

**United Nations Assistance Mission for Iraq (UNAMI)  
Office of Constitutional Support (OCS)**

**CONSTITUTION-MAKING  
COMPARATIVE EXPERIENCES**

**1. Conditions and opportunities for constitution-making:**

The process of constitution-making in Iraq needs to be, first and foremost, Iraqi-driven. Discussing and drafting the contents of a constitution involves bringing people together and achieving agreement on the basic elements that will define the political values and structure of the country. There at least two benefits in a transparent, inclusive and nationally owned constitution-making process. Firstly, such process will lead to the design of a broadly accepted constitutional document. It will also lead to the creation and strengthening of trust and confidence among the actors involved in the process

There is broad agreement among academics and policy makers on the process by which a constitution should made. When it comes to strengthening an unstable political situation and creating conditions for political participation and consensus-building, it is argued, the elements that define the process under which a new constitution comes into place become as relevant as the document itself. Against the premises of old constitutionalism – which put the emphasis on constitution-making as a negotiation between elites who possess the moderation, technical expertise, and negotiating skills –, new constitutionalism advocates participation, transparency and accountability as the key elements for a successful and nationally-owned process of constitution-making.

Theoretical consideration has been given to constitution-making in post-conflict societies. One theoretical approach has focused on what are perceived as necessary preconditions for the achievement of a successful process. According to this line of thought, emphasis is placed on the importance of a previous degree of basic consensus among the major stakeholders on the road map. In this approach, achieving prior consensus on principles, vision and approach precedes constitution-making. There is a danger in commencing negotiations about the specifics of a constitution during a peace-making faze as issues might get charred with the brush of mistrust that can be prevalent during such negotiations.

Another theoretical approach, more in line with the current situation in Iraq, concedes importance to constitution-making as a part of a conflict-resolution strategy, and as a key moderating element in a post-conflict scenario. Constitution-making as part of a post-conflict peace-building strategy is itself endorsed by the United Nations, which includes within peace-building actions to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict. The goal in this case is the promotion of a framework so that the interests of the parties that incited the violence –which may have not been fully addressed in the arrangements that led to the cessation of violence – can be put on the table and channelled through the ways and means of political discussion. The example of constitution-making in post-war situations calls however for caution. At its best, constitution-making can generate social consensus on constitutive issues and simultaneously serve as a healing process in deeply divided societies. At

its worst, it can be a quick-fix legitimacy exercise that gives the incumbent a thin veil of legitimacy but remains a dead letter and thereby discredits the democratic process itself.

Three inter-related elements are essential for an effective constitution-making process: participation, ownership and legitimacy. A process that is open, empowers civil society and allows for wide participation of relevant political and social actors will contribute to the emergence of a widely supported constitutional framework. A constitutional document can rarely be considered as legitimate by the population of a country if there is no sense of ownership; ownership is more likely to exist if participation is encouraged and direct lines between civil society and constitution-making bodies are established. These elements can arise from a democratically legitimate constitution drafting body and from the provision for specific channels of participation of civil society in its deliberations.

Participation, ownership and legitimacy constitute referents for both UN Security Council Resolution 1546 and the Transitional Administrative Law as key elements in the Iraqi constitution-making process. UN Security Council Resolution 1546 implicitly recognizes their importance when giving UNAMI the mandate to play a leading role to “promote national dialogue and consensus-building on the drafting of a national constitution by the people of Iraq.” (7(a)(iii)). TAL provides the National Assembly with the task of drafting the permanent constitution carrying out this responsibility “in part by encouraging debate (...) through regular public meetings in all parts of Iraq and through the media, and receiving proposals from the citizens of Iraq as it writes the Constitution” (article 60). The request for a legitimate, nationally-owned and participatory process is thus found in the legal instruments that frame the transitional period in Iraq. Participation, ownership and legitimacy constitute, on the other hand, essential needs for the country given the current situation of violence and instability. An inclusive and transparent process –even if by itself cannot resolve inter-group conflict-, may succeed in managing conflict and in facilitating bargaining, reciprocity and collaboration.

## **2. Relevant variables in constitution-making. Examples inside and outside of the region:**

Each country undergoing processes of political transition and/or constitution elaboration/reform has developed its own specific model on the basis of its particular situation and constraints. In different circumstances, processes of constitution-making have focused on different elements and have given relevance to certain aspects over others. This has resulted, among others, from the specific legal framework within which the processes came into being, the degree of monopolization of the process by political elites, the significance of consultative or constituent legislative chambers, the importance given to civil society in terms of participation and/or ratification, and the specific time limits for the conclusion of the process as such<sup>1</sup>.

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<sup>1</sup> In the region, the cases of Algeria (1996 amendments), Bahrain (1973, 2002), Iraq (1925), Lebanon (1989 amendments), Mauritania (1991), Morocco (constitutional ratification/amendments in 1962, 1970, 1972, 1980, 1992 and 1996), Oman (1996), Qatar (2003), Saudi Arabia (1992), Tunisia (1959) and Yemen (1991) have been taken into account. Outside the region, Afghanistan (2004), Brazil (1988), Colombia (1991), East Timor (2002), Eritrea (1997), Namibia (1990), Nicaragua (1987), South Africa (1997), Spain (1978) and Uganda (1995) have been considered.

### ***2.1. Drafting the Constitution. Parliamentary decision-making:***

The key variable in this context is the presence or not of a constituent assembly, with all the elements that define its role and significance (elected or appointed, impact of electoral law in its composition and degree of fragmentation, internal rules of procedure for the composition of committees or working groups). It is also very relevant to consider the specific role of the Assembly in the constitution-making process (that is, being a drafter of the Constitution by itself, or working on the basis of documents already produced by extra-parliamentary actors).

In the cases where the constituent assembly is entitled with the responsibility of drafting the Constitution, the institutional mechanism to do so is the composition of a constitutional committee reflecting the composition of the assembly itself. This mechanism is generally considered as a positive way to ensure representation of the different groups within society and, by doing so, to contribute to a peace-building process. A constitutional committee whose members are appointed rather than directly (or indirectly) elected is more likely to become politically suspect of trying to preserve the interests of the appointing body. In any case, the initial task of any constitutional committee should be the establishment of internal decision-making procedures, the development of internal conflict resolution mechanisms, and the establishment of the thematic framework for discussion.

#### ***The constituent assembly as a drafter***

In the following cases, the constituent assembly itself acted as drafter of the constitution (and in some of the cases, as it will be noted, also as ratifying body).

- ***In the region***

The 1973 Bahrain Constitution was formally drafted by a constituent assembly, at the request of the Amir. In Qatar, an appointed constituent assembly was established with the aim of writing the 2003 Constitution. Both constitutions were ratified via referenda.

Tunisia held elections for a constituent assembly five days after achieving independence, and the assembly was in charge of drafting the Constitution that was approved three years later, in 1959.

- ***Outside the region***

The Brazil 1988 Constitution was drafted by a national constituent assembly, which organized its internal work through the composition of eight committees and twenty-four subcommittees (specific mechanisms for the organization of public hearings at the subcommittee level were put in place). The text was ratified via referendum.

The example of Nicaragua in 1987 is that of a constituent assembly establishing a specific constitutional commission that produced two different drafts of a constitutional text (both of which were technically open for comment from civil society). Discussion on the final product was held at the assembly itself (the legislative committee within the assembly studied and revised the draft and presented it to the plenary). The Nicaraguan process, however, is not considered by

many experts as a good example given the fact that major social and political forces decided to boycott it, accusing the government of strict control over the process.

The elaboration of the 2002 Constitution of East Timor was part of a scheduled process led by the UN Transitional Administration in East Timor (UNTAET). UNTAET specified that the constituent assembly would have 90 days to prepare and adopt a Constitution, with only registered parties allowed to nominate candidates, and individuals also allowed to stand as independent candidates. The constituent assembly organized its internal work through the composition of theme committees, in the discussion of a draft that focused on the priorities of the major political party represented. The threshold for ratification at the assembly was a 2/3 majority.

The election of a constituent assembly in South Africa was in fact one of the final steps in the process of constitution-making. The Assembly – composed of a House of Assembly elected by proportional representation (April 1997) and a Senate composed of representatives from the nine provinces -, held two years of transparent deliberations. The Assembly organized internally in committees, whose work was to draft each of the different chapters of the 1997 Constitution. The elections to the constituent assembly were organized on the basis of an interim Constitution, agreed upon by the political elites in a private process that had started in 1990 (Multiparty Negotiations). Between 1991 and 1993, discussions were held on the design of the constitution-making process, the content of an interim constitution and the composition of a national unity government. This national unity government and the interim constitution can be therefore perceived as a “power-sharing” agreement among the key stakeholders. The interim constitution included the principles for the election of the constituent assembly. The threshold for ratification of the final constitutional draft at the constituent assembly was a 2/3 majority.

In Colombia, the option for the election of a constituent assembly was initially promoted by the student movement, and involved a referendum on calling a constituent assembly after an agreement between the President and the major political forces. The elections for the constituent assembly took place in December 1990, in a context of an abstention rate of 75.3% of potential voters. The internal rules of the national constituent assembly were agreed upon by the leaders of the three main political forces. Following up on these rules, five commissions were put in charge of the various relevant constitutional themes. The final text was ratified by the assembly.

In Spain, the undemocratic Parliament of the military regime decided in 1976 to pass a Law for Political Reform that would call for a general election for the composition of a constituent assembly in June 1977. The draft constitution was elaborated within the framework of the Assembly. A 36-member constitutional affairs committee was set up, which appointed a 7-member working group with the specific task of drafting the constitution. The constitution was ratified via referendum after being approved at the assembly.

### ***The constituent assembly as a ratifying body***

This section includes those cases in which the constituent assembly, being the ratifying body, did not play a major role in the actual drafting of the constitutional text.

- ***In the region***

The Iraqi 1925 Constitution was approved by a constituent assembly elected in February 1924. This Assembly was elected on the legal basis of a royal decree (*irada*) ordering the holding of constituent elections. The Assembly, however, did not play a role in the drafting of the

constitution itself (which was left to two extra-parliamentary drafting committees). Its role was to vote on a final document provided by these two committees, and presented in the legal format of an Organic Law “framed by the King of Iraq”.

In Lebanon, the Lebanese Parliament itself adopted the 1989 constitutional amendments that included the dispositions of the Taif Accord, after having achieved a compromise on changing the terms of the constitution in order to include new arrangements regarding the institutional representation of the different groups.

In the context that would lead to the 1991 unification process in Yemen, the Consultative Assembly of the North and the Supreme Peoples’ Council of the South approved the country’s draft Constitution (embodied in the Aden Declaration).

- *Outside the region*

In Eritrea (1997 Constitution), the establishment of a constituent assembly was actually not part of the process of constitution drafting itself, but part of the ratification procedure. The regular legislature, the National Assembly, set up the 50-member constitutional commission that would draft the constitutional text. The Eritrean National Charter provided details of how the process was to be conducted, ruling on the creation of a constitutional commission and the election of a constituent assembly. The National Charter also provided for a basic structure to govern the interim period while the constitution was being drafted.

In the process leading to the elaboration of the 1990 Constitution in Namibia, the election of a constituent assembly was defined in the context of a process provided for legislation drafted by the administrator general and approved by the UN, with a broad agreement previously existing on a basic list of constitutional principles. The constitutional assembly was more an element in a context of broad constitutional consensus than a promoter of consensus itself. The process was led by the UN Transitional Assistance Group (UNTAG), with elections to the constituent assembly taking place in November 1989.

The Uganda 1995 case reflects an important effort for the inclusion of different voices from civil society already at the level of participation at the constituent assembly (and not only regarding potential external input to the works of the assembly). The elections to the constituent assembly – March 1994 - selected 214 out of the 284 final members of the chamber. The rest of seats were distributed on the basis of the respect for representation of specific groups (women, Army Council, disabled persons, presidential nominees, and representatives for each one of the political parties that had taken part in the 1980 election). As in the case of Eritrea, the constituent assembly debated a draft submitted by an independent constitutional commission. The constituent assembly produced a final document on the basis of that draft, including the relevant modifications.

The Afghan constitutional Loya Jirga adopted the new Constitution –prepared by a constitutional commission- by consensus less than one month after being convened. The representatives of the Loya Jirga were elected among other candidates in the 32 Afghan provinces, including as well special category groups. In preparation for the convening of the Assembly, general orientation meetings and sessions for incoming delegates were organized and conducted.

## **2.2. *Drafting the Constitution. Extra-parliamentary participation:***

Constitution-making has often involved the participation of non-parliamentary actors, either in the form of extra-parliamentary committees of experts drafting the content of a constitution, and/or in the form of inputs from civil society or citizens themselves being channelled to a constitution drafting body.

In certain cases, with or without the presence of a constituent assembly, extra-parliamentary constitutional commissions have been set up with the task of drafting the text to be amended and/or ratified. Extra-parliamentary participation can also involve the configuration of groups of experts to assist in the drafting process. In those cases, a balance is needed so that the knowledge and expertise provided by these experts is wisely channelled and the end product adequately reflects the outcome of the consultation process. The consideration of domestic experts –as long as this is possible- appears as a convenient option.

Extra-parliamentary participation also includes the establishment of specific mechanisms for the reception of input from civil society and individual citizens. In cases where broad participation contributes and informs the work of a constituent committee, it is argued, a potential exists for the transformation of the members of such committee from serving primarily as advocates for their respective interest group into a more cohesive group with a greater focus on the needs of the whole society. An extended process of constitution-making provides the necessary time for the implementation of a preliminary civic education phase allowing for campaigns of promotion of constitutional values before an actual consultation phase starts. The capacity for launching an education campaign is directly related to the environment provided by each different case. In a post-conflict environment, the specific limitations that need to be overcome are likely to be, *inter alia*, limited free/fair media and freedom of expression /association (the media as a vital partner in the education phase); lack of security (free and safe participation for civil society to effectively operate is needed); lack of economic development (needed for combatants to be reintegrated in their communities and for people to engage in constitutional discussions once immediate needs are covered); peace-building (trust-building activities prior to constitution-making are needed to overcome initial mistrust among parties). A second phase would involve the actual holding of consultations with civil society and members of the public, e.g. public meetings, on constitutional issues, as well as the creation of a mechanism to collate and react to their views, e.g. a call for public submissions and ‘return email forms’ on constitutional making website.

Extended processes of constitution-making, however, constitute more the exception than the rule, and time limitations have tended to push for condensing the education and consultation phase in one stage, which in fact reduces the potential positive impact of each.

### ***Extra-parliamentary participation in the region: Expert committees***

Following the dispositions of an organic law, the drafting and discussions on what would later become the Iraqi 1925 Constitution were referred to two committees, one Iraqi and one British. Using as referent the constitutions of Austria and New Zealand in particular, the British committee drafted a text that was refused by the Iraqi committee (which produced a draft using as referent the constitutions of Iran, Egypt and Turkey). The two drafts were sent to the colonial office in London, where after long deliberations a new version of the text was accepted. This new version was framed as Organic Law and sent to the constituent assembly for ratification.

In the case of Bahrain in 2002, a committee of experts was composed by the Amir with the goal of suggesting a blueprint for the country’s political development. The committee adopted a

National Charter, which was subsequently accepted by the Amir and submitted for national referendum. The Saudi Basic Law of 1992 was drafted by a constitutional council appointed by the king among scholars and “men of knowledge and expertise”.

- *Extra-parliamentary participation outside the region*

#### *Participation of civil society / Extra-parliamentary drafting committee*

In the case of East Timor, a group of constitutional experts from the Asia Foundation gave technical advice to the relevant Assembly committees. Beyond the work of this group, input was sought from civil society in the form of public hearings organized in all districts prior to the elections for the constituent assembly. These consultation sessions were run at the village or sub-district level by local members of the Electoral Commission or candidates for election for the constituent assembly. The results of the consultations were presented to the constituent assembly in September 2001. In the period between February and March 2002, after a provisional draft had been completed and accepted by the Assembly, copies of the draft circulated and feedback was compiled and presented to the Assembly.

The Eritrean case includes the composition of a constitutional commission by the National Assembly (before its replacement by a constituent assembly), composed of 50 members, and internally organized at the level of subcommittees. Subcommittees were created for the different chapters that would be included in the constitution. Two specific consulting committees were established: One was composed by 45 elders and religious leaders of different groups, experts on traditional customary law. The other was composed of 15 foreign experts in Constitutional Law from the US, Europe, Africa and the Middle East. Mechanisms for input from civil society were established, with popular consultation on the proposals by the constitutional commission, with use of songs, poems, plays in vernacular languages, and use of radio and mobile theatre to reach local communities. Mechanisms were also established in order to receive input from regional assemblies, municipalities, members of professional and civic organizations and relevant individual citizens (the constitutional commission had been explicitly mandated “to develop the instruments to guarantee the participation of the people in the constitution-making process”). A civic education and Public Debate Committee initiated a public education phase, including seminars conducted at the village level by more than 400 trained instructors.

Uganda designed a constitution-making process in which an independent constitutional commission would draft a text to be presented to a constituent assembly. This commission started its work in February 1989 and sent its draft in December 1992, gathering, collecting and synthesizing proposals. These proposals (more than 25,000) were received in the context of public meetings, debates, essay competitions and workshops. Part of the efforts also involved launching programs for public education with use of local languages, and meetings with Ugandan citizens resident in other countries.

A particular case is the one represented by Afghanistan. In this country, the constitutional Loya Jirga was established once the constitutional commission (drafting committee) finished its task. The commission was initially composed of nine members (pre-eminent and well-known Afghan scholars, jurists and other qualified individuals), and was charged with preparing a draft. This drafting body was enlarged to accommodate 35 members, in order to include other “prominent national personalities” and representatives of political parties. These members held consultations around the country and gathered to consider the inputs that were received.

### ***Participation of civil society /No extra-parliamentary drafting committee***

The parliamentary procedures of the Brazilian constituent assembly (elected November 1986) allowed for the participation of civic organizations at the hearings at the subcommittee level, beyond the role played by interest groups in Congress itself. The request for suggestions before, and comment after, the drafting process received a very significant level of response.

In Colombia in 1991, more than 1,500 working groups were set up nation-wide in order to receive proposals from diverse social sectors, to be channelled to the works of the constituent assembly. The presidency systematized over 100,000 proposals in a group of 131 projects, that were considered by the drafting body. The Colombia process, however, was flawed by the absence of key actors in the process (namely, the two largest guerrilla groups, FARC and ELN).

In Namibia, long-term public participation was encouraged and substantial degree of constitutional debate took place, through the organization of lectures, seminars, discussions and workshops.

In Nicaragua, the constitutional commission established by the constituent assembly invited comments from civic groups to the draft it had produced, after engaging in a broad distribution campaign. Twelve debates were televised, and more than 70 town hall-style meetings were organized. Officials informed that around 100,000 citizens took part, and 4,300 specific suggestions were sent to the committee.

In South Africa, political parties represented at the constituent assembly organized consultations at village and neighbourhood levels, and over 2,000,000 submissions for consideration of constituent assembly were received. Media and advertising campaigns were launched to inform on the process, which contributed to a rate of 73% of South Africans being reached by the Assembly's campaigns.

### **2.3. Explaining the Constitution. Information campaigns:**

In most cases, efforts for public education in the context of constitution drafting were extended to the ratification phase in the form of information campaigns, although in some cases these two steps were not exactly part of the same process, and the existence of one did not necessarily imply the putting in place of the other. The United Nations has supported the position that consultation must be followed by a comprehensive civic education programme on the constitution for the citizens of a country to understand its contents and realize how their interests are protected.

Time has been a key variable for the success of information and civic education campaigns. The lack of time in East Timor, for instance, contributed to little awareness of the draft constitution before it was ratified, thus not contributing to participation, in spite of the organization of a vast dissemination campaign (200,000 copies of the constitution were printed and distributed in the context of an ambitious dissemination campaign). The civic education campaign that was initiated to disseminate information regarding the election to the constituent assembly itself was not long enough to focus on issues beyond voter education, and the reports of the hearings held throughout the entire country were never fully communicated to the constituent assembly. Researchers link the little awareness of the public to the conflation of the consultation and the public education phases, which weakened the potential effect of each one of them.



In Eritrea, the information phase followed the public education efforts launched in the previous stage in the process. This second phase included a popular consultation regarding the constitutional commission's proposals, further including a broad public information campaign on the content of the draft constitution.

The 1990 Namibian Constitution was publicized both at the level of public information campaigns carried out by the state media, as at the level of the election campaigns of the different parties, in a constitutional election campaign that started in fact one year before the draft was finally ratified.

In South Africa, the public education campaign was clearly a continuation of the consultation efforts successfully carried out in the drafting phase of the campaign, with an educational role being played not only by government institutions, but also by the media, parties and organizations of civil society. A similar scheme operated in Uganda, where input from civic society was also sought once the drafting process had been completed.

In Brazil, a constitutional commission was created with the aim of informing the broader public on the contents of the Constitution, following up on a process of civic education already launched prior to the ratification phase.

In Nicaragua, not only the draft but also the collected comments to it were widely distributed, in a distribution campaign involving a total of 150,000 copies of the documents.

### **3.4 Ratifying the Constitution. Parliamentary procedures and/or national referendum:**

Ratification of draft constitutions have generally involved either direct participation of the population in the form of referendum, or indirect approval via constituent assembly vote (usually, with a threshold of 2/3). Direct ratification, therefore, has the great advantage of providing the process and outcome with an element of direct popular legitimacy. It can be claimed that in such consultation voters may not make their decision concerning the referendum in isolation; and that external factors can influence the publics' vote as the discussions on the referendum get mixed with other short-term political issues. These drawbacks, however, can also exist if the ratifying body is a constituent assembly.

#### ***Use of referendum***

- ***In the region***

In Bahrain, the 1973 Constitution was promulgated by the Amir. In 2002, the project sent by the committee of experts was accepted by the Amir and submitted for referendum. A similar process was followed in Qatar in 2003, where the text of the appointed constituent assembly was approved by referendum. The Yemeni Constitution that unified the country in 1991 was approved by the assemblies of each one of the two entities (Consultative Assembly of the North and Supreme People's Council of the South), and submitted for referendum.

In the Maghreb region, Algeria approved its 1996 reformed Constitution by referendum. The Mauritania 1991 constitution was also submitted for referendum. Morocco has used referenda in processes of constitutional ratification and reform in 1962, 1970, 1972, 1980, 1992 and 1996.

- *Outside the region*

Referendum for ratification was used in Brazil - where the Assembly had two rounds of voting before finally accepting the draft and submitting it to popular consultation -, and Spain - where the referendum took place barely two months after the approval of the draft at the Parliament -.

*Parliamentary ratification / No referendum*

- *In the region*

In the precedent of the 1925 Iraqi Constitution, the text was submitted to the constituent assembly as an Organic Law, which was passed at the Assembly and later promulgated by King Faisal. In Oman, the 1996 Basic Law was approved by the sultan with no use of popular consultation. In the case of Tunisia, the 1959 text was prepared by a constituent assembly, but not ratified by the way of a national referendum. No referendum was used either in the ratification of the Taif Accord in Lebanon, whose content was adopted by the Lebanese Parliament in the form of constitutional amendments.

- *Outside the region*

The mechanism of approval by the constituent assembly followed by national referendum is in fact not a common feature of the models that have been analysed. In cases with no referendum, the common characteristic is approval by the constituent assembly and ratification by the Head of State.

In Colombia, the approval by the constituent assembly involved a two-debate mechanism: in order to become constitutional norms, all articles required a simple majority in two different debates (the threshold was higher in case of a proposal introduced at the second debate). The final compiled product was ratified by presidential decree.

In East Timor, ratification was solely dependant upon approval by a 2/3 majority by the constituent assembly. Eritrea had the draft approved both by the National Assembly that had composed the constitutional commission, and the constituent assembly (whose task was not to draft, but to vote on ratification). The first draft was approved by the National Assembly in July 1996, and the final draft was approved by the constituent assembly in May 1997. In Namibia, the ratification involved approval by the constituent assembly, as it was the case with Uganda.

South Africa presents a particular case, in the sense that mechanisms were put in place in order to preserve the integrity of certain provisions included at the interim Constitution (agreed upon at the Multiparty Negotiation process in December 1993). This way, the design of the constitution-making process included the creation of a Constitutional Court, whose role would be to examine the draft of the text that would be submitted by the constituent assembly to verify the inclusion of substantive constitutional principles included in the interim text. The Court did in fact find problems regarding distribution of powers between the centre and the provinces, reason for which it returned the draft sent by the Assembly, together with proposed amendments (October 1996). The amendments were considered and the Court sent its certification (November 1996). The final vote at the Assembly— under a 2/3 majority requirement- took place in December 1996.

### 3.5. Significance of timeframe:

The cases listed show a strong correlation between degree of discussion, participation and duration of the process. It can be claimed that political negotiations, participation of civil society, establishment of mechanisms to channel their inputs and launching of information and civic education campaigns require time to be successful.

From the models above-mentioned, South Africa is the example where the process was developed in a longer period of time, a total of seven years. The actual Multiparty negotiations leading to the interim constitution were developed in a four year period, timeframe within which the negotiation for the specific design of the constitution-making process among the key political actors was carried out. The constituent assembly held two years of deliberations, and one more year was necessary for approval of the first draft, review by the Constitutional Court and approval of the second draft.

The overall process in Uganda was held in a period of six years, from the moment the Independent Constitutional Commission started its work, to the moment the constituent assembly passed the constitutional draft. Technically speaking, more time was devoted to the process of creating the first draft in the framework of the Commission (level at which input from civil society was sought) than to the discussion and amendment period at the constituent assembly.

Approximately three years was the time necessary in Eritrea, with the period between the organization of the constitutional commission and the presentation of the first draft to the Assembly amounting to approximately two years and a half. Consultation with civil society and participation of *ad hoc* consulting committees were a constant throughout.

Two years was the timeframe in the models of Colombia and Nicaragua. In Colombia, however, this period includes the time from the moment the referendum in favour of a constituent assembly was held, to the time the Constitution was passed. The actual period of time devoted to content discussion at the Assembly was less than one year. In Nicaragua, the first year was devoted to the work of the constitutional commission within the Parliament in the preparation of a first draft, which was followed by discussions and modifications that materialized in the form of a second draft approximately one year later. In Spain, the process took approximately a year and a half, between the moment constituent elections were held and the moment the constitution was ratified by referendum. That period of time is also the referent for Brazil in regards to the work of the constituent assembly and the efforts for civic education.

Afghanistan completed its constitution-making process in 15 months; that is the period of time between the appointment of the nine members of the constitutional drafting commission in October 2002 and the adoption of the final text by the Loya Jirga in January 2004. Concern has been expressed that the international efforts to promote public education and consultation were inadequate, and that the timeline provided by the Bonn Agreement was not maximized to allow for further consultation (the Bonn Agreement indicates the date of the convening of the constitutional Loya Jirga, but not the date of its closure).

East Timor and Namibia are particular cases, given the shorter timeframes and the special role of the UN in assisting the process (thus, making them more relevant for the Iraqi case). In East Timor, the process had to be completed in a period of 90 days from the moment the constituent assembly was elected, although this body had some time to analyse the results of public sessions and hearings held at sub-district level prior to the actual constitutional negotiations. In Namibia, the time between the moment the constituent assembly was elected and the moment the

constitutional draft was approved was four months (however, active campaigning on constitutional issues had started around six months before, with a substantial degree of social debate).

#### **4. The Iraqi context. General considerations:**

Literature on post-conflict constitution-making takes note of what are the favourable conditions under which a successful constitution-making process can emerge. These assumptions include the initiation of constitution-making activities once the peacemaking process has come to a satisfactory outcome, the completion of the immediate tasks of provision of essential services, or the achievement of an appropriate degree of security. The specific situation of Iraq does not fulfil these conditions. This situation, however, does not reduce but magnify the importance of the future constitution-making process in the country, which has the potential to become itself a part of a wider process of national reconciliation.

The models above can inform the process of constitution-making in Iraq, by providing specific mechanisms should the Iraqi Assembly decide to build on some of the elements that have defined the constitution-making processes in those countries.

The mandate provided by TAL gives the constituent assembly the generic role of drafter of the constitutional text. The Assembly may decide to organize itself internally in committees and subcommittees following the major issues of discussion to be resolved by the Constitution (as in the cases of Brazil, East Timor, South Africa or Colombia), or alternatively nominate a drafting committee (intra-parliamentary or extra-parliamentary) and work and vote on the draft provided by this *ad hoc* body (like in Eritrea, Uganda, Bahrain, Saudi Arabia and even Iraq itself in the process leading to its 1925 Constitution). In the Arab world, Bahrain (1973), Qatar and Tunisia can be relevant case studies regarding the internal rules of procedure for the work of constituent assemblies. Beyond the assembly itself, legitimacy can also be derived from the implementation of specific mechanisms for the participation of extra-parliamentary groups in the process. Examples of specific mechanisms in this regard can be found in Brazil, Colombia, Namibia, South Africa, East Timor or Eritrea. Likewise, Iraq will have to decide on whether foreign constitutional advice is sought on substance, beyond the work done by Iraqi political groups and Iraqi society. East Timor and Eritrea provide examples of participation of committees of foreign constitutional experts.

The mandate of the Transitional Administrative Law explicitly mentions the use of referendum as ratification mechanism. The region offers examples of Constitutions being put to popular consultation, like it has been the case in Bahrain, Qatar, Yemen, Algeria, Mauritania, and Morocco. Beyond the process of drafting the Constitution itself, decisions will need to be done on issues of civic education, especially in the preparation of the referendum. The models analysed provide interesting variations that can be explored.

Time constraints are likely to have an impact, and will need to be considered when shaping each of the decisions that will be taken in this regard. From the listed cases, only Namibia and East Timor present a period of time shorter than the one defined for Iraq, although in both cases the actual constitutional discussion had started prior to the election of the constituent assembly. Time limitations can specially limit the efforts for civic education and civil society participation, which can be particularly negative if this extra-parliamentary participation becomes key for the overall legitimisation of the process.

Constitution-making can be perceived either as a necessity or as an opportunity. In the first case, the tendency would be to adopt short-term objectives, in a context of minimum public participation and speedy process of drafting and ratification. Constitution-making as an opportunity, on the other hand, needs to encourage wide public participation, and to put in place all the necessary instruments to facilitate consensus. The specific situation of Iraq and the transitional schedule outlined by the Transitional Administrative Law calls for a speedy process, albeit with encouragement of debate. The models listed above provide elements that have contributed to successful processes in other countries. They can inform Iraq of the options that can be put in place and of the relevance of these options for the achievement of a final positive outcome.