

Part 1: Introduction to constitution-making processes

1.1 The role of a constitution

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

1.1.1 Increase in constitutions

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

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

1.1.2 Importance of, but difficulty in implementing, constitutions

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

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

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

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

1.1.3 Constitutions as symbols and manifestos, and as legal rules

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

1.1.4 Constitutions as contracts among people or peoples

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

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

1.1.5 Orientation of new constitutions

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

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

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

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

1.1.6 Choices for constitution-makers

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

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

1.1.7 Constitutionalizing responsibilities and duties

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

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

1.2 Issues of process

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

1.2.1 Changing ideas and practices of constitution-making

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

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

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

1.2.2 Can the constitution-making process be designed?

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

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

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

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

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

1.3 Key components and issues of the constitution-making process

1.3.1 The importance of a design

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

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

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

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

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

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

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

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

1.4 Tasks and responsibilities in constitution-making

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

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

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

1.4.1 Resources

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

1.4.2 Sequencing the process

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

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

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

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

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

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

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

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

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

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

1.4.3 Deadlines

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

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

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

1.4.4 Agreeing on an agenda for constitutional reform

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

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

1.4.5 The form of the agreement

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

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

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

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

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

1.4.7 Actors and public participation

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

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

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

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

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

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

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

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

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

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

1.4.8 Deadlock-breaking mechanisms

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

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

1.4.9 Drafting the constitution

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

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

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

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

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

1.4.10 Debating the draft constitution

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

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

1.4.11 Enacting the constitution

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

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

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

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

1.4.12 Implementing the constitution

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

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

1.5 Assessing the impact of the constitution-making process

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

1.6 Who does what? A table

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

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

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

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

Table 2: Who does what?

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