chose a

small number to ensure proper representation of insufficiently represented but important groups.

The conference's proceedings were lively, and highly political. There was a good deal of manipulation and some bribery. Some issues, especially the system of government, were divisive. Decisions were made by consensus, failing which an article had to be accepted by two-thirds of the delegates voting. Deadlock could have been broken by a referendum on disputed issues. This would have been complicated; fortunately, it was not needed.

Just as the conference finished its work, a court held (somewhat unconvincingly) that a referendum was necessary. The government persuaded the parliament to endorse a draft constitution that was different in important ways from what the conference had adopted. The people rejected the draft referendum. Some voted against it because they preferred the earlier draft, some because of general dissatisfaction with the government, and some for tribal reasons.

Postelection violence in 2008 led to an internationally brokered agreement for reform, including a new constitution. A new law required a committee of experts that would include three foreigners and six Kenyans. It was directed to use existing drafts, but to concentrate on resolving contentious issues. Its draft owed a lot to the National Constitutional Conference draft. After public consultation the draft was revised; then it went to a parliamentary committee, back to the committee, and then to parliament. The existing constitution indicated that parliament could propose changes (with a 65 percent majority) but was otherwise not required to approve the draft. Actual adoption was to be by referendum, in which a majority of the votes had to be cast in favor, plus at least 25 percent affirmative votes in at least five of eight provinces, for adoption. The referendum took place in August 2010, with more than 67 percent of those who voted approving the constitution. It came into force when the president promulgated it later that month.

A.8 Nepal [ongoing process]

In 1951 the king promised a constituent assembly. An interim constitution was introduced, but the king reneged and the interim constitution was amended to become a regular constitution. Other constitutions were adopted in 1959 and 1962, the latter a charter for royal power. In 1990, after the first People's Movement, a good constitution was adopted, but there was never a really participatory constitution-making process.

A ten-year Maoist insurgency, and royal autocracy, led to a demand for a new constitution. A second People's Movement in 2006 led to the restoration of democracy, with the promise of a constituent assembly. The Maoists, part of the peace process, refused to work with any version of the 1990 constitution, so the major parties set up a committee to draft an interim constitution. This was adopted in January 2007, and the parliament was restructured under that constitution, without an election, to bring in the Maoists and various party nominees to form a more inclusive legislature.

The interim constitution required elections for a constituent assembly. Outside the government, various groups were agitating, and several amendments were made to the interim constitution

to accommodate their demands, including involvement in the constituent assembly and formally declaring Nepal a federal state. An elaborate parallel voting system was set up for the assembly (240 geographical constituencies and 335 party list members—with complex provisions to ensure that the latter were inclusive in terms of gender, ethnicity, caste, and region). Elections were held in April 2008. The Maoists were the largest party and headed the new government, though they have since left it.

The constituent assembly was formed and adopted its rules. It set its own road map within the overall two-year timetable set forth in the interim constitution. It formed various committees, including ten on substantive issues. The committees presented to the public long lists of questions about the constitution, and received a large number of responses. The committees have worked on “concept papers” on their remits, with draft provisions. A constitutional committee of the constituent assembly is charged with putting these into a harmonious whole. Political wrangling held the process up, and just before its two-year timetable ended, the constituent assembly, as legislature, amended the interim constitution to give itself one more year. At the time of writing (early 2011), that year will expire in four months, and there has been limited progress in the past eight months.

The constituent assembly carried out little civic education, but many local and international NGOs and agencies have done so, often with target groups such as women, Dalits, and indigenous peoples. Almost every imaginable United Nations agency and international NGO is present.

In terms of process: politics is tending to take precedence over constitution-making. The demands of various groups were addressed in an unsystematic fashion—with consequences for expectations of the process. Poverty, illiteracy, and poor communications make public involvement difficult. There is a good deal of ambivalence about international contributions to the official process.

In terms of issues: federalism is a major one, with inclusion in the electoral system and other aspects of public life quite important. The system of government seems likely to remain parliamentary, though there is some discussion about that.

A.9 Papua New Guinea [1975; 1995]

A decolonizing process: Consultative committee and constituent assembly

Papua New Guinea, located in the southwest South Pacific, just north and east of Australia, occupies the eastern part of the large island of New Guinea (the western part of which is Indonesia’s Papua provinces) and many smaller islands. Its population in 2011 is in excess of 6.5 million, more than double the almost 3 million at independence (1975). It is a country of unparalleled linguistic and cultural diversity (more than eight hundred distinct languages are

spoken) and immensely varied and difficult geography. Until independence it was administered by Australia, in part as a colony and part as a United Nations trust territory.

A decolonizing constitution was made between 1972 and 1975. Proposals for a draft constitution were developed by a fifteen-member committee of the colonial legislature—the Constitutional Planning Committee. Its terms of reference were determined by a resolution of the legislature moved by the chief minister (the head of the executive), who emphasized the need for the constitution to be “home-grown.” This was interpreted as involving a constitution that reflected the views of the people, but also autochthonous in the sense both of being developed by Papua New Guineans and incorporating people’s views, and of having no legal authorization from the colonial regime.

After first educating themselves on constitutional issues, the members of the Constitutional Planning Committee conducted civic education for the public (radio broadcasts, newspaper advertisements, posters, and preparation of six information papers that were widely distributed). Two main methods were used to seek people’s views. First, a government department set up 500 discussion groups of about twenty people each, intended to reflect broadly the diversity of the population, which discussed the six information papers and answered the guiding questions they contained. Reports on the views expressed then were submitted to the Constitutional Planning Committee. Second, the committee’s teams held more than a hundred public meetings, with more than sixty thousand people attending. More than two thousand written submissions were received. The views expressed were taken into account by the Constitutional Planning Committee, but limited time and resources meant they were never analyzed systematically.

The Constitutional Planning Committee prepared a two-volume final report containing its views and recommendations for a constitution. Debate by the colonial legislature resulted in some significant changes to the recommendations that were accepted by a majority, and the revised recommendations were incorporated into a draft constitution. To achieve autochthony, the colonial legislature reconvened as the National Constituent Assembly, and without any legal basis under Australian or colonial law debated and amended the draft, and adopted the final constitution, which came into operation in September 1975.

Ongoing changes

The Papua New Guinea constitution adopted in 1975 remains in force in 2011, substantially as adopted, but with changes made through a total of twenty-two amendments, some of them minor and others extensive and significant. The process to amend requires two separate votes of parliament separated by at least two months, with the majorities required varying between sections of the constitution (some requiring votes above 50 percent of all members, some above two-thirds, and some above three-quarters, whether their seats are vacant or not). The difficulty of meeting these requirements means that bipartisan support is usually required for an amendment to be made.

Constitutional changes as part of peace processes

In both 1976 and 2002, major amendments to the Papua New Guinea constitution were made as part of peace processes intended to end secessionist conflicts in Bougainville, a mineral-rich island region about a thousand kilometers west of the mainland capital (Port Moresby). The mid-1970s conflict involved little violence, but that ended by the 2002 amendments took almost ten years (1988–1997) and involved the loss of several thousand lives. (The 2011 population of Bougainville is about two hundred thousand.)

In both cases, details of proposed constitutional amendments negotiated between Papua New Guinea and Bougainville leaders were specified in peace agreements, and received bipartisan support in parliament. The 1976 amendments involved detailed provisions for a system of decentralized autonomy, while the much longer 2002 amendments provided for a far higher degree of autonomy and a referendum for Bougainvilleans on independence for Bougainville, the referendum being deferred until ten to fifteen years after the autonomy arrangements had begun to operate.

Making a subnational constitution

The 2002 amendments to the Papua New Guinea constitution included provision for Bougainville to make its own constitution for its autonomous government, a law mainly intended to cover institutions and processes of the government. (Arrangements for its power and resources, and its relations with the national government, are provided in the 2002 amendments to the Papua New Guinea constitution.) The then existing Bougainville authorities comprised a thirty-member (mainly nominated) provincial government, and a larger and broader-based consultative body of about a hundred members, the Bougainville People's Congress. Their executive bodies were empowered to jointly establish a broadly representative constitutional commission, and the two bodies agreed that they should combine to form a Bougainville constituent assembly with authority to debate, amend, and adopt the draft constitution to be received from the Bougainville Constitutional Commission.

The commission began work in September 2002, and after about two weeks of educating themselves on constitutional issues, the members developed a list of questions on constitutional issues for Bougainville and broke into five teams, which held consultative meetings throughout Bougainville over a period of about a month. The commission then developed a first draft of the constitution. In response to requests made during its initial public consultation meetings for feedback on the use made of the views submitted by the people, the commission prepared a detailed simple-language paper on the proposals in the draft, and circulated that widely, together with limited copies of the draft, and the same five teams held a further round of consultative meetings. This time there were strong requests for copies of any new draft prepared to be circulated widely. After making further amendments based on the additional views received, more copies of the second draft were circulated and a further round of consultative meetings was held. The commission then made another round of amendments to the draft, resulting in a

third and final draft, together with a 370-page explanatory report, completed in July 2004.

In addition to engaging in public consultation, the commission consulted:

- the national government, mainly because PNG had final authority to refuse to endorse the draft Bougainville constitution if it viewed the draft as not meeting the requirements of the Papua New Guinea constitution; and
- the Bougainville provincial government and the Bougainville People's Congress, to ensure that when they sat as the Bougainville constituent assembly they would have a good understanding of the draft constitution.

The constituent assembly met in September 2004, and again in November when it adopted the draft with only minor amendments. The adopted draft was then endorsed by the PNG government in December 2004, and the first general elections for the Autonomous Bougainville Government were held in May and June 2005.

A.10 Poland [1997]

Poland's history of constitution-making has generally given the primary role to the parliament, dating back to its first written constitution, which was adopted in 1791 but never implemented because of collapse of the Polish state in 1795. Two short-lived constitutions that operated between World War I and World War II were also developed by the parliament. Its longest operating constitution was, however, imposed after World War II, when Poland became part of the Eastern Bloc, dominated by the USSR. In 1952 a USSR-controlled government imposed a USSR-style constitution, which was to remain in place, with limited changes, until an initial set of changes adopted through a roundtable process opened the door to more significant but piecemeal changes made over the next several years, and to an entirely new constitution developed by a parliamentary committee and adopted by vote of parliament and approval through a referendum in 1997.

Poland in 1988–1989 provided the model for roundtable arrangements later used in other places (especially in Eastern Europe and Latin America), and brought the term into common usage in relation to constitution-making. Economic and political crises in advance of the collapse of the Communist system in Eastern Europe saw moderate members of the Polish Communist Party recognizing by early 1988 that change was inevitable and seeking to extract some advantage by negotiating with the opposition. The existing Communist Party-dominated parliament did not have the legitimacy to develop acceptable constitutional changes on its own. There was a well-recognized opposition group in the form of the Solidarity trade union movement that had achieved prominence through major industrial action a decade earlier. Risks and tensions were high for both sides, however, partly because USSR intervention was still possible and internal violent conflict was a real prospect. In large part because of such dangers, the initial engagement between the parties was kept secret.

From mid-1988 on, six months of mainly secret negotiations about organizational aspects of the roundtable occurred between the Communist government and Solidarity, with mediation provided by Catholic Church leaders. The roundtable itself was convened in February 1989. The full roundtable met infrequently, most of the work being done in smaller committees and working groups, with some major issues being resolved by agreement between the two leaders. By early April an agreement on the way forward (known in Poland as the “Roundtable Agreement”) was finalized. The existing parliament would pass mainly moderate amendments to the constitution. These involved dissolution of the sitting single house of parliament (the Sejm); a democratization of the Sejm by adding a minority of elected members (it was anticipated that the Communist Party would retain control); the establishment of an elected senate as a second house of parliament; and the creation of a new and powerful office of the president. The constitutional amendments were intended to provide some protection to the Communists, while at the same time enabling the opposition to participate in politics.

The Communist-controlled parliament made the agreed amendments on April 7, 1989, just days after the Roundtable Agreement was finalized. Elections were held in June 1989, with Solidarity candidates winning most available seats in both the Sejm and the senate. The expected Communist control of the Sejm did not eventuate, for the pace of wider change in both Poland and the rest of Eastern Europe was such that by the end of 1989 the Communist Party had ceased to exist. It became clear that the compromise reached through the roundtable process had opened the way to further change that could now be achieved much more readily in broadly representative bodies free of Communist domination. Initial attempts were made to completely replace the 1952 constitution, with the Sejm and the senate establishing separate committees for this purpose from 1989 to 1991, each developing its own draft constitution and refusing to cooperate. With progress toward a completely new constitution slowed in this way, some further democratizing changes to the 1952 constitution were made gradually from 1989 to 1992, removing much of the language and many of the institutions of communism. But the result was a fragmented constitution, without coherence.

In 1992, the parliament adopted the Constitutional Law on the Procedure for Preparing and Enacting the Constitution. It provided for a single constitutional committee made up of members of both the Sejm and the senate (ensuring that there would be no repetition of the separate committees of the earlier period), with some nonvoting representatives of the president, the cabinet, and the constitutional court. A complex process was provided for receiving and considering proposals, developing a single draft, deliberating upon the draft through a national assembly (a combined meeting of Sejm and senate), consideration of amendments proposed by the president, adoption of a final draft by the national assembly, and approval by a referendum.

The process under the constitutional law was initiated in October 1992, interrupted by parliamentary elections held in September 1993 and by changes in leadership resulting from presidential elections in 1995, and slowed down by significant political opposition within and outside parliament as the final draft emerged in 1996–97. But eventually the national assembly approved a draft in March 1997, and a final draft incorporating amendments proposed by the

president was adopted in April 1997. It was approved in a referendum in May 1997—the requirement was for a vote in favor by more than 50 percent of the voters participating in the referendum, with no minimum public participation required. There was a 43 percent public participation rate, and just over 50 percent of those voting supported the new constitution.

A.11 Timor-Leste [2002]

On August 30, 1999, the United Nations sponsored a national referendum in which 78.5 percent of the population voted for independence from Indonesia. Indonesian forces retaliated and destroyed much of Timor-Leste's infrastructure, and the Indonesian authorities fled. In a governmental vacuum, the United Nations Transitional Administration in East Timor (UNTAET) was established, and it was given executive, legislative, and judicial authority. One of the key benchmarks for the process of transferring power from the United Nations to the Timor-Lesteese was the adoption of a new constitution; it came into force on May 20, 2002.

An UNTAET decree established a rushed timetable that did not mandate a process of civic education or public consultation. An eighty-eight-member elected constituent assembly was established to draft, debate, and adopt the constitution within a period of ninety days. (The drafting period was later extended by a further ninety days.) Civil society had strongly advocated for an independent constitutional commission to widely consult with the people and prepare a draft of the constitution that would then be debated and adopted by an elected body. This plan was not followed, and as a compromise UNTAET organized thirteen commissions to educate the public and obtain input on the constitution. The process was flawed. First, the constitution-makers were not required to consult with the public. Second, the process was rushed and so civic education and public consultation were conducted at the same time. The public had little time to reflect on the constitutional options or their aspirations for the constitution. Third, the views were not carefully gathered and analyzed. Fourth, the process was not nationally owned. It was launched by UNTAET under its direction, and when the reports were shared with the constituent assembly many of the members stated that they had not looked at them because they were not credible. (Brandt and Aucoin 2010)

The constituent assembly was dominated by a single political party, Fretilin. The constitution largely followed the draft constitution prepared by Fretilin beforehand. Because the constituent assembly was not representative, it did not facilitate a process of consensus-building. Few compromises were made with other parties or interest groups. Fretilin also understood that it had a mandate from the people to prepare the constitution and did not need to consult with the public. Because of pressure from civil society and the media, the constituent assembly eventually held a one-week public consultation process on the draft, but the planning for the process was poor. Again, the public had little time to read the draft, it was not always available in a language they understood, and their views were gathered in an ad hoc manner. The public consultation had little impact on the final content. Comments on the draft from international actors were more carefully considered.

The dominance of Fretilin in the constituent assembly and the lack of public participation weakened the legitimacy of the constitution. It was not viewed as a product of consensus-building and dialogue among the various stakeholders and the broader public. This, it has been observed, contributed to later conflicts and accompanying calls for a new constitution.

A.12 Uganda [1995]

Uganda, with a population of about thirty-two million in 2011, is a complex country of more than fifty main ethnic groups, divided on regional, religious, economic, and ethnic lines. Uganda became independent from British rule in 1962 under a compromise constitution negotiated between the British and key elite leaders; a mix of federal, semifederal, and unitary constitutional features contributed to constitutional crises and conflict. New constitutions were imposed in 1966 and 1967, with the leaders of major groups excluded and no popular participation. After Idi Amin's military coup in 1971, fourteen years of internal conflict resulted in several hundred thousand deaths.

After a four-year insurgency, a new government came to power in 1986 and established a Ministry of Constitutional Affairs to develop a participatory constitution-making process. In 1988 a law established the twenty-one-member Uganda Constitutional Commission, with a mandate to develop a new draft constitution. The UCC was to "involve the people of Uganda" in deciding on the constitution, work toward a "national consensus" on constitutional issues, "seek the views of the general public," and "stimulate public discussion and awareness of constitutional issues."

The UCC did its work in five main stages. First, in 1989 it developed an agenda of constitutional issues by consulting widely, holding or attending about 140 seminars all over the country attended by almost seventy thousand people. This process identified twenty-nine main constitutional topics and many lesser issues. Second, in 1990, it developed educational materials on the agenda of issues, including publishing copies of past constitutions, preparing a 111-page book called *Guidelines on Constitutional Issues*, a pamphlet containing 253 "guiding questions," a pamphlet on how to make written submissions, and educational posters. Commissioners divided into teams to present the educational materials at seminars held in all of Uganda's 890 subcounties. Third, in 1991, it focused on receiving the views of the people in the form of written submissions and oral presentations, with commissioners again holding public meetings across the country to receive views (to assure the people that their views would not be tampered with after being submitted). Fourth, from late 1991 to early 1992, the commission analyzed all views received, translating submissions presented in local languages and summarizing what all submissions had to say on each of the twenty-nine agenda issues. In the process, it became clear there was consensus on most issues. A few remained contentious, and statistical analysis of the views was used to help the commission reach its decisions on these. Fifth, in the latter part of 1992, the commission's final report and a draft constitution were prepared, presented to the government, and edited and published in 1993.

The Uganda Constitutional Commission also prepared an interim report in 1991 on adoption of the new constitution, analysis of the people's views showing opposition to giving the national legislature those tasks, and favoring a constituent assembly. The government accepted that advice, and in March 1994 elections for a constituent assembly were held. It comprised 214 directly elected constituency members, 39 indirectly elected women's representatives, and 31 interest-group representatives. Meeting from May 1994, it undertook its work in four main stages.

First, there were two months of general debates, where all members spoke. Second, select committees examined particular parts of the draft constitution. Third, select committee recommendations for amendments were debated. The procedural rules required decisions by consensus, unless a motion supported by more than fifty members required a division. A proposal to amend the draft constitution required the support of at least two-thirds of the members voting on the matter. However, an amendment supported by a majority but not receiving two-thirds of the votes was classified as "contentious," and if after a recess for public consultation with voters a second vote resulted in the matter still being contentious, a referendum was required to decide the issue. No referendum was needed. Fourth, there were several weeks of consideration of the whole draft to remove inconsistencies and to improve the precision of the language on many issues. On September 22, 1995, the constituent assembly enacted the amended draft constitution. Before promulgation of the enacted draft by the president, he was empowered to call a referendum on any issue in that draft. No such referendum was called for, and the constitution was promulgated on October 8, 1995.

Appendix B: Glossary

Accountable (accountability)

Being under an obligation to explain and accept responsibility for one's actions. An elected government is politically (at least electorally) accountable to the electorate; in a parliamentary system it is accountable to parliament; a public servant should be accountable to the law.

Adoption

The final decision of a body to accept something. This could be the decision of a constituent assembly to accept the completed constitution, for example, or of a lawmaking body to agree to a particular course of action. It is not necessarily a legal expression. The way in which adoption is carried out may be laid down in the law—for example, by a vote by a particular majority, or by a referendum.

Amend (amendment)

Change a law, including a constitution. How to make a change to a constitution will be laid down in the previous constitution. How to change a law will be in the constitution or the rules of parliament. It is possible that “amendment” does not include replacing the entire constitution.

Amnesty

An undertaking granted to people who have committed or may have committed some act that the authorities frown on (such as possession of weapons or engaging in insurrection) that they will not be proceeded against legally. It may be temporary, in the sense that it will apply only to those who return their weapons or give up their struggle by a deadline. The expression is usually used when groups are granted this opportunity.

Basic structure

An expression used by the Supreme Court of India. The court has decided that certain features of the Indian constitution are so fundamental that they could not be changed even by the procedure that usually allows constitutional changes. For example, the court has mentioned federalism, secularism, and republicanism as “basic structures.”

Capacity development

An expression much used by international development agencies to refer to enhancement of

skills by training, mentoring, and other programs. It is often used about programs to educate public servants, politicians, and members of constituent assemblies involved in constitution-making.

Citizen

From a technical, legal point of view, a person who holds the nationality of a country (“citizenship”). But it is often used in nonlegal contexts to refer to anyone who is part of the population of a state, often with the emphasis on that person’s rights (and duties) as a member of that population—“*civis Romanus sum*” (I am a citizen of Rome) carries the claim of certain rights.

Civic education

An international development agency phrase referring to programs to introduce knowledge and ideas to the ordinary citizen. It does not refer to schooling or formal education. Common features of civic education are workshops, training manuals, leaflets, and various awareness-raising techniques, as well as the use of the media, including radio, television, and social media. For the purposes of this handbook we define it as any activity that helps prepare the public to participate, whether before a constitution is prepared or after it is adopted.

Civil society

The people, in a form that is organized to some extent in formal structures such as political parties, religious groups, organizations, societies, or movements. The key feature of civil society is that it is not controlled by a government.

Code of conduct

A formal set of guidelines for behavior. May be drawn up by an official body, or by any other body. Even if drawn up by an official body it will probably not be legally enforceable, and it will not include specific penalties for breach. But a law could require codes of conduct (for example, for members of a constituent assembly), and in an official context the code could be relevant to deciding whether a person has broken the law or has failed to act properly. Codes of conduct have become common—for legislators and ministers, for candidates and parties at elections, and even in civil society contexts. (See appendix C for examples of codes of conduct.)

Commission

Does not have a specific legal meaning. It generally refers to a body given the responsibility to inquire into certain matters, or to make decisions or recommendations. A commission will not usually be a large body. It is possible to have a constitutional commission to make detailed proposals for constitutional change, though such a commission would not be able to adopt the

constitution for a country. In many countries there are commissions for various purposes (human rights investigations and election management are common examples), which are somewhat—even very—independent from the government. The constitution will often guarantee this.

Consensus

General agreement on an issue—but it need not mean unanimity. However, a mere 51 percent majority would not be a consensus. Though it is a phrase often used in constitution-making, it often causes difficulties. It is rather vague for legal purposes. And there is always a risk that the consensus can be that of the majority, excluding minorities. In South Africa a practice developed in the constitution-making process of accepting “sufficient consensus,” which meant the agreement of the two main political parties. Many would not view that as really “sufficient.”

Consociational

A principle under which individuals are considered part of a state as members of communities rather than as individuals. It could be manifested through community (ethnic or religious) seats in a legislature, power sharing in government, or the right of communities to veto certain governmental decisions. No state is fully consociational; Belgium is a modern example of a state with consociational features. The term is associated with the work of the political scientist Arend Lijphard.

Constituent assembly

A body designed to represent the people, and to adopt a constitution. The form of such assemblies varies widely, and some of them make the final decision about the adoption of the constitution, while in other cases the final act of adoption is performed by a separate parliament or by the people through a referendum.

Constituent power

The power to make a constitution. The Nigerian constitutional lawyer B. O. Nwabueze said, “It is a power to constitute a frame of Government for a Community, and a Constitution is the means by which this is done. It is a primordial power, the ultimate mark of a people’s sovereignty” (Nwabueze 1974: 392).

Constitution

A set of rules that govern the basic structure and operation of institutions of governance in a state. In a modern constitution the rules will also provide for the basic rights of people within the state, and may include some guiding principles for national laws and policies more generally.

In most countries the word refers to a particular enactment that contains those rules. But some countries have no enactment that is called the constitution, a few have several that together make up the constitution, and in a few the constitution comprises a mixture of conventions and laws.

Constitution-making

The whole process of making a constitution.

Constitutional commission

A commission with the task of preparing a proposed constitution, probably after a process of consulting the people and experts, and studying the problems of the existing constitution, if any, the provisions used in other countries, and various other sources of constitutional ideas.

Constitutional reform

“Reform” suggests change, but not necessarily legal change. In the context of constitutions it would usually mean amendment or replacement of the constitution, but might well mean wider changes in society and governance. Not a precise term.

Constitutional review

A process of considering whether an existing constitution ought to be amended. The process might end in a new constitution, but this is not necessarily part of the initial plan.

Constitutionalism

An acceptance, prevailing especially among the ruling classes, of the notion that public life should be governed by the constitution. It does not mean that the constitution is universally respected, but it should be contrasted with a situation in which the constitution is used and respected only if it suits those in power.

Coup

The act of taking over the government of a country by illegal means, most often by the military, but not necessarily by force. May sometimes lead to an effective government that is recognized, even by courts, as “constitutional.”

Deliberation

The fair consideration of all positions, guided by the values of democracy and the general welfare, rather than by populism and crude bargaining on the part of narrow interest groups.

Deliberative process

A process structured to encourage deliberation.

Donors

The countries (especially their aid arms) and international bodies that give financial assistance to developing countries. “Donors” is a common expression, although recipient countries are aware that “donations” are tools of policy of the donating countries.

Draft (constitution)

A constitution or other document not in final form—often offered for comment, as a draft constitution might be published in order to encourage public reaction.

Drafting

The expert task of putting constitutional ideas into precise legal language that those who will employ the constitution, including the courts, are able to interpret. The word is often used to refer to a logically prior phase when ideas are put into a structured document, often called the draft constitution. Unfortunately, in many processes, constitutional commissions and constituent assemblies take it upon themselves to produce the final words of the document, even though they do not fully understand the words’ legal meanings and implications.

Electoral management body

Not the electoral system, which is mainly the way in which the votes of citizens are translated into the membership of legislative bodies, the way in which elections are conducted. Because of the risk of interference, especially from the government, it is common to have a body such as an independent election commission run an election. Sometimes this body is part of the judiciary. It would be in charge of accepting nominations, recruiting staff, arranging the voting on polling day, counting and preserving the ballots, and the like.

Empowerment

The process of creating an awareness of rights and generally educating the public about governance, with the result that the people are encouraged and emboldened to exercise their rights and powers—such as by voting or expressing their opinions. Some agencies are apparently beginning to prefer “engagement”—a logically different concept, but perhaps the outcome of “empowerment.”

Enact (enactment)

Pass a law (including a constitution).

Endorse

Agree with—usually used of authoritative agreement.

Entrench (entrenchment)

Include a rule in the constitution in such a way that it is particularly hard to change. In some constitutions there are a few rules that cannot be changed at all.

Flexible constitution

A constitution that can be changed without great difficulty, though few constitutions will be able to be changed by the process used to change ordinary laws. A flexible constitution is usually one that does not contain great detail, or one in which the meanings of the words themselves are rather broad, leaving room for a variety of interpretations.

Franchise

The right to vote.

Grand reform

Would be used of a major reform of the constitutional system, rather than a process of minor or incremental change.

Hansard

The printed verbatim record of parliamentary debates in many common-law countries. Hansard was a nineteenth-century printer of such records in England. Sometimes, by extension, used of other verbatim records.

Human rights

The rights every person has by virtue of being human—whether one feels these rights are divinely given or not. Recognized by many international treaties and other documents (including the Universal Declaration of Human Rights, the “International Bill of Rights”—comprising the International Covenant on Economic, Social, and Cultural Rights and the International Covenant

on Civil and Political Rights—and various “sectoral” conventions on rights of the child, discrimination, rights of women, and so on) as well as in most countries’ constitutions, though to varying extents.

Implementation

The process of putting the rules of the constitution into practice. It covers passing new laws, setting up institutions, or changing existing laws and institutions as the constitution requires. The insistence by citizens on using the constitution, especially by going to court or otherwise seeking to enforce constitutional duties, is also a form of implementation of the constitution.

Incremental [constitutional] change

Changing a constitution over a period of time by making successive changes to parts of it. May lead to a radically different document over time. But it is not a process that can be controlled or planned.

Interim constitution

A constitution designed to be temporary. It usually prescribes the method for preparing a permanent constitution.

International law

International treaties and other agreements, and international practices that have achieved sufficient recognition to be regarded as binding. In the context of constitution-making the most important form of international law is likely to be human rights law. This includes the Universal Declaration of Human Rights, and various conventions and treaties, such as the International Covenant on Civil and Political Rights. When a country is a party to a particular treaty, it will be important to decide how the constitution is going to reflect this in the rights it recognizes and the duties it imposes. The International Covenant on Civil and Political Rights (article 25) also says that people have a right to be involved in decisions that affect them, which the United Nations Human Rights Committee has interpreted to include constitution-making.

Legal continuity

When applied to a constitution, this term refers to the document having been authorized by some other law. The Bangladesh constitution was not based on legal continuity because it was traced to a proclamation of independence that was illegal under Pakistani law (and Bangladesh was part of Pakistan at the time). The South African interim constitution was the product of legal continuity because it was enacted following the procedures of the existing (white

supremacist) constitution. This technical legal point has no necessary relationship to how much the content of the document departs from the past.

Legitimacy

A concept of political science that refers to the acceptance by people generally of a system of government and rules. It is different from the concept of “legality,” which refers to the validity of the rules in a legal sense. Legitimacy is more a question of (usually public) attitudes.

Majority

Literally, “most.” Many decisions have to be made by a majority of a particular body. But sometimes “most” may simply mean “more.” If there are three or more options or candidates to be decided upon, and the one receiving the largest number of votes is accepted, even if not more than half the people have voted, we call that a “simple majority.” Some decisions have to be made by at least half of the people voting. This is sometimes called an “absolute majority.” It should be made clear whether this is half of all those casting ballots, or half of the entire group entitled to vote. Sometimes constitutional changes are required to be adopted by a much larger majority—two-thirds or even three-quarters of the entire body.

Media

Newspapers and books, broadcasting, and now the Internet.

National ownership

The notion that if people are involved in a process, they are more likely to feel that the outcome is “theirs,” and be committed to supporting it over time. This may be used of a project such as a well, a school or—in the current context—a constitution.

Necessity, doctrine of

Legal rule applied in exceptional circumstances to justify or endorse acts that would otherwise be against the law. When used by a court to recognize a government, the court will usually stress the need to return to constitutional rule as soon as possible. This doctrine was invoked in Nigeria in 2010 when President Yar’Adua neither resigned nor asked his vice president to act, but was himself not acting (and ultimately died), to justify the assumption of power as acting president by the vice president (not endorsed by any court decision).

Nongovernmental organizations (NGOs)

Organizations not comprising persons in government, and not set up by law. They may have to be set up by a procedure required by law and even perhaps registered. They can also be thought

of as organized civil society. Political parties are not commonly referred to as NGOs. In reality many NGOs are not free of governmental involvement. Organizations that are NGOs in one country, but operate on an international scale (often using funds from donors), are sometimes called international NGOs.

Plebiscite

A process in which the people (plebs, the Latin for “people,” is the root) are asked to vote on an issue, rather than being asked to vote to select representatives. Sometimes used of a process in which the vote is not binding. However, the usage is not fixed, and there is no rigid distinction between a plebiscite and a referendum.

Principles

In constitution-making, sometimes used to refer to guidance on certain things that should appear in the final constitution, or possibly on the process. These might be called constitutional or guiding or foundational principles. They may be laid down by a peace process or an interim constitution, or in other ways.

Promulgation

The formal act of bringing a document into legal effect, or the act of making public a law or document that is already complete.

Public consultation

A process of seeking people’s views with the idea of taking account of them in decision-making. It does not require accepting all the views. In the context of constitution-making it usually refers to the process of consulting members of the public about how the process should be structured, their expectations of the constitution, their ideas about the system that should be adopted, and their views on a draft constitution once one is prepared. (See part 2.2.)

Public participation

The active involvement of the public in decision-making about issues in the public sphere. It would often be more than just voting for representatives who will make decisions. In the context of constitution-making it is likely to involve a process of informing the public about the process, conducting civic education and consulting the public on their views related to key constitutional decisions (decisions could be about the structure of the process as well as the content of the constitution). (See part 2.2.)

Ratify (ratification)

To approve an act done by someone else—and thus to have some legal effect, or to bind oneself. A country for which a representative has signed a treaty will often not be bound until it is ratified by some body—perhaps the legislature. In constitution-making a referendum might be required so that the people can ratify the constitution.

Referendum

A process in which the people are asked to vote on an issue, rather than being asked to vote to select representatives. Sometimes used of a process in which the vote is binding—as opposed to a plebiscite. However, the usage of neither word is fixed.

Repeal

The act of “unmaking” a law—usually by the same legal process used to enact it.

Revolutionary legality

Used in Eastern European socialist states to describe the basis of law. Also used sometimes in relation to the process of deciding that a regime that was originally illegal has become legal by virtue of acceptance; sometimes also called the “successful coup” doctrine. See also “Necessity, doctrine of.”

Rigid constitution

A constitution that is hard to change. Also refers to one that has many detailed provisions, leaving little room for different interpretations. The opposite of a flexible constitution—though in reality all constitutions are on a continuum.

Road map

A document that sets out a sequence of events, perhaps with timetable, that is to be used to move toward an objective. It might prescribe not just the institutions to be involved in constitution-making, but the order in which decisions are to be made and public consultation is to be carried out, and so on.

Roundtable

A meeting of a wide range of bodies within society, not within the framework of the organs of government, and probably without a formal structure or decision-making process, intended

to decide on a course of action. That might be the broad framework of a constitution or of a road map toward a constitution. Participants might be political parties but might also include civil society.

Social contract

A construct of political theory that refers to the idea that human beings come together in society and agree to be ruled. The original social-contract theorists thought of this as an agreement between the people on the one hand and the rules (probably represented by a king) on the other. Modern theorists might think in terms of an agreement among the people. Some have suggested that the constitution is a form of social contract.

Sovereign (sovereignty)

Characteristic of an independent state within the community of states, meaning that it is not subject to any other state. Having full powers. Also used in the phrase “sovereignty of the people” to indicate that the sovereignty is not that of a monarch or government.

Spoiler

Used in literature on constitution-making to refer to one who obstructs the constitution-making process.

Submission

A putting forward of ideas and suggestions—either orally or in writing.

Transition

Movement from one situation to another; often used to describe political or constitutional change from autocracy to democracy and the like.

Transitional

A term often used of a constitution or an institution intended to last for a limited time until something permanent is established. It could refer to, among other things, a legislature, a court, or a government.

Transitional justice

A term characteristic of various institutions designed to bring justice and reconciliation to a

country that has gone through conflict; may include a “truth and justice commission,” special courts or tribunals, and commemorations.

Truth and justice commission

A commission set up to hear the stories of victims, usually of a previous regime, perhaps recommend or grant compensation, and perhaps recommend or grant pardons. The names of such commissions may vary from country to country.

Workability

An assessment of the “workability” of a constitution includes whether the design will match the circumstances of the country, as well as questions of the capacity of the country to operate it, its likely cost, whether it will generate a great deal of litigation, and so on. Less important perhaps are other concerns: readability, length, and durability.

Appendix C: Sample codes of conduct

C.1 Sample code of conduct for a member of a constitution-making body

I. General Principles

1. By accepting this office, a constitutional commissioner undertakes to fulfill to the best of his or her ability the letter and spirit of [whatever law has created the constitution-making body] and this code of conduct. A constitutional commissioner shall work collaboratively toward producing a draft of the constitution [or a report, depending on the mandate].
2. The position of a constitutional commissioner is a high public office, carrying with it strong ethical obligations. The conduct of a constitutional commissioner should always uphold the dignity and solemn responsibility attached to the task of drafting the constitution. A constitutional commissioner must therefore act with honesty and propriety and ensure that his or her conduct does not discredit the constitutional commission at any time.
3. The duty of a constitutional commissioner is to act in the best interests of the people of [Country X].
4. A constitutional commissioner shall exercise his or her functions without regard to any improper influence, direct or indirect, from any source.
5. A constitutional commissioner is appointed on a full-time basis. A constitutional commissioner must not accept retainers, honoraria, or income from work other than his or her remuneration as a constitutional commissioner.
6. A constitutional commissioner shall at no time afford any undue preferential treatment to any group or individual, discriminate against any group or individual, or otherwise abuse the power vested in him or her.
7. No constitutional commissioner, by his or her membership, association, statement, or in any other manner, shall jeopardize the credibility, impartiality, or integrity of the constitutional commission.
8. Constitutional commissioners, other than the chair, shall not speak on behalf of the commission. The chair of the constitutional commission is the spokesperson of the

commission, and the chair or his or her designate has the sole authority to speak on behalf of the commission.

II. Decisions or Deliberations of the Constitutional Commission

9. Constitutional commissioners shall be bound by the decisions of the commission made in accordance with [Law or Mandate X] and shall not harm the credibility of the commission by undermining those decisions in public. This provision is particularly important regarding the commission’s deliberations on the draft of the constitution that is prepared for submission to the [Body X].

III. Confidential Information

10. Matters of a confidential nature in the possession of a constitutional commissioner shall be kept confidential and shall not be used for the private or public benefit of the constitutional commissioner. Such restrictions shall apply also after the constitutional commissioner’s tenure is concluded.

IV. Attendance

11. Constitutional commissioners have been entrusted with an important task and must make every effort to carry out their duties with diligence and attend every meeting of the commission, including public consultation meetings.

V. Compliance

12. Constitutional commissioners shall comply with the provisions of this code of conduct and [Law X].
13. In the event of uncertainty about any of the provisions of this code of conduct, a constitutional commissioner shall consult the chair of the commission.
14. A constitutional commissioner may be removed from office by [X] based on evidence indicating incapacity or incompetence, or the commission of an act that violates his or her oath or the code of conduct.

C.2 Sample code of conduct for civic education providers

[The Constitution-making Body X—hereinafter, “the CMB X”] is mandated to conduct civic education [under Authority X or Law X]. To ensure that the CMB X is able to carry out civic education and prepare the public to participate, it will cooperate with agencies or organizations with the capacity and commitment to help with this effort.

The agencies and organizations providing civic education will be expected to conduct all civic education activities in strict accordance with the civic education guidelines set by the CMB X. They shall not be motivated by profit or gain beyond legitimate expenses they may incur in respect of duties undertaken on behalf of or in collaboration with the CMB X. They are expected to carry out all activities in accordance with the principles stated in the code of conduct as set forth below.

1. Each civic education provider shall conduct civic education in accordance with the curriculum prepared or approved by the CMB X.
2. The CMB X requires that every civic education provider conduct all civic education activities without partiality, advocacy, or influence from any person or group.
3. Every civic education provider shall refrain from engaging in any activity that would discredit the work or image of the CMB X.
4. Every civic education provider shall refuse any gift, favor, hospitality, or inducement that would influence or appear to influence the discharge of its duties.
5. Every civic education provider shall ensure that all citizens are accorded the opportunity to participate freely and effectively in the civic education program without intimidation, coercion, threat, duress, or undue influence.
6. Every civic education provider shall ensure that its program is inclusive and is designed to meet the needs of all participants, including people with disabilities, women, youth, nomads, or other groups that may be excluded if special efforts are not made to include them.
7. Every civic education provider shall ensure that civic education activities are accessible, and shall give special consideration to ensuring that all participants have access to any relevant documents in an appropriate language, a suitable venue, and translation or interpretation services where needed.
8. Every civic education provider is expected to make relevant use of human and material resources found within the area in which it is engaged to provide civic education.
9. Every civic educator provider shall avoid actual or apparent conflicts of interest, and in the event of any such conflict shall notify the CMB X.
10. Every civic education provider shall refrain from disclosing any confidential information acquired in the course of its work unless otherwise authorized by the CMB X, and will not use any such information for personal gain or the gain of a third party.
11. Every civic education provider shall perform its duty in accordance with such other rules, regulations, and standards as may be set from time to time by the CMB X.

12. Any civic education provider who violates or contravenes any of the above rules shall be liable to [the appropriate penalty or action for the context].

C.3 Sample of code of conduct for members of a constitution-making body consulting with the public

General Principles

1. This code of conduct sets down the conduct expected of members of the constitution-making body (hereinafter, “members”) during the public consultation process.
2. By accepting their office, members have undertaken to consult with the people of [Country X] for the purpose of faithfully gathering, analyzing, and carefully considering the views of the public when preparing the constitution. (The purpose stated here is an example only. The purpose should follow the objectives of the process, whether defined in a legal document or by the constitution-making body in interpreting its mandate.)
3. The conduct of a member during the public consultation process should be to uphold the dignity and solemn responsibility attached to the role of serving as a member of the constitution-making body. Members therefore have a duty to act with honesty and propriety and ensure that their conduct does not discredit the constitution-making body.

Duties and Obligations of Members during the Public Consultation Process

4. The duty of a member during the public consultation process is to:
 - a. attend (except in extraordinary circumstances) every public consultation process he or she is scheduled to attend, and faithfully execute all assigned duties;
 - b. refrain from presenting any personal or partisan views or advocating for any constitutional options to the public;
 - c. use the public consultation process as an opportunity to listen respectfully to the views presented;
 - d. treat each speaker with the utmost respect and not give any indication that the member agrees or disagrees with the views of the speaker unless the views incite violence;
 - e. ensure that the process is as inclusive as possible and that all persons are treated equally regardless of their sex, age, race, or socioeconomic status;
 - f. ensure that all groups or persons invited to public consultation meetings are given the same amount of time to make their views known to the constitution-making body;

- g. ensure that all views are faithfully transcribed, recorded, and received by the constitution-making body; and
- h. ensure that each community or group receives a feedback report in the form of a faithful summary of its public consultation session and has sufficient time and opportunity to make corrections when necessary.

Confidentiality (if security is an issue)

- 5. A member shall not disclose the identity of an individual, group, or community regarding the specific views that may have been expressed during the public consultation.

Enforcement of the Code of Conduct

- 6. Allegations of noncompliance with this code may be handled as follows:
 - a. An allegation should normally be raised first with the member complained against. However, there may be circumstances when it is more appropriate to raise the matter first with the [whichever body is in charge of enforcement or adherence to the code — options will depend on context; it could be the leader of the constitution-making body or a body in charge of enforcing the code of conduct].
 - b. If the complainant chooses to pursue the matter, he or she should refer the allegation in private directly to [enforcement body].
 - c. The [enforcement body] will then examine the allegation and may decide to investigate it further or to dismiss it.
 - d. In the investigation and adjudication of complaints against them, members have the right to the same safeguards as those applied in the courts.
 - e. If after investigation the [enforcement body] deems that the allegation is proved, the member complained against has a right of appeal to [X].
 - f. The [enforcement body] will decide the appropriate penalty, which may include being removed from the public consultation process or from the constitution-making body.
 - g. The conclusions of the investigation should be shared with the constitution-making body.

Appendix D: References

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Suggestions for further reading on constitution-making processes as well as other suggested resources are available at www.interpeace.org/constitutionmaking.



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