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Specialist Bodies for Constitution-Making

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1. Introduction

Constitutions are meant to have lasting value. Their purpose is to provide a framework of overarching norms and principles so that a country can be governed in a stable and predictable manner. These norms and principles constitute a set of "meta" rules from which more specific legislation is supposed to be derived. Reviewing or making a new constitution, therefore, is not an everyday event. It typically takes place only in extraordinary circumstances. Although these circumstances vary, they can more generally be characterized as political conditions in which the existing regime—overarching norms and principles—is being called into question or having already collapsed.

Because constitution-making transcends "politics-as-usual" there is a perceived need or desire among political elite and citizens alike to create bodies that can devote their attention solely to developing and adopting new constitutional proposals. These "specialist bodies," as they are called in this volume, have historically been particularly prominent in helping to develop and design constitutions but with the rapid growth in constitution-making exercises in the wake of the "third wave" of democratization (Huntington 1991), these bodies have increasingly been created to prepare the ground for the constitutional reform exercise itself as well as to ensure adoption of the new constitution.

A salient feature of constitutional reform efforts in the past two decades is their participatory orientation. Constitution-making is no longer the prerogative of a few experts or a select group of political representatives. Whether through consultation, direct submissions, or a referendum vote, citizens are invited to take part in constitution-making that was rarely, if ever, practiced before. The task of developing constitutional proposals, therefore, has changed a lot from the days when the fifty-five Founding Fathers designed and adopted the United States constitution or the time immediately after the First World War when Hans Kelsen and Hugo Preuss provided Austria and Germany respectively with what can be best described as "professorial" constitutions. Today's processes are also in stark contrast to the top-down practices associated with the adoption of the post-World War II constitutions in Germany and Japan as well as the Communist countries in Central and Eastern Europe.

The role of specialist bodies in the contemporary context, therefore, tends to be different in some important respects, most notably that they are created and used for multiple purposes, not just designing the proposals. As used here, "specialist bodies" refer to those special forums, committees or commissions, and assemblies—appointed and/or elected—that are set up, usually with a limited time frame, to facilitate and contribute to the development of constitutional proposals as well as their adoption. This is a broader definition than others may use, but it is justified in order to deal with the variety of approaches that have been taken especially in the Third Wave period.

The purpose of this paper is partly to draw attention to this variety, partly to bring some coherence to the interpretation of these practices. The chapter begins with a mapping exercise drawing on cases from three regions and showing what these specialist bodies are, what functions they have, and what their basic rationale is. It continues by looking at the

challenges and problems that are associated with the use of these bodies. The conclusion provides a overall assessment of the usefulness of specialist bodies in the Third Wave context.

2. Types of specialist bodies, their functions and rationale

Constitution-making today is more than just design and adoption of proposals. Because it is so often induced under difficult circumstances, there is a need to prepare for the actual design and adoption phases. Special bodies are thus created to facilitate the process. Similarly, throughout the process of designing a constitution issues arise over how it might be best managed. It is appropriate to acknowledge, therefore, that this phase of constitution-making is not merely technical but also highly political. The adoption phase, though highly political too, may nonetheless be the least complicated because by that time many of the hurdles have already been passed. In the discussion below, the distinction will be kept between the three phases in which specialist bodies participate:

Facilitation→Formulation→Finalization

There is often an overlap between the various phases. A body created to facilitate the constitution-making process may be called upon to also participate in the formulation of constitutional proposals. Similarly, the line between formulation and adoption is not always clear. For example, a constituent assembly may also be in charge of developing proposals through committees established under its immediate authority. Such empirical variations notwithstanding, the three-phase approach makes sense for analytical and explanatory purposes. It will be applied to the following discussion of specialist bodies in three separate regions: Eastern Europe, Latin America and Africa.

2.1 Eastern Europe

Constitutional review and the development of new basic laws in Eastern Europe were prompted by the fall of Communism in the late 1980s. Although the patterns vary somewhat the exercise typically started as a review of the existing Communist constitution, was done in a hurry and did not employ specialist bodies except in the form of legal drafting. Eastern Europe, therefore, is an example of where specialist bodies were relatively unimportant for the final outcome. This is particularly true for Bulgaria and Romania, the first states to adopt new constitutions in 1991. The rush and the inclination to keep the exercise within the ranks of existing political institutions is best explained by the desire among incumbent Communist leaders to stay in power while adopting a softer, social democratic stand on the transition. This strategy worked because the former Communists won landslide victories in the first free parliamentary elections after the new constitution had been adopted. There was neither much public discussion nor serious negotiations over the content of the proposed constitutional principles. As one account notes, the new basic laws became for the former Communist leaders their *sui generis* "democratic business cards" in the process of integration with Western Europe (Dreijmanis

and Malajny 1996).

The constitutional reform process was more complex and drawn out in Poland. Even there, the exercise began as an attempt to revise the old "Stalinist" constitution, but it could not be monopolized by the ruling Communist leaders. The presence of an underground movement—*Solidarinosc*—and a powerful Catholic Church forced the latter to incorporate others in the process, beginning with a special Roundtable to negotiate and hammer out the principles for a transition to more democratic forms of governance. This led to an initial quite far-reaching modification of the 1952 constitution in 1989 followed by the adoption in 1992 of the "Little Constitution" which had the effect of abolishing the old Stalinist constitution.

The Hungarian case resembles what happened in Poland in that the reform process went through distinct phases. The purpose of the first stage involved a "pacting" exercise between incumbents and reformers aimed at liberalizing the previous regime. The second phase was used to create the foundation for a democratic system and a market economy by reinstating the rule of law, establishing fundamental rights and freedoms, setting up checks and balances, and introducing authentic judicial review. In 1989 and into the first years of the 1990s there existed a political will to establish a legal framework for the transformation of government but also to pass new constitutions (Paczolay 1993). The process was not free of controversy and conflict. For instance, in Poland, the Senate and the *Sejm* (lower house) formed their own commissions to draft a new constitution with the result that a major disagreement arose whether to adopt a presidential or parliamentary system, an issue that was then resolved in favor or the latter but later reversed.

There are certain lessons that can be drawn from the East European constitution-making exercise that stem from the limited use of specialist bodies. The first is that it was confined to the political elite with little input from the public at large. The second is that by relying on existing legislative institutions, constitutional reform issues had to compete for attention with more immediate political issues. The third is that because they were carried out in a hurry—Poland being the main exception—the basic laws that were initially agreed upon were not adequately assessed in terms of how well they would suit the new political dispensation in the making.

2.2 Latin America

No region of the world has received more attention than Latin America when it comes to democratic transition and consolidation. Together with the southern European cases of Greece, Portugal and Spain, democratization in Latin America during the Third Wave has been at the center of the emerging literature on the subject (O'Donnell, Schmitter and Whitehead 1986; Linz and Stepan 1996). The challenges in Latin America are different from those of Eastern Europe. While in the latter, the transition was from a totalitarian system, the process in Latin America, as in southern Europe, has been from an authoritarian, typically military, regime. Another important difference is that while the Communist leaders in Eastern Europe tried to hang on to power or at least be sure that they could continue to be relevant political actors, the outgoing military leaders in Latin America

were ready to withdraw from politics altogether, thus paving the way for a new order that could be more effectively introduced and managed by civilian groups and parties.

Because of these circumstances, the preparatory phase during which the outgoing military leaders and the incoming reformist civilian leaders would meet to agree on the terms for the transition has been particularly salient. Special negotiating forums have been necessary to facilitate the transition and setting the conditions for constitutional reform (Przeworski 1991). This "pacting" is not new in Latin America. It has been adopted as an important part of the constitution-making exercise in previous years when a military or civilian dictatorship has given way to democratic rule. A case in point is the 1958 Pact of Punto Fijo which paved the way for the 1961 Venezuelan Constitution and helped institutionalize a new democratic order. It charged the newly elected senators and deputies to write a fresh constitution and soon thereafter the latter created a bicameral commission for constitutional reform (Planchart Marique 1988). The pattern during the Third Wave has been similar. For instance, in 1990 there was a political pact between political parties in Colombia to design and agree on the mandate for a constituent assembly. In Argentina, Brazil, Chile and Peru, where the transition was negotiated with the outgoing military still in charge, the dynamic was different but the process similar, leading as it did to the creation of a constituent assembly that would design a new constitution.

There are a few interesting lessons that can be learnt from the Latin American experience. One is that agreeing on the principles and terms for the constitutional reform exercise has generally been its most important political aspect. Paying attention to what institutional arrangements are best suited to maximize the probability of success at facilitating the rest of the process has been critical in that region. A second lesson is that once political agreement has been reached, the constitutional drafting has been fairly straightforward and dominated by legal expertise. This may also explain why the constitutions in Latin America over time have come to emphasize the same set of principles with only modest modifications. Because law and politics are closely integrated in the region, as they are in all countries that have inherited features of the Napoleonic Code, there is a striking path dependency reflected in the way constitutions have been developed and adopted. The third lesson is that because of the prominence of legalism in the constitution-making process, the gap between constitutional principle and political practice is a common feature of the Latin American political scene (O'Donnell 1994).

2.3 Africa

The political and constitutional context in the Africa region is less homogenous than it is in either Eastern Europe or Latin America. The former countries all shared a Communist legacy but also proximity, culturally, economically and politically, to the rest of Europe. With the desire to join the European Union, the constitutional path there was pretty much set in a uniform manner. In Latin America, as suggested above, it was not only a common experience with military dictatorships but also a long common constitutional tradition that helped pave the way for revision and reform. The use of specialist bodies, therefore, tended to confined to facilitating a process that otherwise would be quite closely managed under the auspices of existing legislative bodies. In Africa, by contrast, there is a variety of

constitutional legacies at play. In francophone Africa, the French constitutional model is very much dominant; in anglophone countries, the constitutional features of British parliamentarism dominate despite a move toward presidentialism. What is more, African countries lack of constitutional tradition of their own, leaving constitutional reform largely confined to a choice between options derived from foreign models.

The driving forces behind constitutional reform have been both domestic and foreign. Dissatisfaction with governments unable to deliver development goods to the people has been one important factor as has opposition to corruption and violations of human rights. At the same time, foreign governments, not the least those that provide foreign aid to Africa, have insisted on and encouraged reforms in accordance with the spread of democratic forms of governance elsewhere in the world. Not surprisingly in these circumstances, incumbent government leaders have typically shown little interest in constitutional reform and have agreed to it only reluctantly. These circumstances explain why in the Africa region, specialist bodies have come to play a particularly prominent role in the reform process.

The francophone and anglophone countries have chosen different strategies for dealing with constitutional reforms, each reflecting their respective legal traditions, the former within the civil law the latter within the common law system. The French-speaking countries adopted the national conference as the principle vehicle for engaging rulers and ruled in a dialogue on constitutional and legal principles. LeVine (1994) believes that it is a replica of the French Third Estate, which, as a popular assembly in 1789, declared itself a sovereign legislative body and swore its famous Tennis Court Oath as the sole representative voice of the people. The parallels are especially striking in the cases of Benin and Mali. The national conference in these two countries brought together representatives of the most important social forces, proceeded to assert its own autonomy and after having chased incumbent military rulers from power, engaged in drafting a new constitution. While these national conferences lacked their Abbé Sieyes to realign and manage the Third Estate throughout the process, the churches in both Benin and Mali made their clergy available to preside over and guide the proceedings. The new constitutions are largely reinventions of the French constitution for the Fifth Republic and there is little that some one familiar with the French system does not find (Mbaku and Ihonvbere 1998). It should be added here that the national conferences that were held in other Francophone countries about the same time were not as successful as those in Benin and Mali. For instance, in the Republic of Congo, the national conference fuelled ethnic conflict. Much the same happened in Chad. In Togo, the military decided to hold delegates to the conference hostage for a long time (Clark and Gardinier 1997).

The trend in nglophone countries has been characterized by more caution. Governments in power have been quick to point out that they are legitimately constituted bodies and that their parliaments are sovereign. This argument has been used in several countries, e.g. Kenya, Tanzania, Zambia and Zimbabwe, against those groups in the emerging political opposition who have advocated a sovereign constitutional conference along the lines of what the francophone countries have done. Constitutional amendments, therefore, have

remained the prerogative of parliaments where incumbent governments typically have a comfortable majority exceeding the two thirds necessary for such amendments. Uganda and Kenya, in addition to South Africa, are the only countries in English-speaking Africa that have appointed independent commissions involving politicians, lawyers and lay people representing civil society[1].

These commissions are interesting because they have been highly participatory and thus open to local input. In Uganda, the Secretariat of the Commission responsible for drafting the new constitution in 1988-94 received no less than 25,000 documents to consider, many from the country's local government bodies. In South Africa, there was also various ways of engaging the public using both print and visual media, the result being the submission of some 250,000 petitions and comments, although only about 11,000 were really substantive (Ephraim 2001).

Of all the constitutional reforms in Africa, the one in South Africa was particularly impressive. Not only did it result in a very different liberal constitution compared to previous documents. It also demonstrated that where there is political will, reform is possible. These achievements, however, would hardly have been possible had it not been for the careful preparations that were made to get the exercise off the ground in the right direction. As Haysom (2001) points out, this preparation required two distinct phases, the first agreeing on the preconditions for "talks about talks," the second—"talks about talks"—focusing on establishing the conditions for substantive negotiations. These inter-party dialogues in both phases were critical to the pursuit of the substantive reform efforts.

The lessons from Africa indicate that specialist bodies have played a very important role in all three phases of constitution-making. They have been important in the facilitating period. Wherever the national conference model was successful, it tended to take responsibility for formulation as well as adoption of proposals and thus the finalization of the reform process. In Anglophone countries the reluctance among leaders notwithstanding, once specialist bodies had been agreed to, they tended to become forces of their own shaping the process in often unanticipated directions. That certainly was the case in Uganda and also in Kenya 2000–2004.

2.4 Summary of Main Points

It is possible now to bring this mapping exercise to closure by offering a summary of the discussion above that highlights the principal points about specialist bodies at different points in the constitutional reform process:

1 Ethiopia and Eritrea are two other countries, which chose the mechanism of independent commissions to prepare for constitutional reform. The extent to which these commissions enjoyed autonomy varied. It was very high in South Africa, quite high in Uganda, but much less so in Kenya, and especially Ethiopia and Eritrea where the process was very much influenced by the agenda of the incumbent regime (Hyden and Venter 2001).

Table 1. Summary of types, functions and rationale of specialist bodies.

Phase	Examples of specialist body	Rationale
Facilitation	Pact (Latin America), National Conference (Francophone Africa), Inter-Party Dialogue (Poland, South Africa)	Finding agreement on a Grundnorm or a set of guiding principles
Formulation	Constitutional Commission/ Committee,	Development of proposals drawing on divergent political views and independent expert opinions
Finalization	Constituent Assembly	Adoption by a one-time elected representative body to avoid short-term and special interest considerations

The main points about these bodies are that they are temporary and devoted singularly to constitution-making, whether it is laying the ground for it, developing specific proposals, or adopting them. Their functions differ according to which phase in the constitution-making process applies. In order to clarify and summarize what these functions are it may be helpful to provide a summary of what these are in the three phases:

Table 2. Functions of specialist bodies in the different phases of constitution-making.

Facilitation	Formulation	Finalization
Reaching a broad-based accord on basic principles	Designing specific proposals	Deliberating the draft prepared in the formulation phase
Legitimizing the exercise	Deliberating proposed rules and potential alternatives	Seeking inputs from specific political constituencies
Building constituencies of support	Raising awareness among members of the public	Agreeing on the procedures for final adoption
Mobilizing resources, human as well as financial	Seeking specific inputs from the public	Adopting the constitution
Designing the features of the constitution-making process	Managing the process to achieve agreements	Securing legitimacy for the constitution

Making a constitution is not a simple exercise, nor is the process of doing so linear. The lines between the three phases are often blurred. There is often movement both forward and backward. Not all the time do the constitution-makers succeed. In short, there are a number of challenges and problems arising along the way. Drawing on a select number of cases, the next section of this chapter will deal with these as they apply to each phase of the process.

3. Challenges and Problems

Constitution-making typically takes place at certain extraordinary moments in a country's history. While the principles and norms of constitutional law and constitutional government tend to have a universal value and applicability, finding the commonalities with regard to the constitution-making process is more difficult. Nonetheless, the rich experience of constitution-making during the Third Wave, in particular, has produced a set of insights that may be of particular interest for future consideration. The focus here is on the challenges and problems that participants and analysts have identified as especially pertinent. They will be discussed here with reference to each phase of the process.

3.1 Facilitation

Although most attention in constitution-making has been paid to drafting and adoption issues, the preparatory phase is often the most critical and difficult. This is particularly so since many recent cases of making new constitutions have resulted from experiences with severe and widespread civil and political violence. This is true for Africa where constitution-making has been quite frequent in the past two decades, but also elsewhere, e.g. Asia and the Pacific. Getting to the point where drafting can begin requires its own strategy. The following challenges and problems seem to be particularly relevant for consideration here: (1) Is there a perceived need for reform? (2) Is there a political will to invest in the process? (3) Are political leaders ready to "give and take"? and (4) Can key stakeholders agree on how to proceed?

3.1.1 The need for reform

Even if there may be a shared sense that a country is caught in quite extraordinary circumstances, members of the political elite as well as the public are not necessarily going to find themselves in agreement about the need for a new constitution. Governments are usually the least likely to agree to reform preferring to keep the existing constitution and instead managing the process by agreeing to amendment of specific paragraphs. The establishment of specialist bodies is rejected not only on grounds of financial costs but also and often, in particular, because incumbent leaders are afraid of losing control of the reform process. This is what has happened in many nglophone countries which have remained free from major upheavals, notably Kenya, Tanzania and Zambia. Governments have referred to the sovereignty of the elected parliament and claimed that it should be the body dealing with constitutional changes. In Tanzania, the Government has succeeded in holding back demands for a special constitutional commission, although members of the political opposition called for it after a special commission headed by the then Chief Justice, Francis

Nyalali, had proposed a series of amendments that could have warranted the establishment of a special review body (Mwakyembe 1995; Widner 2001).

The outcome of the political battle in Kenya over the need to reform eventually ended up differently largely because it was driven in the 1990s by a strong and unified civil society in which church leaders and lawyers played a prominent role. Its representatives developed a proposal of its own identifying the kind of Kenya they wanted (Mutunga 1999; Ogweli Analo 2004). This draft became a political rallying point although the President, Daniel arap Moi and his government for a long time showed little interest in buying into the call for reform. When Moi finally agreed to a constitutional review in 2000, the proposed chairman, Professor Yash Ghai, agreed to serve only as long as the constitutional draft of civil society could be incorporated into the agenda of the commission. Moi yielded to this condition and thereby set in motion a review that turned out to become much more than he had anticipated (Cottrell and Ghai 2007).

The experiences of Kenya and Tanzania are not necessarily typical since they carried out their constitutional reviews under conditions of peace and stability. Establishing special forums for constitution-making in "post-conflict" societies, where a new entity is being created, e.g. Kosovo, or where state failure has occurred may seem especially urgent, but getting agreement on the need for reform is not necessarily easier. There is always the fear that one party will try to use the occasion to entrench itself in power. Because of such mutual suspicion, agreeing on the need for reform may be impossible and definitely take its time. South Africa is a case in point. The need for reform was eventually shared by both the white minority government and the black opposition that previously had been forced into exile, but it took a long time.

3.1.2 Political will to invest in the process

South Africa provides perhaps the best evidence of the importance of key stakeholders being willing to invest their energy in the process. This case indicates that where parties are stalled and there is no progress in sight, the willingness to start negotiations is unlikely to exist, but once there is a sign of breakthrough, as happened in 1988 in response to the publication of a document entitled "Constitutional Guidelines for a Democratic South Africa" by the African National Congress (ANC). It was the first concrete indication that the party was prepared to accept a constitutional dispensation which subordinated majoritarian democracy to the limits prescribed by a constitution (Hansom 2001:95). This had the effect of bringing civil and political leaders in South Africa together in new ways and encouraged tentative—though politically controversial—meetings between South African government representatives and members of the exiled ANC leadership outside the country.

These initial contacts between the ANC and the Government may be best described as informal bodies that were set up in order not to negotiate but to build confidence, thereby paving the way for formal negotiations at a subsequent point (Spark 1993). These were "talks about talks," as Hanson calls this initial phase of the constitution-making process (Hansom 2001:94). These conversations did lead to more regular meetings, but there was still disagreement about a number of things so the "talks about talks" continued, initially

under the ill-fated Codesa (Convention for a Democratic South Africa) in 1991-92, but subsequently through a resumption of bilateral talks that ended with the Memorandum of Understanding in late 1992. Most importantly, this set of negotiations produced the 34 Grand Principles that would serve as binding on the rest of the constitution-making process.

The South African process was in the end successful in producing a constitution that all the major stakeholders would accept, but the political will to invest in the reform process is sometimes lacking or at least insufficient. If political leaders are not ready to take the facilitation phase seriously, the chances that the rest of the process will be productive diminish significantly. This seems to have been the case in Kenya as it reluctantly embarked on constitutional reform in 2000. It has happened elsewhere too. For instance, the collapse of the Egmont Palace Pact in Belgium in 1977 severely complicated and put back the reform process which only much later has ended up in a federal constitution for the country (McWhinney 1981:13).

3.1.3 3. Readiness to "give and take"

Constitution-making is a strategic game where political actors typically enter the process with a view to promoting and defending their own interest, not necessarily their personal ones, but those of their respective constituents. Being able to transcend these often particular, if not narrow, views, is paramount for a constitution-making process to move forward. The special bodies that are set up to facilitate confidence-building and mutual understanding are the vehicles by which such values are fostered. As the South Africa case indicates, learning to respect and trust each other enough for meaningful negotiations takes time and requires patience. This is particularly true in situations where peace negotiations constitute a *sine qua non* condition for constitutional reform (Klug 2007).

Peace negotiations in societies that have undergone periods of serious civil and political violence deal with the underlying political conditions but they are often focusing on the immediate rather than the longer term implications of the agreement. As such the peace agreement is a facilitating mechanism and it is important, therefore, to ensure as much as possible that it lays the ground for subsequent negotiations about a new constitution. The most important outcome of peace negotiations, as the case of Burundi indicates, is the socialization of key stakeholders into a mode of thinking that makes them look at each differently. Even so, as the Burundi example also shows, building enough confidence that leads to constitutional negotiations is cumbersome when social and political cleavages go deep. The Sri Lankan case would be another where the willingness to give and take that once existed between the Sinhalese and Tamil groups now seems to be completely gone (Ghai 2005). As one analyst notes with reference to Iraq, building a democracy entails much more than drafting and adopting a new constitution (Benomar 2004).

The need for a long facilitation phase is likely to be the case especially in countries that emerge out of civil and political conflict. Peace negotiation becomes the special and primary mechanism for preparing constitutional reform. It is important to keep these two activities apart and ensure that the facilitation phase concentrates on talks rather than drafting. An assuring climate in which contending parties can sit down and agree "on

paper" what the future constitutional framework of their country should look like is an important first step.

3.1.4 Agreeing on how to proceed

Yet another challenge in the facilitation phase is to be able to negotiate and create the time and space for a strategic and long-term view of what is needed. In post-conflict countries, in particular, members of the public are tired of the violence and want a rapid return to peace. Sometimes peace agreements turn out to be no more than truces. Violence breaks out soon again. The danger in these situations is that the mechanisms or bodies that were created to facilitate peace and pave the way for constitution-making lose much of their credibility. It is not only individual political leaders that may lose face; the whole institutional apparatus does. Finding agreement on a *Grundnorm*, however, is often tedious and political leaders are apt to give into popular pressures to act swiftly. Without implying that such a "fast track" is bound to fail, it is clearly very risky. The challenge, therefore, is to strike a balance between reflection and action, planning and implementation.

Disentangling the various components of peace-making and what needs to be done to proceed to the next stage is not easy but there seem to be two ways forward that make the challenge somewhat easier to handle. The first is to create a "peace package" which involves a complex mix of discrete but complementary of components. This way of "sweetening" the path forward was attempted, for example in Bougainville, as it embarked on negotiating peace with Papua New Guinea and a new constitution. This package approach had both advantages and disadvantages. Some stakeholders could not accommodate themselves to the full package and were reluctant to go along, but step by step progress was made as actors took steps that others could not afford to reciprocate. The lesson from there and other similar cases, e.g. more recently Nepal, seems to be to include fill the package with things that are not necessarily resolved in full but within reach of being agreed upon so that keeping negotiations going is worthwhile.

The other approach is built on the notion of sequencing. In this approach it is important for actors involved to agree on the process toward making a constitution entails. This step-by-step approach is more careful and avoids "front-loading" as often happens when stakeholders are under pressure to achieve swift results. Sequencing typically involves thinking strategically about what is necessary to put in place in order to move from one phase to another. For instance, the South African process was carefully planned in terms of how to move from A to B. Although it was temporarily derailed before any real constitutional drafting had taken place, it eventually resumed with an agreement about basic principles that then made it possible to agree on substantive negotiations and drafting.

Sequencing is a strategic tool to help the process move forward from facilitation to formulation, but it is fraught with its difficulties and traps. The "road map" of the process that sequencing allows is often not clear enough to make a full commitment by all stakeholders possible. Some may be tempted to withdraw their support and the whole process collapses. Such is the risk that must be taken in this approach. One step at a time, one phase at a time in constitution-making sounds like the right approach, but it often turns out to be two steps forward and one (if not more) backward, leaving stakeholders and their represen-

tatives in the constitution-making process frustrated and often ready to abandon their commitment.

3.2 Formulation

The line between facilitation and formulation is sometimes difficult to draw in the empirical reality of constitution-making. They do occur in sequence, but they are often compressed in such a way that it is difficult to trace where one begins and the other ends. In fact, this compression is in some cases so complete that they are better seen as complementary measures that support each other. This becomes the case especially where the specialist body that was set up to prepare constitution-making also takes on the task of actually carrying it out. The most extreme examples of this are the National Conferences that were held in francophone countries in the late 1980s and early 1990s to pave the way from military autocracy to civilian democracy. For instance, the Conference in Benin declared itself sovereign and proceeded to draft—and adopt—a new constitution. One and the same body with the same composition throughout made all the decisions about both process and substance (LeVine 1994). Such examples, however, are exceptions because, despite an inevitable continuity with regard to institutional formulas and personnel, there is usually a distinction between those who lay the political foundation for making a constitution, on the one hand, and those responsible for drafting the proposals.

The challenges that arise in the formulation phase, therefore, are related to the exercise of drafting proposals and how to drive the process forward through strategic management. They can be summarized as follows: (1) Who should draft? (2) How should public input be assured? (3) How is the process best managed?

3.2.1 Who Should Draft?

Drafting is typically an exercise that requires legal expertise but the specialist bodies that are set up to produce proposals are often filled with political representatives as well. In some cases, legal and political expertise is combined in one and the same group of individuals. Such was the case, for instance, in Spain at the time it prepared its first post-Franco constitution in the late 1970s. The drafting was delegated to a seven-person committee, the *Ponencia*, made up of representatives of each main political party who also happened to be constitutional experts.

Drafting bodies when set up as special institutions are generally larger than the *Ponencia* in order to accommodate major interest and groups in society, because in addition to simply be technical or legal, the tasks also include deliberation. So there are essentially two models: one that integrates drafting proposals with public deliberation; the other that keeps the two separate.

The first type is usually referred to as a constitutional commission. The political representatives are dominant and are served by legal expertise that is either confined to a common secretariat, as the case was in Uganda 1988-1992 or attached to individual political parties as the case was in South Africa 1991-94 (Hyden and Venter 2001). In Kenya, the Constitution of Kenya Review Commission was made up of representatives of civil society organizations, the main political parties with the Attorney General and the Secretary to

the Commission as ex-officio members. There were lawyers among these members and the body had the advantage of being chaired by an independent constitutional lawyer (Cottrell and Ghai 2007). The "publicness" of the constitution-making process has become increasingly important in recent years as one of the effects of the Third Wave has been to prompt greater accountability and transparency in politics. This has been driven by domestic constituencies as well as the international community that often finances constitution-making exercises. This has been the case particularly in Africa.

The second model is to have a specialist body that largely concentrates on drafting proposals but let these be deliberated in another body, typically a legislature. Such bodies are often referred to as constitutional or drafting committees. They often have less public prominence and tend be largely technical or legal. This model is more common in countries that embark on constitutional review or reform with long-standing democratic institutions—parliament and political parties, in particular—that tend to assume that it is their prerogative to take political responsibility for the exercise. Even though these committees in some cases may be seeking public input and consists not only of lawyers, they are working as a special arm of an existing parliament. This was the case with the body established by the Swedish parliament in 1955 to review the country's 1809 Constitution that had become obsolete following the transition to democracy in the early 20th Century. This committee worked diligently with much attention to technical detail while also "updating" the language to fit the circumstances in the second part of the century. It took 12 years to complete its review (and it took another six years before the constitution was adopted by parliament separated by two elections). The Swedish case stands in contrast to the Spanish review of 1977-78 which was carried out not only much faster but also without any public input.

In fact, the *Ponentia* drafted the new constitution in closed chambers (Rubio Llorente 1983).

It has not been uncommon to have legal experts from other countries join in the drafting exercise, but their role has typically been to serve as advisors rather than actual authors of particular proposals. For instance, in the cases of Ethiopia 1994 and Eritrea 1996, the Constitutional Commission arranged a special international conference to be able to draw on relevant comparative experiences and listen to the views of constitutional experts coming from other countries (Wodajo 2001). At least in the former case, the ideas shared at the conference lived on and led to a debate on some principles that had been introduced by foreign experts at that occasion.

3.2.2 How is public input assured?

Not all constitutional commissions and committees go out of their view to systematically collect opinions from individuals, groups and private or public agencies but it has become more common that in the interest of legitimizing the exercise, such efforts are increasingly being made. In African countries, for instance, with no real constitutional tradition, previous constitutions have been disregarded by political leaders. Such was the case with the "independence constitutions" that were pragmatically, if not cynically negotiated by the outgoing colonial government and the incoming nationalists. The latter never treated these

constitutions as blueprint and were only too happy to change—or abandon—them after independence. The first three decades after that event witnessed an almost total disregard of constitutions and the adoption of autocratic or dictatorial practices that left the public disillusioned. The Third Wave, therefore, created space for new constitutions that would reflect democratic values (Hyden 2006). Popular expectations of a "people's constitution" emerged in these countries, e.g. in Uganda (Mugwanya 2001).

It is clear that constitutional commissions as independent specialist bodies have been able to organize their own collection of opinions from the public. Calls have been sent out through the media, including Internet, in order to receive inputs. Special media campaigns, for instance, were conducted in South Africa with astonishingly rich results (Ebrahim 2001). A similar effort, though less formalized occurred in Uganda where over 20,000 were received and some 7,000 considered and discussed by the Commission (Waliggo 2001). Cottrell and Ghai (2007:9) report that the Commission in Kenya received no less than 37,000 submissions from individuals and groups, ranging from lengthy (and sometimes learned) presentations to a few oral sentences. In Kenya as well as Uganda, special hearings were organized in each district or electoral constituency with sometimes thousands of people in attendance (Cottrell and Ghai 2007:9). All the accounts above confirm that the public views that reached the commission were faithfully considered.

The specialist bodies, therefore, play an important political role in legitimizing the constitution-making exercise. If it is able to demonstrate its independence from government, as happened in both Kenya and Uganda, there is a tendency for the exercise to overshadow day-to-day politics and encourage media to address its issues in a favorable manner. These bodies have had an important role to play in raising public awareness about such issues as human rights, rule of law, and other aspects of what is generally called "good governance."

3.2.3 How is the process managed?

The formulation phase is not merely about drafting. Equally important is the ability to move the process forward giving opportunity for deliberation, yet not get caught in deadlocks. This political task is sometimes best performed by a respected and influential person who can persuade all contending parties. It may be done through direct intervention or more indirectly through using "moral persuasion." When Yugoslavia embarked upon its new constitution in the early 1970s, the actual drafting was led by the President of the Constitutional Commission, Edvard Kardelj, but he enjoyed the political backing from the country's president, Tito, to help resolve outstanding issues. Moving the process forward, therefore, was the result of a direct engagement in the process by both individuals with a view to finding concrete solutions to disagreements over the formulation of the constitution (Djordjevic 1983). In South Africa, the influence of President Nelson Mandela was more indirect but it is clear that his presence was felt among the participants throughout the constitution making process (Hansom 2001).

Constitutional commissions enjoy varying degrees of autonomy when it comes to drafting proposals. In South Africa, for instance, the process was closely tied to ongoing inter-party negotiations. In Uganda, by contrast, where political parties were not allowed to campaign or pursue any really partisan activities, the Commission operated much more independent-

ly under the able leadership of a respected judge. Because the commission in Uganda was under less pressure from political parties to deliver it took its time to complete the exercise. Having been appointed in 1988, it submitted its report six years later. The commission relied on donor funding, notably from Denmark, and members of the international donor community did express concern about the time it took to complete the drafting, yet felt that they could not stop funding the process given its significance for the future of the country and the fact that it enjoyed broad-based legitimacy among the people of Uganda (Waliggo 2001).

The Ugandan case raises the issue of whether deadlines are helpful or not for drafting commissions. Such deadlines have often been applied. For example, when Egypt adopted its 1971 Constitution, the drafters were given a deadline of two months (Saleh 1983). Although no explicit deadline is always set, the drafters are aware of the need to deliver proposals promptly. The *Ponencia* in Spain, for instance, produced its complete draft in less than four months in 1977 (Rubio Llorente 1983:252-53). There is no real precise answer to the question about the usefulness of deadlines. The cases under review seem to indicate that the political circumstances—often the need to seize a "historical opportunity"—tend to determine the approach that is taken.

The Spanish case raises another issue: should the drafting be public or conduced. The drafters furnished summaries of its progress on a regular basis after each of its meetings, but it never published the preliminary drafts. The media lamented this approach and criticized the *Ponentia* for its semi-secrecy. Just before the draft was finalized, however, the drafters arranged a "leak" via a newspaper close to one of the key authors, thereby allowing the Spanish public to know about it in full. The only snag in this particular case was that by publishing the draft the authors lost control of the process, to the point that they never got around to carry out even technical corrections (Rubio Llorente 1983:253).

Current practice tends to be more transparent and interactive not only with high-level party representatives but also members of the public. This tends to have two immediate effects. One is to prolong the process because consultations and deliberations are more widely held. The other is to prompt drafters to include a wide range of rules that could have been left for regular legislation but which a public and transparent process makes politically difficult to ignore in the actual draft of the constitution. Specialist drafting bodies today, therefore, tend to be under increased pressure to be as inclusive as possible. In this respect, constitution-making is back to the Kelsonian days hundred years ago, when the professors were in charge and used their legal insights to try to plug literally every conceivable loophole. The difference, of course, is that today it is not the experts that call for such an approach but stakeholders in a democratic process in which constitution-making is nested.

3.3 Finalization

As between facilitation and formulation, there is overlap between the latter and finalization. Some of the issues that arise in the formulation phase keep popping up in the deliberations that precede adoption of the constitution. Because drafting is not merely a techni-

cal exercise but fraught with its own political contestations, the same disagreements that complicated the drafting are often amplified in the process of adopting the constitutions. This is particularly true in many countries in which constitution-making involves addressing fundamental issues of state formation or nation-building as the case is in Africa, parts of Asia and the Pacific.

Despite the overlap, the final phase of constitution-making raises its own issues that deserve attention here. The first is the way the process of adopting a new constitution is organized. There are variations that are relevant to discuss here. The second issue concerns the role of the constitution-makers. How do they interpret it? The third issue relates to how well a constitutional consensus can and should reflect the national consensus. How do constitution-makers respond to this challenge?

3.3.1 The process of adopting the constitution

Some countries, e.g. Greece in 1974, have left the adoption of a new constitution in the hands of a sitting parliament. A variation of this approach is the one taken, e.g. by Sweden, where parliament adopts the constitution—or constitutional amendment—but does so in two separate sessions divided by a general election. The more common practice, however, has been to enact legislation to create a special body with exclusive responsibility for deliberating and adopting it There are various ways that this has been done. In some countries, e.g. Uganda in 1994, a "one-shot" Constituent Assembly was created and elections of its members across the country. In addition, a number of groups that were not likely to be elected, including women, youth and disabled, could nominate their own representatives to the Assembly. The Ugandan Assembly sat for almost a year before the constitution was enacted and promulgated by the President in October 1995 (Wapakhabulo 2001). This approach seems to be particularly common—and appropriate—in countries which start from "scratch," i.e. have to bring in a democratic regime after a civil war or the return from military rule. Where elected bodies have been in existence but temporarily suspended or where legislatures exist but having been restricted by autocratic rulers, the tendency has been to turn the parliament into the constituent assembly focusing exclusively on its adoption. If the legislature has two chambers they have combined into a Grand Assembly in which they jointly deliberate and approve constitutional principles. The idea of creating a special assembly is justified mainly on the ground that constitutional matters are important and should not be allowed to be crowded out by day-to-day parliamentary business. Another reason is that the latter typically operates with different rules than parliament, e.g. requiring not simple but extraordinary majorities for approval.

The idea that a special constituent assembly should be responsible for adopting the constitution is associated not only with the United States and France where this formula was first used in the late 18th century but it has also been adopted in many British Commonwealth countries where the original model relies on the sovereignty of parliament rather than specially elected bodies. Australia, Canada and most other Commonwealth countries have deviated from the British model and opted for the special Assembly for deliberating and adopting new constitutions or significant amendments.

The use of a constituent assembly that is elected for the sole purpose of adopting a new

constitution seems to be the more common approach in the Third Wave period, but some countries have gone further in this "direct" or "populist" way of constitution-making by introducing a popular referendum for purpose of ratifying a constitution or amendment (McWhinney 1981). Interestingly, this is the case within the United Kingdom where the issue of constitutional devolution to Scotland and Wales was subject to popular referendums. The same applies to the European Union which has applied the same model for a vote on its proposed constitution. In none of these cases, however, has the referendum been anything more than a consultation of popular opinion. Law-makers have not been bound by their outcome.

3.3.2 Role of constitution-makers

Many of those who as members of a specialist body are charged with deliberating and adopting a new constitution may be experienced and seasoned law-makers but that is not always the case. In many countries where constitution-making involving specialist bodies is new, some, if not all, of those who are elected or nominated to the Constituent Assembly have little understanding of what the role of being a constitution-makers entails. To be sure, as the case was in South Africa (Mbete-Kogitsile 2001), members of these bodies gradually acquire the experience of focusing on specific issues instead of just making speeches for the sake of taking a position. They also get socialized into their roles as negotiators. Thus, even though the beginning may be rough, progress is made as experience is gained. In other countries, e.g. Uganda 1994-95, the balance between taking a stand on a particular issue and finding a solution to it appears to have been more wearisome (Wapakhabulo 2001). Much the same is also reflected in the deliberations of the proposed new Kenyan constitution in 2004 Cottrell and Ghai 2007).

The cases listed above also raise the question of how the constitution-makers view their role. Are they representatives of specific constituencies on whose behalf they speak and are accountable to or are they "delegates" with a mandate that allows them to act independently? This distinction is rarely spelled out in advance as a way of making the constitution-makers reflect on who they are in such a capacity. The vast majority of them tend to identify themselves as "representatives" rather than "delegates." It is easy to see in a democracy—or a country aspiring to be one—that this is an appropriate conceptualization but it often has the effect of making agreements difficult because the members of the assembly are reluctant to give up a position that they have once taken on an issue. In Uganda 1994-95, for instance, it turned out that it was impossible to get any agreement on the "land question," i.e. what formula should apply for owning land in the country (Wapakhabulo 2001:125-26). The issue had to be deferred to the parliament that would be elected following the adoption of the new constitution.

The "delegate" role is more compatible with a specialist body that is made up of constitutional experts who share a common language and understanding of the issues. The *Ponencia* in Spain is a case in point. This small committee was made up of representatives of the main political parties, who were also all constitutional lawyers. To be sure, they were largely responsible for drafting, not adopting the constitution, but they managed to reconcile these two roles in a constructive manner that allowed for an expeditious. The notion of

being a representative has been widely embraced in Third Wave countries where the idea is that the new constitution must somehow reflect popular opinion. It is not clear, however, that reliance on elected representatives necessarily paves the way for a more durable and meaningful constitution. Constituent Assemblies that are established in countries with little domestic constitutional tradition are often inclined to become too ambitious in terms of adopting endless numbers of paragraphs that not only are unjusticiable but also difficult to apply politically. In short, the tendency to include a number of moral or ideological statements is likely to be particularly pronounced wherever specialist bodies are called upon to deliberate and adopt constitutions in countries with no or scant indigenous tradition of constitutionalism.

3.3.3 Constitutional and societal consensus

In addition to trying to plug specific loopholes, contemporary constitution-makers also strive to ensure that what they agree upon reflect a societal or national consensus. This ambition is driven partly by their mandate as elected representatives but also by their wish to ascertain that their constitution easily gains support and legitimacy outside their own chamber. Because socio-economic and political conditions in every country tend to change, this is a challenge that the constitution-makers find hard to address.

They have difficulty in accepting that a brief constitution that is first and foremost a document that can be tested in courts is often the best approach because it tends to rely on legal texts and it leaves room for interpretation. This approach, which is best illustrated by the U.S. case, however, is not easily applied in other countries where the legal tradition and political culture is different. The inclination in those countries is to make the constitution as long and verbose as possible in order to try to capture a perceived societal consensus.

A compromise that allows for adjustment to changing circumstances is to build into the constitutional act appropriate methods for how it can be amended. Amendment procedures should be sufficiently flexible to allow such an exercise to happen, but it should also be strict enough that amendments do not pile up in endless numbers as the case is, for example, in the state of Florida in the U.S. A qualified majority—typically two-thirds—are needed for amendment. Such a threshold level does not work in every country—in many of them in Africa the dominant party has more than a two-thirds majority. Thus, the rule can easily be misused and the credibility of the constitution undermined.

There is also the issue of where the compatibility of constitutional and societal consensus applies. For instance, the 13th, 14th and 15th amendments to the U.S. Constitution, all carried out in the wake of the Civil War, mandate racial equality but it took almost a century before these amendments were acted upon politically and an acceptable level of compatibility—to most, if not all Americans—was achieved (McWhinney 1981:17). Constitutionalizing morals has proved especially difficult. They tend to be ignored whether they appear in the original text or become the subject of an amendment as, for instance the 18th Amendment to the U.S. Constitution aimed at prohibiting sale of liquor, illustrates.

Ignoring the need for compatibility between constitutional and societal consensus or failing to achieve it can be harmful as the case of the German Weimar Constitution of

1919 demonstrates. It was adopted with a number of ambiguous clauses with regard to basic constitutional provisions because there was at the time no identifiable societal consensus and the constitution-makers rather than trying to see their role in that context and do something about it, they felt ultimately responsible to the legal community. In so doing, they ignored the need to address underlying political disagreements and resorted to hoping that the legal professors could resolve the issues by developing appropriate clauses for their adoption. They were fooled by the promise of these professors that law stands above politics and thus could be used to somehow engineer solutions to political problems. In the end, the Germans learnt the hard way the limitations of such an approach.

4. Conclusions

The generic types of specialist body in constitution-making are the constitutional drafting committee and the Constituent Assembly, one confined to formulation, the other to finalization. The point that the paper has tried to make is that these kind of bodies have become not only more frequently used but also applied in new ways in Third Wave countries. There are several reasons for this proliferation. An absence of a strong constitutionalist tradition in many new states in Africa and the Pacific has allowed for experimentation. Particularly striking is the number of British Commonwealth countries that have deviated from the British model of parliamentary sovereignty to establish specialist constitution-making bodies. Another reason is that many countries in Africa and some in Asia and the Pacific have emerged from—or in a few cases still being caught in—civil war, circumstances in which it has been necessary to create specialist bodies to lay the ground for meaningful constitution-making. It may be the most significant change in the use of specialist bodies compared to earlier periods. Facilitating the process has become an integral part of making a new constitution as the cases of Uganda and South Africa, among others, illustrate. Yet another reason for the proliferation is the demand for participation by groups that in an autocratic political dispensation have been prevented from exercising influence. The rise of the National Conference to sovereign constitution-making body in Benin and Mali—and other African countries with less success—is one case in point; the evolution of an alternative constitutional proposal by civil society organizations in Kenya in the 1990s another. Failure to lay the ground for consensus on the basic principles—or *Grundnorm*—for the constitution-making exercise can be costly. In Kenya, the political establishment remained divided thereby thwarting the adoption of the constitution that had been carefully drafted 2001-04. In Bolivia, more recently, the attempt to change the constitution without first securing a national consensus led to the emergence of two rivaling exercises.

The final point is that with an increasingly rich and varied experience with specialist bodies around the world the basis for providing advice on how to conduct constitution-making exercises is wider but also more complex. There is no simple formula for how to make best use of these bodies because so much of their performance depends on the context—temporal as well as social—in which they are nested. The conclusion, therefore, is that learning from other experiences is important but in the end it is the political sensibility of key stakeholders about how to proceed and what role specialist bodies can play that matters.

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