

Part 2: Tasks in a constitution-making process

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

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

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

Types of tasks

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

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

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

Organization of this part

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

2.1 Tasks—starting a process

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

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

2.1.1 The constitutional starting point

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

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

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

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

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

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

2.1.2 Deciding if a process is needed

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

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

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

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

There are arguments against constitution-making, including:

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

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

More modest enterprises

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

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

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

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

The constitutional moment?

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

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

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

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

2.1.3 Starting a process: The law and the politics

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

When there is no constitution

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

Table 3: Constitutional review timetable

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

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

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

When there is an existing constitution

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

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

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

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

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

Some examples of initiation

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

Table 4: Constitutional review initiation

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

The political dimensions of starting a process

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

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

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

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

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

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

Box 1. Colombia’s popular movement for reform

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

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

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

2.1.4 Design

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

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

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

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

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

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

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

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

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

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

Who designs?

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

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

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

Sequencing

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

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

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

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

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

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

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

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

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

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

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

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

2.1.5 Timetables

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

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

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

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

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

Box 3. Damaging deadlines

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

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

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

Factors suggesting some urgency may include:

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

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

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

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

Who should set the timetable?

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

for success or failure. Factors involved include the following:

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

Rigid or flexible?

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

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

Factors likely to result in completion on time

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

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

What happens if a deadline simply expires?

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

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

How can a timetable be enforced?

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

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

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

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

Some examples of timetables

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

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

law establishing the commission, and lack of resources.

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

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

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

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

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

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

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

2.1.6 Legal basis for the design

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

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

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

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

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

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

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

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

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

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

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

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

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

Box 4. “Revolutionary legality” and “necessity”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1.7 Preparing the constitution-makers

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

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

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

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

word “education.”

The objectives

Constitution-makers can ideally be prepared to:

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

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

Developing a program for substantive constitutional issues

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

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

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

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

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

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

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

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

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

Approaches to learning

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

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

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

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

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

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

at the Swiss system, especially federalism;

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

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

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

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

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

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

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

Resources

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

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

2.1.8 Guiding principles for the process

Agreeing on guiding principles: An increasingly important task

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

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

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

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

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

The nature of guiding principles

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

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

Principles in documents that establish constitution-making processes

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

Guiding principles: A common phenomenon

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

Sources of principles for constitution-making processes

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

Who decides on the guiding principles?

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

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

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

Verifiable principles in conflict situations involving entrenched minorities

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

Box 5. South Africa: The certification judgments

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

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

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

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

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

Other cases of verifiable principles

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

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

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

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

How are principles used?

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

Must guiding principles be followed?

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

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

Comments

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

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

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

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

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

2.1.9 Interim constitutional arrangements

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

Interim and incremental: Connected but different

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

Reasons for interim arrangements

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

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

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

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

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

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

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

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

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

The negative side of interim arrangements

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

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

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

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

may put the objectives of peace at risk.

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

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

Interim arrangements as road maps to a new constitution

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

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

Box 6. Negotiating interim arrangements in Nepal

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

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

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

The orientation and scope of the interim arrangements

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

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

Who negotiates the interim arrangements

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

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

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

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

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

Forms of interim arrangements

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

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

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

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

Legality of interim arrangements

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

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

Managing the transition period

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

Box 7. “Incremental” change in Chile

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

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

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

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

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

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

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

Internally managed interim arrangements

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

2.1.10 Starting over when a process has “failed”

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

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

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

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

Back to square one

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

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

Giving up

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

What about the “no constitution” countries?

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

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

Gradual change

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

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

Starting from where you left off

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

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

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

Box 8. Options for “starting over” in Kenya

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

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

The “political will” question

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

On not rushing to change the new document

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

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

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

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

Certain groups are often excluded:

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

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

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

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

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

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

2.2 Public participation

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

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

2.2.1 Introduction to public participation issues

Changing modes of making the constitution

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

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

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

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

Meanings and aspects of public participation

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

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

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

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

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

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

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

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

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

The impact of public participation

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

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

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

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

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

The relevance of decision-making bodies

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

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

Participants

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

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

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

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

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

Assessing the impact of public participation

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

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

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

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

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

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

Potential opportunities in public participation

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

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

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

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

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

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

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

Potential risks of public participation

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

unreasonably prolong the process.

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

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

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

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

Box 10. Veil of ignorance

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

2.2.2 Preparing the public to participate: Civic education

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

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

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

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

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

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

Key stages of civic education

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Who conducts civic education programs?

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

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

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

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

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

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

Planning civic education

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

Practical planning tips

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

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

Methods of civic education

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

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

Television and radio

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

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

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

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

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

Print materials

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cultural and sporting events, games, and competitions

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

Official website of the constitution-making body

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

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

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

- **Introductory page**

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

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

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

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

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

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

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

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

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

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

- **Online video or audio recordings**

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

- **Questions and answers**

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

- **Getting public views**

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

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

Mobile messaging services and social media

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

Civic education workshops

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

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

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

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

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

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

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

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

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

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

Practical tips for conducting civic education programs

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

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

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

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

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

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

Some challenges of implementing civic education programs

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

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

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

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

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

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

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

Box 14. Evaluations of civic education workshops: Some observations

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

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

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

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

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

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

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

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

2.2.3 Public consultation

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

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

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

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

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

those of the public)?

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

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

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

Public consultation on issues about the constitution-making process

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

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

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

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

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

Public consultation on issues about the contents of the constitution

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

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

main drafts that were quite widely circulated.

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

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

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

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

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

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

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

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

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

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

Box 15. Examples of legal mandates to conduct public consultations

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

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

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

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

Section 18 of the act required the commission to:

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

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

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

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

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

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

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

Box 16. Uganda: The use of views

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

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

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

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

Which body conducts public consultation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

public about the new constitution.

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

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

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

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

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

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

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

Some guiding principles for conducting a public consultation process

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

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

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

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

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

Planning well in advance of the public consultation

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

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

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

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

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

Establishing realistic timetables

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

Preparing the public to participate meaningfully

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

Being transparent

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

Being representative

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

Ensuring that the consultative process is accessible, secure and inclusive

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

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

Respectfully listening to the public's views

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

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

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

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

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

Carefully considering the public’s views when making key decisions

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

Being accountable and providing feedback

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

Ensuring that the consultative process is nationally owned and led

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

and plan for public consultation.

Evaluating the consultative process

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

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

Choosing methods for consulting the public

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

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

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

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

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

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

Requests for submissions of people’s views

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

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

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

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

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

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

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

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

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

Use of guiding questions

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

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

Practical tips for guiding questions

Guiding questions:

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

Use of questionnaire-based surveys

Conducting a scientific questionnaire-based survey

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

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

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

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

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

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

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

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

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

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

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

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

Volunteer questionnaires

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

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

Reports on surveys

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

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

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

Practical tips on surveys

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

Use of face-to-face public consultation meetings

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

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

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

Public consultation meetings

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

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

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

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

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

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

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

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

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

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

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

Focus groups

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

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

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

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

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

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

Meetings with sectoral groups

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

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

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

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

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

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

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

Thematic meetings

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

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

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

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

Using video to facilitate public consultation

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

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

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

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

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

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

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

views presented.

2.2.4 Receiving and analyzing the people's views

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

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

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

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

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

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

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

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

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

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

What perhaps might at first seem odd is that in a number of constitution-making processes,

Box 20. How South Africa's two million submissions were counted

In South Africa [1996], it is sometimes claimed that more than two million submissions were received. Most were signatures on petitions (mainly on specific issues); there were only about thirteen thousand substantive submissions. However, even though these submissions were analyzed and reports about them were provided to technical committees of the constituent assembly, for the most part they had a limited impact on decisions about the constitution, largely because the primary outcomes were negotiated among the major political parties.

Box 21. Use of views in Papua New Guinea [1975]

Although extensive use was made of the many views collected, and the recommendations of the pre-independence Constitutional Planning Committee are regarded as being based heavily on the views of the people, twenty years later one member of the committee said, “in the end we abandoned the idea of analyzing all the submissions that came in, because there were just too many. And there was also, to a certain degree, a position taken . . . that we represented the people and that in some ways the people had to be led and not be followed” (Mackenzie Daugi, member of the Papua New Guinea Constitutional Planning Committee, in Regan, Jessup and Kwa 2001: 361–62).

while considerable efforts were made to collect people’s views, those views subsequently receive little attention from the constitution-makers. In Rwanda [2003] only 7 percent of the responses to fifty thousand lengthy questionnaires provided to the people by the constitutional commission were analyzed. In Iraq [2005] the questionnaires that had been distributed and gathered were never looked at by the constitution-makers.

Reasons why views are not analyzed may include:

- a failure to make a plan or budget to effectively analyze and use the views;
- the view held by primarily elected constitution-makers that they represent the people and so should be free to make decisions based on what they think is best.
- the effort and extensive resources required if large numbers of written and other submissions are to be received and analyzed, and the extreme time pressures that are often experienced in constitution-making processes;
- constitution-makers who participate in numerous face-to-face meetings with the public feeling that they are capable of making their own assessments of what they have heard, and do not need further analysis of transcriptions of what was said at such meetings or of what they may feel is similar material contained in written submissions;
- people often being consulted about their views for purposes other than to inform the constitution-makers, including:
 - raising awareness about constitutional issues (almost a form of civic education);
 - attempting to legitimize the process;
 - responding to expectations of or pressures from civil society, the media, or the international community; and
- the pressures on constitution-makers to ignore, or downplay, the views of the people on particular issues, as, for example, in South Africa, where strong popular pressures for constitutional provisions in support of capital punishment and in favor of prohibitions on abortion were ignored because of the concern of the African National Congress (and others)

to ensure that the new constitution contained progressive protections for human rights.

The views of the people are never the only source the constitution-making body is permitted to use. (See part 2.2.3.) While the people's views may be important, the use of other sources necessarily results in constitution-makers allocating their research and analysis efforts in other directions. That can result in the development of views on constitutional issues that are different from, and even contrary to, those that predominate in the views submitted by the people.

Effects of public consultation choices for receiving and analyzing the people's views

A constitution-making body may want to receive and analyze the views of the people for a range of quite different purposes. Such purposes can have major effects on the type and the timing of the work involved, and staff and resources needed to do that work.

An initial round of public consultation about the people's views may be held to help the constitution-making body determine the agenda of issues to be addressed as part of the process. In such cases a subsequent and usually much broader public consultation process will usually take place concerning that agenda. Quite apart from the task of organizing the public consultation, the receipt and analysis of views required people to record the meetings, transcribe the views presented, and summarize those views into reports the commission used in making decisions on the agenda of constitutional issues.

The most common purposes for obtaining views, however, usually concern developing proposals on the new constitution. This can be done in the many ways outlined in the earlier discussion of public consultation, and may require attention to the organization and resource issues outlined in the general discussion of requirements for receiving and processing views.

If, however, people's views are sought in relation to a draft constitution, additional organizational and resource issues will arise. There will be a need to print copies of the draft, or at least to prepare adequate explanatory materials (i.e., providing enough information to the people to enable them to be meaningfully consulted). There may be a need to have the draft constitution and explanatory material translated into local languages. It may also be necessary to have a specifically designed civic education program to help people understand the content of the draft constitution sufficiently to be able to provide meaningful comments.

One purpose of analyzing views is to provide the constitution-makers with insights into the extent to which views differ between regions of a country, or among ethnic or religious communities within a country. An understanding of such variations may be of great significance in the process of making recommendations on constitutional issues, especially in a postconflict situation. To ensure that such an analysis is possible, it will usually be necessary to organize the consultative process in such a way that the views of the distinct communities are separated as they are received, or so they can readily be separated and subjected to later analysis. (The 210 separate constituency reports in Kenya are an example of what can be done.)

A further reason for receiving and analyzing views may be to assist the constitution-making body in the resolution of contentious issues. In Uganda, a careful statistical analysis of views submitted to the constitutional commission on divisive issues was one of several sources the commission used to make decisions on the limited number of issues where a broad consensus had not yet emerged after a highly consultative process taking more than three years. As outlined below, the commission needed a specialist staff and significant resources to undertake the analysis of the views on those issues contained in the 25,547 written submissions it received. The commission also published the results of the statistical analysis, as a means of reducing any suspicion that the statistical analysis had not been conducted in a bona fide manner.

Requirements for receiving and processing views

The following discussion provides a brief overview of some of the issues that arise when receiving and analyzing the views of the people.

Who collects and analyzes the views

While most commonly this work is done by the constitution-making body or its administrative management body (e.g., its secretariat), there can be major difficulties involved in doing this. Putting together the personnel and resources required can be a major exercise, one that it is hard for the constitution-making body to do on its own and in the limited time likely to be available. So, in some processes, either existing governmental or nongovernmental bodies undertake the work on behalf of the constitution-making body, or a special body is established for that purpose.

In Papua New Guinea, the colonial government's political education office (later called the department of information) was put at the disposal of the constitutional planning committee. It designed the public consultation program and conducted the training of advisors for discussion groups established all over the country, through which much of the public consultation took place. Those advisors then took responsibility for transmitting to the committee the answers given by the discussion groups to guiding questions contained in six discussion papers circulated by the committee. In Colombia, a government commission organized almost sixteen thousand working groups throughout the country to gather public views. It worked for the three months before the constituent assembly met. It then organized the written submissions for use by the constituent assembly. In Albania [1998], a newly established ministry of institutional reform and relations with parliament was established to support the constitution-making body (a committee of the parliament). The ministry assisted in establishing a quasi nongovernmental body to facilitate public participation and the processing of views. It was funded mainly by donors.

In the more common situation where the constitution-making body itself takes responsibility for coordinating public consultation and the receipt and analysis of views that it generates, especially ones that continue for several years, constitution-making bodies do build up their own workforces, including specialist employees. An example of the personnel required concerns the Uganda Constitutional Commission, which took on the work of receiving and analyzing the memoranda, reports, and oral submissions containing the Ugandan people's views. This was a

major exercise. All submissions were summarized for general use by the commission. In addition, the views expressed in all submissions were examined to identify positions expressed on a number of controversial issues. Those views were analyzed statistically in order to help the commission make its decisions on the controversial issues. The commission's workforce, which already had almost a hundred personnel, many working on summarizing and managing written submissions, was expanded by the employment of forty-eight university graduates and other staff members, including computer specialists.

The various forms in which views may be provided, and receiving and storing the views

People may provide their views to constitution-makers in a wide range of ways, including:

- oral submissions at public meetings and in some processes over dedicated telephone lines (as in South Africa);
- answers to questionnaires or to guiding questions circulated by the constitution-making body, which might be in writing or could perhaps be submitted online;
- written or printed submissions on issues of particular concern to the authors, which can include brief notes, letters, long and detailed submissions, draft constitutions, and the like; and
- petitions on particular issues, in some cases signed by hundreds of thousands of people.

With increasing access to electronic forms of communication, the ways views can be submitted is increasing, including:

- text messages sent through mobile telephone networks;
- e-mails;
- blogs;
- submissions made on dedicated websites; and
- Twitter and Facebook.

A constitution-making body that is serious about receiving and analyzing views needs to give careful attention to the arrangements it makes for managing these views in ways that ensure that the material is accessible to and readily available for analysis by the constitution-making body.

For management of large volumes of views submitted electronically, it will be essential for a constitution-making body to employ a specialist staff capable of setting up systems for recording receipt of such submissions, and electronic storage and backup. Such arrangements will need to make the material readily accessible to the constitution-makers and their staff, and also available for such statistical and other kinds of analysis as the constitution-makers require. Special arrangements may be needed if there is substantial use of video technology to record views. Where large numbers of oral and written or printed submissions are generated, arrangements will be required just to ensure that all such material reaches the constitution-

Box 22. Use of social media to prepare a constitution: The case of Iceland [ongoing process]

The Icelandic Constitutional Council has established a website (<http://stjornlagarad.is/english/>) with links to Facebook (<http://www.facebook.com/Stjornlagaradand>), YouTube, and Flickr. The council views this as an effective way to engage a large percentage of the public because at least 90 percent of Icelandic citizens have access to the Internet, and most have Facebook pages. The public is invited through media advertisements, the Web, and social media to send messages using Twitter, Facebook, or the website. All of the messages are posted as long as the sender provides his or her name and the message is cleared by the council's staff. Others can comment on the views expressed, which has been promoting debate on the issues. Every day the council posts short interviews with council members on YouTube and Facebook. Every Thursday, the council meetings are broadcast live both on the council's website and on Facebook. The website also includes the current constitution, drafts of the constitution and other key documents, a schedule of meetings and events, the council's procedures, names of council members, a newsletter, and the like. The country is relatively small, so this may be manageable. Such an experiment might prove more challenging in a larger country. The use of social media to prepare a constitution is a new approach (other countries, such as Ghana, have used social media tools as well but not as extensively) and should be studied to determine how it can be most effective.

making body. In a large country where much of the population lives in far-flung and relatively inaccessible areas, literacy levels are low, and many local languages are spoken, systems for receiving views may need to include arrangements for:

- recording what is said at face-to-face meetings; and
- encouraging submission of views in written or printed form, and then collecting the submissions and getting them to the constitution-making body.

In Kenya, the Constitution of Kenya Review Commission established documentation centers in all administrative districts not only to facilitate distribution of civic education material produced by the commission but also to act as depositories for submissions. In other places, government and administrative staffs have collected submissions from the public and forwarded them to the constitution-making body.

After the views have been received, the need for the material to be stored and managed in ways that ensure accessibility to the constitution-makers and availability for statistical or other forms of analysis gives rise to a number of major considerations, including:

- Filing and storage systems will be needed for both electronic and documentary submissions. Consideration will need to be given to whether written or printed submissions are saved online (to make them more readily retrievable) and about where and how the originals will be stored.
- Oral submissions may need to be transcribed, to make them available for reading by members of the constitution-making body, and perhaps for inclusion in statistical analyses of views submitted.
- Both oral and written or printed submissions may need to be translated from local languages into languages that enable the views to be read and (if necessary) analyzed statistically.
- In some processes, constitution-making bodies have put great effort into summarizing submissions so as to make them more readily accessible to both perusal by the constitution-makers and statistical analysis.
- Constitution-making bodies need to consider how best to address the concerns, often expressed by people when consulted, that their views will not be used, or may be manipulated (e.g., to meet the interests of a political party). Sometimes such concerns are answered by producing reports of the views received. It might also be possible to make the views received available on a website, accessible to all who are interested.

For a more detailed discussion of issues about the records that may need to be kept by a constitution-making body, inclusive of records of submissions of views, see part 2.3.8.

Analysis of the views

A credible public consultation process requires analysis of the views. In particular in cases where large numbers of submissions (oral, written, printed, or electronic) are received, if only because it is usually impossible for members of the constitution-making body to read every submission. Apart from an analysis that essentially summarizes or identifies main themes expressed by the participants, various other forms of analysis may be required. These can depend on the terms of the legal mandate of the constitution-making body, and also on which of the various purposes for which views are received and analyzed are applicable in the particular case.

Most commonly, there is no special purpose beyond making the views readily available for use by the constitution-making body when it makes its decisions on constitutional issues. But to do that it may be important to have the views available in a range of forms. These might include analyses of views on particular issues, along with their main variants; analyses of views from different regions; or statistical analyses of options for responding to certain issues. There is no clear pattern here in terms of the tasks involved or in the way such tasks should be carried out.

For answers to questionnaires or to guiding questions that have been closely followed in submissions, a statistical analysis may be reasonably straightforward. But where submissions containing views are more open-ended, various technical issues may arise. For example, should a submission from a large political party, church body, NGO, or trade union be given the same statistical value as a submission from an individual? When statistical analysis is undertaken to

help resolve divisive issues, usually the analysis aims to identify the number or percentage of views submitted that support each particular option. As was the case with the Uganda Constitutional Commission in 1992, this may require analysts to examine each submission to identify whether the submission takes a position on any divisive issue being analyzed, and what that position is. Determining such issues can involve matters of judgment.

Wherever summary or further analysis of views is required, there is the potential that the public will be concerned about manipulation of the analysis. The sensitivity can be especially high when statistical analysis is used as part of an effort to handle divisive issues. In all such cases it may be vital to establish procedures to protect the data from manipulation. To this end, the Uganda Constitutional Commission used several levels of review for all data entry in its statistical analysis exercise. Constitution-making bodies can help build confidence in their analyses by being as open and transparent as possible about:

- their decision to undertake statistical analysis;
- the method of analysis being used;
- their efforts to ensure that there is no manipulation of data or results; and
- the results of the analysis, ideally through publication of reports on the outcomes.

Examples of processes for which reports focusing on analyses of views were published include Uganda (where a report of the results of statistical analyses of views expressed on divisive issues was included in the three-volume report published by the constitutional commission) and Kenya [2005], where the Constitution of Kenya Review Commission published a number of reports on its analysis of people's views, including separate reports on views expressed in submissions from each of Kenya's 210 electoral constituencies.

Staff, resources, and funds

Whether the views of the people are received, managed, and analyzed by the constitution-making body or by another agency, a large-scale public consultation process that results in many submissions will usually bring with it the need for specialist personnel, technical equipment, and funds. Personnel needs could include record keepers, data-entry personnel (physical and digital), computer specialists capable of developing software, managing digital record keeping and statistical analysis, and people to transcribe oral submissions, translate oral and written submissions, and persons who can summarize and analyze submissions.

Equipment required may include filing cabinets (or other pieces for storing original documents), equipment for transcribing recorded oral submissions, and scanners and computer software and hardware for storing and analyzing written and printed submissions. In Zimbabwe [ongoing process] those managing the process had to develop a system of locking away or securing the original submissions so that none of the political parties could later claim the submissions had been tampered with.

Serious allocations will be required, not just of staff members, resources and funds but of also time. This commitment will exceed what was needed for civic education and public consultation. A serious effort to collect and analyze views will be almost impossible unless adequate provision for such an effort is made in the work program of the constitution-making body from an early stage.

Reports of constitution-making bodies on use of the people's views

Some constitution-making bodies, notably constitutional commissions and committees of parliament, prepare and publish reports of their work. (Other constitution-making bodies such as constituent assemblies, parliaments, and constitutional conferences do not in general issue reports on constitution-making, though verbatim reports of the debates of such bodies are often published.) Reports of constitutional commissions and the like are usually intended to explain the reasons for their recommendations on constitutional issues. As such, they are usually directed mainly to the constituent assembly or parliament that will debate the draft constitution prepared by the commission or committee.

An additional and often important purpose of such reports is to be transparent and inform the public about the analysis of the views of the people, and to explain how those views were taken into account (or discounted or ignored) in making decisions on constitutional issues.

Because they are directed at persuading constituent assemblies and parliaments of the value of the proposals for the draft constitution that they explain, such reports often are long and detailed. The volume of the 1974 report of the Papua New Guinea Constitutional Planning Committee containing the narrative and recommendations was 348 pages, while the 2004 report of the Bougainville Constitutional Commission was 368 pages. The 1996 report of the Fiji Constitution Review Commission was 791 pages. The Uganda Constitutional Commission's final report consisted of three separate volumes:

- a 144-page draft constitution;
- a 921-page volume, *Analysis and Recommendations*, explaining the reasons for the decisions on which the draft constitution was based; and
- a 383-page *Index of Sources of People's Views*, listing all written submissions received and reports of public seminars conducted by the commission, and containing tables summarizing the statistical analysis used by the commission to help it make decisions on several divisive issues.

While such lengthy reports may be read by some in the constituent assembly or the parliament, their length and detail usually make them inaccessible to most ordinary citizens.

An alternative approach, used by the Constitution of Kenya Review Commission, was to publish not only reports giving feedback on views received in each constituency, but also a short version of the major report addressing the constitutional recommendations of the commission. The short report was specifically intended to overcome the common problems of accessibility encountered with long and detailed reports.

The roles of such reports are in some cases made more significant by provisions in a new constitution requiring courts interpreting that constitution to make reference to key documents relevant to the original intention of its provisions. In the constitutions of Papua New Guinea and of the Autonomous Region of Bougainville, such provisions extend the reports of the respective constitutional commissions. In that way, to the extent to which the reports analyze and rely upon the views of the people (and in both cases they do to a considerable degree), those views remain relevant to the ongoing interpretation of the constitution.

2.3 Administering and managing the process and its resources

Participatory constitution-making processes can require the planning for, coordination of, and implementation of hundreds of complex and politically sensitive tasks, and the management of hundreds of people over an extended period. In a postconflict environment these tasks can become formidable. Infrastructure may be scarce or seriously damaged, human resources diminished by warfare or exile, and mistrust rife between communities and leaders. Managers have had to overcome these constraints and many others to raise funds, refurbish buildings, hire and train large numbers of personnel at short notice, fly in photocopiers and computers and vast quantities of paper, accommodate the media of many countries, pay staff members and send money to field offices with no functioning banking system, secure the process, and handle members of the international community who want to influence the process, as well as slow-moving or corrupt bureaucracies. Administrators and managers have accomplished this and more with little time for advance planning.

The administrative and management requirements of a constitution-making process are often not well understood by the designers of the process. In this section, we alert our readers to the administrative and management tasks that are unique or critical to constitution-making. The tasks discussed in this section do not involve policy decisions taken by the political leaders of the constitution-making body. These are primarily the tasks that are carried out in support of the constitution-making body. A closely related discussion about the bodies that perform these tasks and how those bodies are structured and managed can be found in part 3. In particular, part 3.3 deals with the administrative management body that may be responsible for many of the tasks described below.

2.3.1 The core tasks of administering and managing a process

The administrative tasks of a constitution-making process may be broadly outlined in the legal framework, but the process will often entail far more tasks, such as:

- strategic planning;
- financial matters, including budgeting, fiscal record keeping, auditing, fundraising, and

donor relations;

- personnel issues, including recruitment and management;
- logistics, including bringing people from far away for meetings and arranging accommodations;
- procurement of transportation, equipment, supplies, and services;
- security, including making policies and procedures and implementing them;
- refurbishing or securing buildings and maintaining equipment;
- conference management and catering (possibly for five hundred or more people);
- translation and interpretation services;
- information and communications technology, including setting up networks and database systems as well as repairing computers;
- capacity development and orientation for personnel and constitution-makers;
- research, drafting of constitutional provisions, archiving, and record keeping;
- secretarial tasks, including note taking, minute taking, and distributing agendas;
- printing and publishing books, pamphlets, questionnaires, or leaflets; and
- public outreach, including civic education and public consultation.

A wide range of expertise will be needed to carry out such diverse tasks, each of which will involve many more specific activities. Here is a glimpse of the variety of possible tasks:

- organizing a pop concert, song contest, or soccer game as part of a civic education and youth outreach program;
- translating the draft constitution into several languages and printing millions of copies of it prior to public consultation;
- hiring tents to serve as meeting rooms for a large constituent assembly or constitutional convention;
- designing security passes to indicate who has access to which parts of the constitution-making grounds and meeting rooms;
- arranging for daily tea service and meals for up to a thousand people for a national convention; and
- designing the logo and official stationery for the constitution-making body.

2.3.2 Strategic and operational planning

By strategic planning we mean establishing a plan for implementing the broad policy decisions of the constitution-making body. The strategic plan should set out where the process is going and how to get there, including detailed operational plans about how every task will be carried out, by whom, and what resources will be needed to carry it out. This helps with the next step in the planning phase: creating the budget. The more detailed plans are critical, because in

difficult circumstances—perhaps with inexperienced staff members, changing deadlines, and political crises looming—even basic tasks can be overlooked. For example, in past processes administrators and managers have failed to:

- secure, in plenty of time, a meeting place for the constitution-making body, which led to the need to pay for an expensive hotel for months on end so meetings could be held;
- order enough paper or toner cartridges for the printer, which prevented members from receiving drafts of the constitution to review and led to lengthy delays until more paper and cartridges arrived;
- realize that the members would be speaking different languages, and that translators and interpreters would be needed for several languages on a daily basis, which slowed down the process considerably and left many constitution-makers feeling excluded from participating;
- train note takers or establish a system to record decisions, which led to confusion about what had been decided and charges of manipulation against the leaders of the constitution-making body because certain constitutional provisions had been changed and members could not recall if this had been agreed to;
- realize the need for analyzing submissions, which has led to various difficulties including delays in the process, use of ineffective methods of analysis, or the abandonment of any serious attempt to analyze the views received, and pressures to obtain funds and specialist staff members at short notice; and
- deliver copies of the draft constitution to a minority community before the public consultation process began, which led the community to accuse the constitution-makers of manipulation and secrecy.

The strategic plan is developed by the managers or leaders of the process and includes some or all of the following components:

- the overall goals and objectives (which may be defined in a legal mandate for the process or may need to be developed further for the strategic plan) for the administration and management of the process;
- the core tasks that will achieve the objectives of the process;
- an overall timetable for the main tasks that need to be completed and coordinated mapping of what will be needed to implement the tasks in the time frame provided, including personnel, materials, and financial resources as well as external partnerships;
- identification of who or which department or body needs to do what and by when; and
- how the tasks will be monitored and evaluated.

The plan should be realistic both in terms of what can be achieved in the time frame given and the resources available for the process, including funds. Ideally, the key personnel or managers implementing the strategic plan will help develop the detailed operational plans. These plans describe specifically how each task will be carried out and how success will be monitored. This handbook, in part, has been prepared as a planning tool to identify the tasks, personnel, institutions, procedures, resources, and external relationships that may be needed. A quick

Box 23. Example of a strategic planning process

To provide an example of strategic planning, let us assume there has been a decision to have a constitutional commission that will prepare a final report and a draft constitution that will go to the parliament. The overall road map for the process might include the following stages:

- preliminary civic education;
- public consultation;
- analysis of views collected;
- first draft;
- consultation on the draft;
- final decisions;
- legal drafting; and
- debate in parliament.

The commission is appointed and it has several months to prepare its strategic plan. It has one chief administrator and three other administrative staff, one of whom is an accountant. It has access to the ministry of finance and other ministries for guidance.

For each stage, the commission must decide whether, and to what extent, the various tasks involve it. For example, by the time the final stage (debate in parliament) takes place, the commission may be winding up.

The strategic plan involves broad activities and time frames. After the plan has been created, the commission will have to break down those activities into more detailed tasks, then identify the resources that are needed to perform the tasks, and finally prepare the budget. There is a feedback loop covering the various stages; the commission can't simply plan to do things with no idea of whether it will have the money.

The framework for the strategic plan must be the legal or policy document (here we call it the law) that enshrines the thinking to that point. Also crucial are the realities of the situation—and for this the commission should not hesitate to ask for information from all relevant sources, including ministries, research bodies, and international agencies.

In planning the first stage—on civic education—the commission would ask itself the following questions:

- What does the law say? Is the commission required to carry out civic education? If not, is it able to do so, or is it expected to encourage others to do so? Or would it and other organizations all carry out civic education? Would it have—or should it seek—funding to pass on to others, or is it expected to remain entirely outside the education process? If the commission is to play no part, the planning process might stop there and move on to “receiving views.”
- If the commission has a choice of what to do, what structure for civic education will make the best use of the available resources—of the commission and others? This will require

assessment of the capacities of the commission and of other bodies.

- What is needed—how much do people already know about the constitutional issues?
- If the people have had some civic education already, who has done it? Was it well done? Are those bodies able to continue?
- If the commission is to be a funding body only, it will depend on other bodies to help it decide how much funding will be needed. If the commission is to do more, it should proceed to the following questions.
- How much time is available?
- How can marginalized or hard-to-reach groups be educated?
- What methods should be used to communicate—radio, television, theater, books and pamphlets, comic books, meetings, art and writing competitions, and the like (see part 2.2.2). At this stage, much help will be needed from others—does someone have figures on newspaper readership, listeners to radio, literacy? Experts on civic education will be needed (the commission is unlikely to have any, or not more than one, among its members). What language or languages will be used? Eventually the commission will need to know how much these things cost. Do newspapers publish this sort of thing without payment? How will marginalized groups be reached, and who are they?
- If the commission is to be involved in delivering, coordinating, or funding civic education, it should develop an overall plan to cover issues such as:
 - How are most people to be reached—by newspapers, face-to-face meetings, radio, television? And what type of electronic media programming: discussions, drama, phone-in programs?
 - At what level should meetings take place (every town, major headquarters)?
 - What sorts of publications will be needed?
 - Will the commission have a website, and will it use other online platforms such as Facebook?
- Its strategic plan will need time frames—within those probably set by the law. Benchmarks will be mainly for internal purposes: by a certain date staff must be hired; by a certain date partner organizations, if any, must be identified; during a certain period public meetings must be held, and so on.

This may seem daunting—but in reality much of the work will be done by others. Some tasks can be postponed until more staff members are appointed (but not for long). Government agencies, consultants, and others can help.

This is not the end of the process. Next comes budgeting: how much will all this cost? Roughly, how many pamphlets at how much per copy? How many meetings at how much per average meeting? How much does a website cost? How many staff members will be needed, and how much will they cost? How much does it cost to translate a thousand words into another local language, and how many thousands of words will need to be translated?

And the art of budgeting is not a precise one: there must be contingency plans, chances to ask for more (within reason), and rough estimates.

This sort of planning has to be carried out for each step in the process.

perusal of the detailed table of contents of this handbook can assist with the planning process.

A common management tool used for making strategic and operational plans is the analysis of the strengths, weaknesses, opportunities, and threats related to each component of the process. This is really just applied common sense. The idea is to assess the tasks to be accomplished, the resources and opportunities available, and the difficulties that lie ahead. The mention of strengths and opportunities as well as weaknesses is designed to encourage organizations not to ignore what they do have in the way of resources and circumstances—and not to focus only on the problems and the needs, which may lead to unnecessary pessimism and overspending on new people and resources. The analysis of potential threats or challenges will help managers when they are devising alternative plans for problems that may arise.

If managers have little or no experience with strategic planning, an external facilitator could help. However, it is not true that the same techniques necessarily work for producing a constitution as for producing paper clips, or even that public consultation on constitutional issues requires the same strategies as a participatory poverty assessment. Someone with planning experience may be useful for facilitating the development of a strategic plan. But to be useful, that person should be conscious of the particular features of a constitution-making process, including its technical nature and political sensitivity.

The overall strategic plan or parts of it could be a public document to inspire trust in the process and explain the road map of how the process will proceed. It could be placed on the official website or shared with key stakeholders, such as donors, the media, and civil society. This has been done to varying degrees in several places, including Afghanistan [2004] and Kenya [2005].

2.3.3 Financial management

Managers of a process in a conflicted or postconflict state—in particular, one where institutions have collapsed and are being reestablished—may have few or no financial procedures to follow and no government revenues to fund the process. The potential challenges include:

- developing an internal financial management system from scratch;
- the requirement by international donors to have an external actor (for example, the United Nations Development Programme) handle the financial management of the process, which can slow the process down if the financial systems are cumbersome (e.g., UNDP's bureaucratic procedures for financially administering the process in Zimbabwe [ongoing process]) or the financial managers of the external organization are not competent and the constitution-makers do not have control over who is hired or fired;
- securing funding from international donors who may then require some kind of management,

- oversight or advisory role while attempting to retain national ownership of the process;
- handling complex and multiple financial reporting or auditing requirements required by international donors; and
- needing to administer corruption-prone activities such as procurement, per diems, salaries, and the like entirely in cash because there are no functioning banks.

In states with functioning governmental institutions, financial management may be carried out according to preexisting systems and procedures, and at least some of the funds for the process come from contributions made by the government. When financial systems are in place, the existing governmental procedures can create other problems. They may involve reliance on a slow, corrupt, or incompetent bureaucracy. If the government has no legal obligation to fund the process, government actors may stop the funding if the proposed changes threaten those who have power over the money.

Some processes have received funds from governments and also from international donors, and their managers have had to deal with a combination of all of these problems. In this section, we discuss the challenges in a range of contexts. (Issues in relation to dealing with donors are discussed in part 2.3.12.)

Budgeting and costing for the process

Before costs for the process are determined, ideally a strategic plan has been created that has considered the level of funding available and has identified the realistic objectives, tasks, institutions, and resources needed. (See part 2.3.2 on strategic planning.) The next step is to develop a detailed budget that identifies the items and costs for each aspect of the process—for example, the costs of establishing and running each of the needed institutions and procedures, such as a constitutional commission, a constituent assembly, and a referendum. This can become complicated, because the establishment of institutions or procedures may depend on a precondition. For example, in Kenya the law provided that if a divisive issue could not be decided by the constitutional conference it would be decided by referendum. In a country where state institutions have broken down, there may be no electoral management body and no government funds for elections, yet managers must budget for the possibility of holding a referendum.

If the funding comes exclusively from international donors, one overall budget may be required and the approval process may be established by the donors. The process then resembles that of a civil society organization making a project budget and receiving funds from a donor. Additional budgets may need to be prepared if and when new components of the process are added, such as a decision at a later stage of the process to consult on the draft constitution. Establishing good relationships based on trust with the donors or government officials will help with the dilemmas that may emerge in planning for the process and getting funds released on time.

This handbook, in part, has been developed to serve as a planning tool and can assist with identifying budgetary items related to the potential tasks, institutions, procedures, and personnel required. Simply reviewing the table of contents will help in the creation of a budget.

Practical tips

- The task of developing the budget should be led by experienced local financial managers (to the extent possible) and personnel who will understand the unique challenges and needs of the context. International actors with relevant experience in budgeting for a constitution-making process can assist but should not take over the process even if international donors are required to approve the budget.
- Budgetary items that tend to be overlooked include audit fees; fuel for vehicles; maintenance and repair expenses; running costs such as rent, electricity, and gas bills; catering; cleaning services; security services; cell phones and usage costs; accommodations; the establishment of regional or district offices; the refurbishing of buildings; the extensive amount of paper as well as printing and photocopying expenses; interpretation and translation costs (especially if the constitution-making body is working in several different languages), graphic design work; salaries or per diems if necessary for future members of the constitution-making bodies; transportation costs (for personnel, members of the constitution-making body, and possibly for members of the public to get to public consultation meetings), the technical equipment and personnel required to record, secure and analyze public views for a widespread public consultation process; and capacity development or workshop costs so that staff members are adequately prepared to undertake their responsibilities.
- A decision will need to be made about how much or whether to pay constitution-makers for their time and whether to provide them with transportation and living allowances. It is reasonable to compensate people for lost income from time spent away from their job. However, when the compensation is more than what they might expect to earn otherwise, this can lead to members purposely delaying the process. Remuneration should be modest, and it should be noted that for larger constitution-making bodies—ones that are convened only to adopt the constitution—members may expect no remuneration (though payment of daily allowances and travel expenses may still be required). Corrupt politicians or others may try to pad the budget so that large per diems are made available as a way for political parties to influence key actors to serve their interests.
- To be cost-effective and promote national ownership of the process, requests for funds and in-kind contributions should be made not only to donors (from the international community) but also to local civil society organizations, the business community, the media (perhaps space in a newspaper for the draft constitution), and so on. Past processes have benefited from such offerings as secondment of staff and free radio time.
- Many constitution-making processes are funded only until the adoption of the constitution, but this is not the end of the process. Many costs remain, including those for keeping some personnel on staff to ensure that all official documents and media materials (such as pictures and video) are properly archived, that civic education and outreach continues so people are aware of the contents of the constitution, and that key government officials understand the implementation

Box 24. Benefits of a diverse staff

In Afghanistan [2004], the secretariat made it a priority to include women in leadership positions and to have a staff that was balanced in terms of gender and ethnicity. If the secretariat had not hired women it would have been difficult to speak with women leaders or organize elections in areas where women often are allowed to speak only to men from their families. Similarly, the secretariat communicated with marginalized groups more effectively because members from those groups were hired to perform outreach tasks. In contrast, in Iraq [2005], the committee secretariat had formed an outreach unit to handle the public consultation process. The Iraqi staff members recruited were predominantly Shia Arabs and they used predominantly Shia networks to gather input on the constitution. Far fewer Sunni Arabs or Kurds were consulted or had the opportunity to participate.

requirements of the constitution. (See part 2.7.2 on implementation.) Any official website established as part of the process should be continued for a while at least (as it may play an important role in making the new constitution accessible and better understood). When it is no longer needed for such purposes, the website should be archived, so that the material is later available to researchers. Or the website could remain active and used as a tool to continue to engage the public on constitutional issues. These items should also be put in the budget.

Financial accountability

Preventing corruption is a key challenge. In states emerging from conflict, there may be no financial systems in place. Policies for procurement may not be well established or understood, and where no bank exists, creating a system of cash disbursements that carefully tracks all financial transactions is tricky. If funds have been spent but there are no supporting documents in the form of receipts or vouchers, there may be accusations of corruption even if the problem is simply poor financial management. Accurate records of financial transactions are critical and must be reviewed regularly. All supporting documents should be gathered and filed in the order received, and cross-referenced to the books of account.

In contexts where the funds are controlled by a corrupt bureaucracy, managers may need to develop special methods of oversight to avoid problems. Even a slight misuse of government or donor funds can have serious consequences. In Uganda in 1992 a donor withheld critically important funding because of corruption in the ministry of constitutional affairs. The funding, however, was for the constitutional commission, and the corruption was identified by the financial managers at the commission. The withholding of funds delayed the drafting process and reduced the credibility of the process.

To ensure fiscal accountability, the expenditures should be audited. In Kenya, the chair of the Constitution of Kenya Review Commission (2001–3) invited the national auditor general to carry out an early audit, which enabled the return of funds that had been siphoned off through corruption. A code of conduct (see appendix C.1) should provide clear guidance about what practices are considered corrupt.

2.3.4 Personnel

Hiring or seconding personnel

In divided societies, the hiring process must be inclusive. It is not only the constitution-makers who should be representative of the nation, but also the administrative and management personnel. Such personnel are often the public face of the process. This is especially so when they are involved in civic education or public consultation efforts or in setting up field offices. Because of the important and sensitive roles that staff members play (including assisting with the drafting of the constitution), if a single ethnic or other group dominates the management bodies, there may be charges of bias in the whole constitution-making process.

Minorities, women, and other groups should have equal opportunities to manage and administer the process. Equal-opportunity, gender-sensitive, and diversity policies and procedures should be developed or adopted to guide hiring practices and should be followed in the work environment.

Table 6: Types of positions staffed in a constitution-making process

| Staffing of positions | |
|---|---|
| Archivists | Interpreters/translators |
| Capacity development specialists/trainers | Legal drafters |
| Catering staff | Legal researchers |
| Civic educators | Logistics and procurement personnel |
| Data-entry staff | Managers |
| Drivers | Media specialists |
| Electoral specialists | Photographers |
| Empirical social scientists | Public consultation/deliberation experts |
| Financial managers | Secretarial staff, including transcribers |
| Fundraisers | Security officers and guards |
| Graphic designers | Specialists/librarians |
| Information personnel | Translators |
| Information technology experts | Videographers |
| Foreign advisors/mentors | Website developers |

Box 25. Examples of secondments: Timor-Leste [2002]

In Timor-Leste, a media group lent a media relations expert to assist with press conferences and daily communication with the press, and the Asia Foundation hired and managed translators and interpreters to assist the secretariat, which was managing the process. (The secretariat had not planned for these positions and did not have funding for them.)

Careful consideration should also be given to whether public servants should become staff members. Public servants may be aligned with or too easily influenced by the government because of their reliance on the government for their salaries. Parliaments require considerable support in the form of secretarial and administrative assistance, including procurement, drafting, research, record keeping, building management, and security. The same useful skills are often needed to support the constitution-making body. However, in South Africa [1996], the former parliamentary staff members who had worked under apartheid were not trusted by some of the other staff and constitution-makers.

An inclusive hiring panel can interview potential candidates from a less biased perspective. There should be strict rules against nepotism. In many countries, anyone charged with setting up a constitution-making body or process of any type could expect to be inundated with requests for jobs or contracts for relatives, friends, relatives of important people, and so on. Such persons should be chosen in part on the basis of capacity to resist such pressures, and should insist that proper processes are used from the outset. Failure to do so risks compromising the reputation, integrity, and legitimacy of the process. In one instance, the director of a secretariat hired his young and inexperienced cousin as a deputy. The resulting poor execution of many tasks led donors to threaten to cease provision of funds.

All of these considerations underscore the importance of planning the hiring process early and having hiring guidelines and procedures in place, especially for a process that requires a wide range of personnel.

The types and number of personnel will depend on both the availability of funds and the number of specialized tasks that must be carried out. Management will have to determine the qualifications, terms of employment, and levels for each position.

In postconflict situations especially, a large proportion of the country's skilled professionals may have fled. Drawing members of the diaspora back to support the process can help inject needed expertise. Yet overreliance on returnees can create tensions, as local people who remained during the conflict may resent the diaspora members returning to take up important positions just as peace is taking hold.

Professional "headhunters" have been used to find appropriately skilled personnel. Civil society,

academia, the media, and the private sector have also lent personnel to the process, and public service staff members have been seconded.

Employees, seconded personnel, and consultants

An official process will probably have to operate within existing national procedures for the recruitment and terms of service of staff. In many systems there might be three basic categories of staff.

An employee is someone who is under contract to work for the particular body, and paid a salary, usually a certain amount each week or month. Such an employee will probably have a contract for a fixed length of time—often with the possibility of premature termination by either side. There may be provision for some sort of benefit for an employee who works for a certain length of time. In the case of a short-lived body, this is likely to be a lump sum rather than a pension system.

A person may be seconded, usually from another government agency. Such a person would likely continue to receive the same pay and other benefits as in his or her regular job, though sometimes the person would receive some extra benefit during the period of secondment.

A consultant is someone who receives either a lump sum to do a particular piece of work, or a certain amount a day, perhaps for a limited number of days in a period. A consultancy contract is more likely to be used for a specific expert for a specific project, though it is sometimes used for people doing less specific tasks. Often a consultant will be required to produce one or more “deliverables”—reports, drafts, and so on, before being entitled to payment.

When deciding on the relevant basis for employing staff, the constitution-making body might wish to take into account factors such as:

- will the staff member count as an “employee” for the purposes of the local law of employment, including liability of the body for accidents they might have, or even liability for their breaches of the law?
- would certain types of arrangement have cost implications for travel, insurance, health, housing?
- would a person seconded potentially have some kind of conflict of interest (for example, if they regularly work for parliament would they have an interest in certain provisions getting into the constitution)?
- relationships between employees, especially resentments that may be created by marked differences between people doing similar work.

Accountability of personnel

Unfortunately, in countries where corruption is a significant issue (though hardly anywhere is

it not a problem at all), constitution-making processes are not immune. If “corruption” means allowing personal interest to conflict with one’s responsibilities (that is, excluding purely political interference), the following are examples of the problem:

- obstructing work (perhaps by not turning up, or unnecessarily prolonging debate) in order to benefit more from salaries and allowances;
- engaging in procurement scams, such as issuing purchase orders for goods that are not intended to be delivered (at the time of the constitution-making process in Uganda, this form of corruption was known as “air supply,” and there was at least one elaborate scam of this kind that caused major problems for the Uganda Constitutional Commission when the commission discovered it), or services that are not rendered or not rendered in full, or for which the price is inflated (airtime offers an easy example, as it is hard for auditors to check how many minutes of purchased airtime have been used);
- employing, or secretly facilitating the employment of, one’s relatives and associates or their businesses (in one instance, commissioners employed their own relatives as drivers, insisting on having them paid through the commissioners, and then pocketing—stealing—some of the money); and
- taking bribes to vote in a certain way.

How can this be handled? Other than insisting on background checks before people are appointed or hired, some possibilities are:

- having and enforcing a code of conduct (see appendix C);
- not permitting people whose job it is to draft a constitution to be involved in management activities that involve hiring or procurement;
- asking for extra official audits;
- insisting that existing procurement procedures be used;
- using a private accounting firm to control certain activities (such as procurement);
- being creative in checking on whether goods and services have been provided (insisting on seeing the stacks of photocopy paper; asking commercial companies that track media how many of your advertisements have indeed appeared); and
- being alert to the “cash for votes” issue.

2.3.5 Capacity development

In a country emerging from conflict, capacity development can be an extensive task, and perhaps costly, because institutions that develop skills and knowledge relevant to a constitution-making process—such as parliaments, academic institutions, and civil society organizations—will often have collapsed. In these cases, developing the skills and knowledge necessary for staff members to carry out their tasks is essential if the process is to be nationally owned and led. This can include providing training on how to plan, take minutes of meetings, use the Internet, conduct

civic education, administer and manage a process or run a referendum.

Ideally, all staff members should have a basic understanding of the whole idea of a constitution and constitution-making. The more the members of the staff understand, the more committed they will feel to the project. Staff members who are in contact with the public, or are involved in the production of documentation, or who analyze submissions, will need more. Different levels of training will be needed for different types of staff members. Training in the terminology of constitutions will be essential for translators and interpreters.

When the international community has a stake, it often rushes the process and provides foreign advisors who perform key tasks, such as drafting the constitution or devising the rules that govern the process. While this may speed up the process, it blocks the opportunity to build capacity for other democratic tasks and more importantly may lead to the people not feeling a sense of ownership over the results.

Taking the time to develop capacities strengthens the foundation and sustainability of other democratic institutions that emerge. For example, in Afghanistan [2004], many of the trained personnel of the secretariat for the constitution-making process later managed and staffed the newly formed electoral management body and secretariat for the legislature.

2.3.6 Foreign advisors

We use the term “foreign advisor” broadly to mean any international actor who supports the administrators, managers, or constitution-makers in planning and carrying out their tasks, regardless of whether such actors serve as mentors, technical advisors, or substantive advisors on the content of the constitution.

Why are foreign advisors needed? Preparing a constitution is not an everyday event. In some countries few if any local actors may have ever participated in or witnessed a constitution-making process; local actors may have little or no experience with governance, and professionals may have fled the conflict. Foreign advisors have played effective advisory and mentoring roles in many such contexts and have assisted with a variety of tasks, including sharing their comparative constitutional experience on how to structure the process, the content of the constitution, setting up websites, information technology systems, and financial systems, supporting the running of large assemblies, coordinating security, and observing electoral processes. Here we focus mainly on the roles of advisors other than those with expert specialist knowledge of constitutional issues and the drafting of the constitution whom we categorize as “experts” (adopting a term for such persons used in a number of processes). We discuss “experts” (local and foreign) in part 3.4.1.

Ideally, the foreign advisor will not simply take over a position but also serve as a mentor to appropriate counterparts, helping them develop the capacity to do the job. However, this requires

the foreign advisor to have not only skills in transferring knowledge, but also a good understanding of the local context (history, culture, and so on)—and not all do. Moreover, for foreign advisors to succeed, they should view the transfer of knowledge as a reciprocal process, and so should not just read books and papers to research the historical, political, and cultural contexts in which they are working (many do not even do that) but should also seek assistance from the national staff they work with in an effort to better understand local context and how it may best be taken into account to improve the effectiveness of their work.

Avoiding common pitfalls of using foreign advisors

When foreign advisors are involved, careful planning is required to avoid common problems. Some foreign advisors have been inexperienced, have provided advice that did not suit the context, have taken over the jobs of national actors without developing local counterparts, have pushed the agendas of their home countries, or have advanced their own personal interests. In this section, we discuss some practical tips for avoiding these pitfalls.

Before hiring or accepting foreign advisors or mentors, managers should ensure that local knowledge and expertise are harnessed by the local constitution-making bodies. It is best to determine needs through the strategic planning process and request the types of foreign advisors, if any, that will further the process. Such advisors have ranged from experts on analyzing public consultation views to graphic designers.

Some countries do not attract much international attention, and if foreign advisors are needed they must be requested. But in higher profile processes, embassies or international organizations are usually keen to provide advisors. Before accepting assistance, the constitution-makers should determine whether the foreign advisor or mentor will be viewed as an unacceptable foreign intervention in the process—in particular by spoilers. In some contexts, the international community is viewed as having caused the conflict. If the context is sensitive, all foreign advisors (or those from a particular country) may be refused, or other measures may be taken, such as having the advisors sit separately from the constitution-makers or even answer questions via the Internet or telephone.

The constitution-making body may be able to select and budget for its own foreign advisors. However, they can be costly. Embassies or other international actors will sometimes offer advisors at their own expense. In this case, the constitution-makers or managers should request to see the qualifications, evidence of experience, and references of the proposed advisors, or else suggest their own. Managers will have to be diligent in seeking out the right types of advisors. To give an example relevant to the category of experts (discussed more in part 3.4.1), if advice is needed on an issue such as federalism, Western countries tend to offer only Western advisors, from countries such as Australia, Canada, Germany, or Switzerland, when experts from India, Malaysia, Nigeria, or elsewhere may be more relevant or better qualified. There should be a trial period to see if the foreign advisor is well suited for the task at hand and fits the context.

To ensure that managers and advisors both understand what is expected, the foreign advisor or mentor should be provided with clear information about tasks, length of trial period and employment, reporting lines, expectations of confidentiality, and the like. If the advisor is being seconded from an international agency or organization, it will be important to be clear about who will manage the foreign advisor and to whom he or she will report.

It is essential that foreign advisors understand the context in which they are working—both the historical and the cultural context—and also the aspects of culture that can affect working life and relationships where absence of understanding and sensitivity can lead to misunderstandings and conflict in the workplace. Ideally, the foreign advisors selected should be persons who already have an extensive knowledge of the country in question, or have worked in countries with similar circumstances. If the only ones available have little or no knowledge of the local context, the foreign advisors should be briefed. A packet of reading material illuminating the local history, politics, and culture—or at least a reading list—should be put together. If there is a group of foreign advisors, it might be possible to arrange a briefing seminar. Neither the host country nor the advisors should feel that this is inappropriate; ignorance or biased knowledge derived from casual conversations with interested actors will not enhance the contribution of the experts.

Ideally, foreign advisors will be accountable to and report to the national managers of the constitution-making process. There should be a duty of confidentiality if they are advising on sensitive matters, and the advisors should sign a contract to this effect. In one instance, a constitutional advisor helped with a sensitive process, and then upon returning to his academic institution wrote an article divulging information that endangered the process.

It may not always be possible to find an advisor with both the necessary expertise and the relevant language skills. The advisor should be offered the necessary translation or interpretation services (see part 2.3.9) and whatever material resources are needed, such as a cell phone, computer, desk, transportation, and housing.

When managed properly, foreign advisors have played effective roles in many contexts and have assisted with a variety of tasks. In general, foreign advisors who have been effective:

- had relevant experience in a number of diverse constitution-making processes;
- were good listeners and humble and remained in the background;
- either knew the local context well, or learned and worked closely with and respected those who did;
- did not advise on issues or aspects of the process for which they were not qualified, and helped find qualified advisors when necessary;
- supported a nationally owned and led agenda without attempting to take over the process or take credit for the official work of the constitution-makers (as one South African noted, “if I had a dime for every international who has claimed to write the South African constitution I would be rich”);

- emphasized the development of national actors rather than always doing the task themselves; and
- remained engaged in the process over the long term (although sometimes it is helpful for specific experts to fly in for a short time to advise on a specific issue or problem or assist with a discrete task). In some processes, foreign advisors have remained in-country or have returned regularly to work closely for years with the constitution-makers, managers, and staff members turned implementers.

2.3.7 Making a historical record of the process

Constitution-making processes are rare and often defining moments in a country's history. The process should be carefully documented, using photography and videography as well as archiving all of the important documents. Some countries have created national museums or special exhibits that display original drafts and final versions of their signed constitutions, and that educate and promote awareness about the constitution, the role it plays in society, and how it was made.

Even if a decision has not been made about how the process will be preserved and shared with future generations, managers should plan from the outset, if possible, to document and preserve the process. Some processes have had photographers, videographers, and archivists on staff.

2.3.8 Keeping records

Why record keeping?

A constitution-making process creates an astonishing quantity of words: public and other submissions, deliberations of commissions, committees, and assemblies, and, of course, the words of the constitution, as well as various drafts. Careful planning is necessary for keeping records of these words (and for deciding which words are to be discarded and which retained). Records may need to be kept for a variety of purposes:

- **Records of what people say to the constitution-making bodies**, whether orally or in written form; important because public participation is meaningless if there is no way of recording it and ensuring that it can be used in the constitution-making process; also because the people want to know that what they say is being treated with respect, even if they realize that not everyone's point of view can have an impact on the final document.
- **Records of the deliberations of the bodies** responsible for making the constitution; important because in the future lawyers and courts may come back to the records for assistance in interpreting the constitution, and because there are likely to be disagreements during the constitution-making process about what was said, and these can be resolved only by referring to the records.

- **Records of the actual decisions made;** important for obvious reasons—this is the immediate basis for the constitution; but also difficult because in the heat of debate, unless there is firm leadership and impeccable note-taking, it may not be possible to reconstruct later what was decided, especially as some people will have vested interests in distorting what was decided.
- **The developing text of the final document:** this must be kept in reliable custody to avoid the risk of its being lost or even tampered with.

These points concern the integrity of the actual process. In addition, making a constitution is an important national event, and future historians ought to be able to study its various stages.

In many legal systems it is permissible to look at the record of lawmaking bodies as a guide to interpretation. Such reference to sources has become much more prevalent in recent years, and is perhaps particularly common in constitutional interpretation. Many courts will permit this only if the records are publicly available, because any other procedure would be unfair. To make this possible, the proceedings of many constitution-making processes have been published. An early example is the verbatim record of the debates in the constituent assembly of India—similar to the verbatim reports of parliamentary debates, often known as Hansard in common-law systems.

Issues in record keeping

The steps that need to be taken to ensure proper record keeping can include:

- acquiring the necessary equipment and staff in advance to record oral submissions;
- establishing good filing systems in advance for submissions and other documentation;
- setting up a good system for analyzing submissions and communicating them to the decision-making bodies (this is looked at in some detail in part 2.2.4);
- supporting each committee with a secretarial staff, including someone with knowledge of the substance of the process to make notes and keep formal minutes of decisions;
- having available the staff and equipment necessary to record the deliberations of decision-making bodies and their committees, including transcribing the records and (ideally) publishing them. Whether a verbatim record of committee meetings will have to be determined, but a full record, like that normally kept of the proceedings of legislatures, should be kept of the meetings of a constituent assembly or similar body; and
- arranging for full records to be kept after the constitution-making process is completed. One copy (indeed, perhaps originals, for which this concept makes sense) should be deposited in the national archives, but if there is any rule in the particular country that records in the archives are not open for public use until a number of years have passed, that rule should be waived for the constitution-making records.

Among the factors that should be taken into account are the risks of records being destroyed (by vermin or damp in the case of paper; by fading in the case of photocopies) or lost. National

archives are not necessarily immune from these problems (in the 1990s the national archives of Vanuatu were seriously damaged by a typhoon), so more than one depository should be identified. Reliance on modern technology may have its own hazards; it may be superseded, and websites may cease to be maintained. University libraries may be less efficient than one would wish. (Copies of important documents donated to some university libraries seem to have disappeared.)

It would be wise to have several copies in different places. It may indeed be wise to keep copies of documents in more than one country.

Maintaining security of documents connected with the process can be an important during a process, not least because of the dangers of sensitive issues being misunderstood or deliberately manipulated by opponents of the process, or simply by people seeking their own political advancement through a controversy arising from the process. For example, at a very early stage of one process, a foreign advisor produced a draft document intended to be seen only by the chair of the process, generating some ideas about structures. But a member of the constitution-making body stole the document, removed the cover sheet that explained its purpose, and passed it on to political interests who wanted to stop the process and who used it in attempts to discredit the process. While as much transparency as possible in a process is both desirable in principle and makes the burden of maintaining security lighter, this example illustrates the point that there are likely to be stages in a process and some categories of documents generated where secrecy will be required. In such instances, it needs to be made clear who has rights of access to any restricted document. Measures need to be put in place to ensure that no one else has that access.

More on records and record keeping

As noted, some countries have contemplated establishing special archives—indeed, museums—of constitution-making. The verbatim records of the constituent assembly debates in India were published, and they are available on the Internet:

<http://parliamentofindia.nic.in/ls/debates/debates.htm>.

There is also a useful search engine at:

<http://viveks.info/search-engine-for-constituent-assembly-debates-in-india>.

Many modern constitution-review processes have websites, and they may even have full records on these. However, websites are ephemeral; there is no guarantee that they will be maintained after the review processes are completed. For legal purposes it may be difficult to persuade a court to accept a document taken from a website.

A constitution itself may contain provisions about interpretation that have implications for record keeping. The Papua New Guinea constitution says:

- (1) The official records of debates and of votes and proceedings—
 - (a) in the pre-independence House of Assembly on the report of the Constitutional Planning Committee; and

(b) in the Constituent Assembly on the draft of this Constitution, together with that report and any other documents or papers tabled for the purposes of or in connection with those debates, may be used, so far as they are relevant, as aids to interpretation where any question relating to the interpretation or application of any provision of a Constitutional Law arises.

An act of parliament provides how these records are to be used in court. The records of the constituent assembly were published to enable them to be referred to in this way.

2.3.9 Translation and interpretation services

Especially in divided societies, language can be a highly politically sensitive issue as well as a logistical hurdle. Constitutional deliberations require clear communication among those involved. Tensions have arisen when documents as important as drafts of the constitution have been put forward in the dominant language and other members have waited for the documents to be translated into their language, or when the translations are so poor they cannot be understood. Other key challenges involve ensuring inclusive communications with the public. The process should reach all members of society. This takes careful planning and significant resources if more than one and sometimes even dozens of languages are spoken. Finally, communicating with foreign advisors and donors may require another set of translators and interpreters altogether.

Translation for nationals

In some countries there are people with a great deal of experience in translation, Neglect of certain communities in other countries may have been among the causes, or the consequences, of conflict. Linguistic chauvinism in Nepal on the part of the dominant caste groups was entrenched, and an element of the People's Movement of 2006 was the demand for rights for all, including distinct language groups—symbolized by the members of the constituent assembly being able to take the oath in their own languages (of which there are perhaps a hundred in the country). But in other countries there may still be those whose attitudes are stuck in the past. In Somalia, for example, speakers of the dominant language, Af-Maxaa Tiri, will sometimes insist that Af-Maay (classified in Somalia as a version of Somali) is a dialect of Somali, although the two are largely mutually unintelligible, and the Af-Maay speakers have always felt marginalized, especially because official Somali orthography is based on Af-Maxaa Tiri.

Translation is both time-consuming and expensive, and common sense as well as sensitivity is required. It is not possible to translate materials into many languages, and there may be few literate members of some linguistic communities. While the actual text of a constitution ought to be available in major languages, few will read the text in any language, and leaflets making the main points in some other languages may be enough.

All the problems of translation from foreign languages highlighted below may be more acute when there is a need to translate into languages that—along with the communities that speak them—have been somewhat neglected in the past, with the result that constitutional terms have never been developed in those languages. This raises the question of whether it is appropriate to invent new words, or use existing words in a new sense. Though this may be a long-term solution, it hardly helps comprehension in a popular-consultation exercise, which is often the reason for the translation. It may be necessary to insert an explanation rather than an obscure or invented word.

Translation for foreigners—and of foreign material for nationals

Unfortunately, in some processes there is no foreign member of a team who has a command of the constitutional and political terms needed in a given local language, and no local staff member who has that same degree of facility in the foreign language or languages. This means that there is no quality check on translations, which may actually be almost incomprehensible.

All too often the issue of translation is not addressed early enough. And the need to recruit translators quickly may lead to the recruitment of quite unsuitable individuals. Although most people realize that simultaneous interpretation is a highly skilled task, they may not realize that the skills needed for translation of technical documents are equally great, if different. In one process an international organization recruited as a translator a young man whom they met while he was working in a bar. His English was indeed excellent, but his knowledge of constitutional

Box 26. Translating the language of constitutions

“Convention” has two quite different meanings, one referring (in only a few countries) to an established constitutional practice, and the other (more common) sometimes referring to a constitution-making assembly.

“Proportional representation” usually refers to an electoral system designed to ensure that the votes each party receives are reflected in the number of legislative seats it wins; the phrase is now used in Nepal to refer to the ethnic, religious, community, or caste representativeness of a body.

“Federalism” is a system of government under which power to make and administer laws, collect taxes, and the like is divided between the national government and governments at one or more lower levels—used by some purists to refer only to a country such as the United States, where preexisting units came together to form a new state.

“Penitentiary” means “prison” in the United States, but the word isn’t used in the English of many other jurisdictions, though people there would likely understand it.

law was nonexistent. In Timor-Leste, the secretariat did not realize it needed interpreters until the constituent assembly held its first session and it became evident that the younger members could not follow debates in Portuguese. Interpreters were found, but some were poorly trained, and communications problems among the members existed throughout the process.

Not only is the language of constitutions technical; it is also specific to countries. A camshaft may not vary in its nature from country to country, but legal terms are not necessarily understood in just the same way everywhere, and constitutional terms also have political overtones. While a person who has some knowledge of constitutional concepts in English and some knowledge of French and Latin might be able to translate a constitutional text from Spanish or Portuguese into English with a little help from a dictionary and an online translation program, there will inevitably be significant gaps in his or her understanding of what the terms would mean to a Spanish or Portuguese lawyer. This is a matter of constitutional knowledge as much as of translation; it points to the need to be careful not to make use of terms in any language without knowing what they mean. This serves as another reminder that foreign experts need adequate preparation and briefing. Only a dictionary focused on a particular discipline is likely to include many of the necessary words and phrases. A bilingual dictionary is unlikely to include phrases such as “parliamentary system” or “proportional representation.” This is true particularly because these are concepts, not just labels.

Some concepts have no exact equivalent in some languages. In Nepal the word “democracy” was translated in two ways, each version having political overtones. In Somali, “democracy” seems to be viewed as a foreign term, and there is no clear word for “federalism”; any word for it that does exist is essentially Arabic.

Practical tips

Both local and international actors should focus as soon as possible on whether translation is going to be a problem. Some of the strategies listed below may be helpful. But it must be emphasized that translation is a technical matter; ideally it should no more be carried out by an amateur than technical constitution drafting should be. The first strategy should be to locate the people with the necessary skills and knowledge:

- Recruit a group of good translators and train them in the concepts and the language they will need; this will probably require a short course in constitutions. A well-run course in constitutional and political translation would be a useful contribution to the country’s future development.
- Identify as soon as possible a good bilingual dictionary that focuses on the range of vocabulary likely to be used.
- Prepare a glossary of words in the relevant local languages and the relevant foreign languages; this should not just be a dictionary, but should explain the use of the words, at least in the foreign languages. It is important to address the problem of words with no translation and agree on how to handle them. (This may have its risks; one writer observed that the English phrase “Lord Chancellor” was translated into Turkish as “Lordlar Kamarası Başkanı,” meaning

the “head of the House of Lords” (Anthroscope n.d.). The Lord Chancellor still exists, but is no longer the head of the House of Lords!

- Train the translators and interpreters in the use of the glossary, and insist that they use it.
- Emphasize the importance of always using the same words for the same concepts, resisting any temptation to sacrifice accuracy for elegance. Resist also the urge to use “politically correct” terms if these were not used in the original—for example, it is not proper to use the word “gender” when translating into English instead of “sex” just because this is the United Nations’ favored word. This is particularly important when drafting a legal text as opposed to a piece of political analysis.
- Obtain a bilingual version of the existing or most relevant previous constitution, especially if there is what is professionally thought to be a good translation, and insist that translators consult this when translating a new draft.
- Try to persuade translators not to adopt dying usages in other languages; for example, modern drafters in English are moving away from “shall” to indicate obligation (a word that modern nonlawyers would read as a statement of what will happen in the future) and toward using “must” or some other clear word of obligation. However, when translating into the local language, it is perhaps not a good idea for international actors to try to “improve” local usages, though some education about the existence of alternatives might be permissible.
- Establish cooperation among organizations so that only one translation needs to be prepared for each new document.
- Explain the problem to foreign experts and insist that they do not use obscure words in their presentations and written documents—there is no point if the words, when translated, will be nonsensical.
- Ask speakers in a foreign language to discuss their topics with the interpreters in advance, so that the latter can ask for guidance on meaning and be forewarned about possible difficulties.
- Discourage foreign experts from asking for complex writings to be translated, thus taking up the valuable time of translators to produce something that is unlikely to be read.
- Consider using a commercial translation agency; in Iraq it proved possible for documents to be sent to agencies in a different time zone and for translations of fairly short documents to be made overnight. This, however, has the obvious shortcoming that it bypasses local workers and does not contribute to the development of their skills—and quality control may be a problem.

2.3.10 Security

Today, many conflicts end in stalemate, and the constitutional process is one of negotiation among previously warring factions. Spoilers may remain outside the process and pose serious threats. Managers have to face the possibility, often quite real, that constitution-related activities will be disrupted by violence. In Iraq and Somalia constitutional commissioners were murdered and in Afghanistan rockets were launched in an attempt to hit the tent of the Constitutional Loya Jirga. Security procedures need to be developed to suit the context and all constitution-makers,

staff members and those participating in the process should be briefed about them, such as what do to in case an armed intruder enters the constitution-making area or a vehicle is attacked.

Security is also essential to guarantee that a participatory process protects the rights to freedom of speech and assembly as well as personal security. In Zimbabwe [ongoing process] people participating in a public consultation meeting were beat up and even arrested for observing the process. Managers must determine the level of security needed to safeguard the process. In postconflict contexts in particular, official security forces may not be trusted; private security companies (even international ones) may be required (though their record has not always been good). And if there is a severe shortage of local security options, the international community may play a role. In insecure environments, constitution-makers or others may demand excessive security protection. Constitution-making venues of all types (for public consultation as well as deliberations) must be carefully selected to avoid security risks. It may be necessary to decide the context is so volatile that public consultation and travel must be limited.

Constitution-makers have addressed the issue of security in different ways. In Eritrea, management went directly to the heads of the military and negotiated with them for security for all aspects of the process. In Albania, local police and constabulary forces were enough to counter threats of violence. In Afghanistan [2004], the army checked every car entering the constitution-making area for bombs, perhaps now a common post-9/11 practice. Managers should be specific with security providers about their needs, and enter into a written agreement about such issues and how many security officials will cover each event and what they will be expected to do.

Handling security requires more creative solutions when the police or the military may have committed human rights abuses, may represent a particular interest and be considered biased, or may be viewed as poorly trained. In some contexts, police or other officials may be an impediment to public participation; in Kenya [2005] the police were asked to keep out of public consultation meetings because people feared to speak openly in their presence. Commercial security firms may sometimes be used instead of the police, either because of the inadequacy of the latter or because of their perceived loyalties.

The international community has helped provide security. These efforts have ranged from United Nations peacekeepers or other security forces providing security at constitution-making events or meetings to their providing security information. The international security providers should work in close coordination with the national actors so that no steps are taken that will undermine the process.

Outreach teams and field offices will need communications systems so that they can be in touch with their base. When the United Nations is involved, it judges security situations on a scale and takes corresponding precautions, including sometimes prohibiting United Nations employees or consultants from traveling by anything other than a United Nations vehicle, and barring them from going to certain places.

2.3.11 The media

“Media” refers to the printed press, radio, and television. The term now also includes the Internet, as well as short messaging services for mobile devices. The media play two key roles: informing and educating the public about the process (see part 2.2.2 for examples) and playing a traditional “watchdog” function, whereby they investigate and assess whether the process is being properly conducted. (For tips on how the media can do this effectively, see part 4.1.) These two functions can cause tensions between the constitution-makers and the media.

On the one hand, media outlets cannot always be relied upon to report the news in a neutral fashion. In many countries they are owned by one of the major political forces, such as the state, a political party, even politically active individuals, or a major economic interest. These media outlets often report stories that promote their own concerns and interests, which could be biased, or at least decline to publish or heavily edit “unfavorable” matter. Even where media diversity exists, journalists may lack experience and fail to report on important matters, or may misinform the public about constitutional issues or the constitutional process. In some countries, because journalists are poorly paid they may want to be paid for printing stories. Even when journalists are well trained and experienced they may still fail to report on issues of substance because they are looking for stories that are sensational.

On the other hand, the media can become frustrated by the failure of constitution-makers to provide them with access and information about the process and the constitutional issues at hand. In some cases, media outlets have complained that the process was being conducted in secret. Constitution-makers have failed to provide the media with regular press releases or briefings, clear and accurate information, or guidelines about access to proceedings or information. These and other tensions have led to negative reporting in the media and the lowering of the credibility of the process.

The media strategy

Developing a media strategy (i.e., a strategy to communicate with the people as widely as possible by using radio, television, newspapers, the Internet, or social media technologies) can reduce the tensions between constitution-makers and media actors, and ideally ensure that the media is used to inform and educate the public and encourage its engagement in the process. Components of a media strategy may include:

- identifying key media outlets, bloggers, methods such as Twitter and Facebook, or newly emerging media innovations that can be used to reach the people (see box 22 on how Iceland is using the media to reach the people);
- organizing regular briefings for the media or bloggers, etc.;
- distributing regular press releases that are clear and accurate;
- organizing training for the media about key aspects of the process;

- recommending a suitable spokesperson for the process, and training him or her;
- hiring a dedicated staff to coordinate with the media and communicating important information about upcoming events or new developments;
- having the leaders of the process be as accessible as possible to the media, and attending public events as often as possible;
- issuing regular press releases that highlight newsworthy stories and summarize essential facts;
- providing sample interview questions to journalists in advance of interviews with members of the media, particularly in countries where media development is in its infancy;
- inviting journalists to attend internal meetings (in South Africa, journalists were welcome to attend nearly all of the administration and management meetings, which promoted transparency);
- developing alternatives to state controlled media outlets (e.g., distributing shortwave radios); and
- developing rules regarding media access.

Developing rules regarding media access

Ensuring media access at appropriate stages of the process can promote accountability, transparency, the public's right to information, and the people's right to political participation. At the same time, media access needs to be managed. There should be a presumption of access unless there is a good reason to exclude the media. The extent of access at any particular time will depend on a range of issues, including the stage of the process and the nature of the work being carried out.

It would be expected that the media will have access to the public deliberations and debates of a constitution-making body. However, some deliberations are best held in closed sessions. For example, it may be helpful to ban television coverage at certain stages where such coverage might encourage the "grandstanding" of members for political gain and discourage consensus building and compromise.

The rules concerning media access should adhere to international standards and to any local legislation that defines the types of information to which the public has a right of access from their public institutions.

It may be useful to meet with key media professionals to get feedback on the rules, explain them, and answer questions. To promote openness, a small handbook for the media could be developed to inform them about:

- the constitution-making body and the process;
- times of press conferences and briefings;
- where relevant information can be found (e.g., the official website for the process);

- what access the media will have, and at which stage of the process;
- how, when, and where members of the media will be accredited and be given security clearances if required; and
- whom to turn to with questions, complaints, or requests for assistance about access or accreditation.

2.3.12 “Managing” relationships with the international community

Who is the “international community” in a constitution-making process?

For the purposes of this handbook, the “international community” is a collective term that refers to the broad range of countries and other international actors that may influence, directly or indirectly, a constitution-making process. The international community is not a homogenous group and it does not represent a single policy or viewpoint. There are at least six main categories of international actors that may make up the international community in any postconflict context:

- International, regional, and multilateral organizations, such as the United Nations, the African Union, the European Union, the League of Arab States, and the South Pacific Forum, may initiate, or at times lead, the constitution-making process or provide political legitimacy and legal authority—for example by passing resolutions in support of the process. They may also deploy missions to support the process, provide special representatives to help out, and provide funds.
- International agencies, such as United Nations agencies—most often the United Nations Development Programme; the United Nations Development Fund for Women; the United Nations Children’s Fund; and the Office of the United Nations High Commissioner for Human Rights—or international financial institutions, may provide expertise and assistance programs and may also serve as donors.
- Individual countries may have a direct interest in the process and provide diplomatic influence or skills, technical assistance, or resources. They may be from the region or beyond it; Australia (Australian Agency for International Development), Canada, the Scandinavian countries, Switzerland, the United Kingdom (Department for International Development), and the United States (especially through the Office of Transition Initiatives of the United States Agency for International Development) often play this role.
- International NGOs may provide expertise and resources or run programs related to the constitution-making process.
- Sometimes, essentially domestic organizations from one country take an interest in another

country's constitution-making affairs. They do not tend to interact with other international organizations, and may be secretive. For example, it is clear that churches from the United States were funding parts of the “No” side in the Kenyan 2010 constitutional campaign (primarily because of the abortion issue).

- Individual advisors are often provided and remunerated by a particular international institution or government but generally do not represent them. (For more on management of foreign advisors, see part 2.3.6, and for more on roles played by constitutional experts—a specialist category of foreign advisor—see part 3.4.9.)

The interests and roles of the international community

Historically, countries have made their own constitutions. For many years law was considered to be largely irrelevant to development, and the United Nations, donor agencies, and other international actors were concerned with the latter. Now any developing country that wants to make or review a constitution is likely to find itself drowning in a positive alphabet soup of United Nations and aid agencies as well as international NGOs that wish to engage in the process. There can often be pressure on constitution-making processes to accept support from the international community (e.g., limited domestic funding for constitution-making processes in postconflict countries makes donor funds attractive—issues discussed further under the next subheading—as does limited availability of expertise in respect of offers of foreign advisors, as discussed in part 2.3.6). But acceptance of foreign funds and advisors often comes together with pressures to meet particular interests on the part of the international community offering the assistance or cumbersome financial management requirements.

Where the international actors are offering support to the process, they may do so for a variety of reasons. Their interests may include promoting rights, democracy, or international standards, preventing terrorism, improving regional or national security, preserving or expanding business or natural resource interests, or ensuring that the new system of government is similar to that of their own countries. At times these interests will coincide with those of the constitution-makers and at other times they will conflict with them. For example, the international community might attempt to keep references to Sharia law out of a constitution in an Islamic country because it believes that such law clashes with human rights.

The international community has exerted substantial pressure in favor of particular outcomes in many processes—most notably in Bosnia-Herzegovina and Iraq. The United Nations has also played a key role, often in partnership with other major actors, in countries such as Afghanistan, Cambodia, Namibia, and Timor-Leste. In other contexts (such as Peru and Sudan), regional associations have taken the lead in negotiating peace and also in shaping the constitutional process. The United States in Afghanistan and Iraq significantly shaped the processes and influenced the contents of the constitutions.

Some international actors may emphasize empowering constitution-makers to design and

implement their own processes, but others become involved in constitution-making primarily to advance their own interests. Their interests can be advanced through involvement in the initial negotiation about the design of the process, the provision of experts or technical assistance and resources, the use of incentives, the application of political pressure, lobbying, controlling the flow of resources to the process, or even threatening to use or using military intervention or action. It is also worth remembering that even such international actors as United Nations agencies and international NGOs can seek involvement in a constitution-making process more out of self-interest than out of a true desire to assist the process. International NGOs and United Nations agencies have to justify their existence; they constantly have to develop projects to raise funds, and if they see the opportunity of getting project funding because of their involvement in a “significant” constitution-making process, they will rarely decide that they are either not needed or not the most relevant body to help the process.

The international community also plays other important roles in constitution-making processes, as in various cases of mediation to end a conflict through constitutional means rather than arms. At times the international community may even create the conditions for the process to proceed, as in Somalia where the United Nations enabled the constitution-makers to be based in Djibouti so they could do their work in a secure environment.

Some constitution-making processes, especially those connected to peace processes intended to end significant conflicts, can attract heavy involvement from regional bodies, United Nations agencies, international NGOs, and embassies, some offering support to the constitution-making process, some to the peace process, some providing humanitarian or development assistance, and almost all monitoring the situation. All will need national staff of one kind or another, and will usually pay higher salaries or fees than local institutions, such as constitution-making bodies. As a result, they often lure the best-qualified national actors into working for them—sometimes taking them from the constitution-making bodies, thereby undermining local capacity (and sometimes making it more necessary for constitution-making bodies to rely on foreign advisors). Such problems are not readily resolved, though they have sometimes been helped a little where donors have been persuaded to supplement salaries of national staff, to make their conditions of employment more attractive.

Donor funding to the process

The significance of the extent of donor funding in support of constitution-making processes varies greatly, from situations where a single donor provides small amounts of funding targeted to support a particular activity to others where one or more donors together fund virtually all aspects of the process. Funding the entire process tends to occur mostly in situations where international community actors are not so much donors to the process as they are leaders of a political transition process in one way or another (e.g., in Cambodia [1993], Bosnia-Herzegovina [1995], Timor-Leste [2002], Afghanistan [2004], Iraq [2005], and Somalia [ongoing process]).

There are other situations in which limited availability of domestic funds results in heavy

reliance on donors even in processes initiated and run by domestic actors. Even where the donors are not pursuing their own political or strategic interests, such funding is usually subject to conditions about use of democratic and transparent mechanisms, financial management and reporting procedures, regular meetings with the embassy, and perhaps the dominating presence of foreign advisors supplied by the donor country. Results of such arrangements can include widespread suspicion in the host country of foreign interference. Even in the more common situations where donor funds merely supplement significant levels of domestic funding for the process, such perceptions can arise. A perception of foreign interference can undermine any sense of national ownership, and damage the legitimacy of the process and perhaps of the constitution it produces.

Such dangers might be reduced by constitution-makers releasing regular media statements about the roles of donors, and the extent of conditions of engagement and reporting requirements, emphasizing both that these are normal aspects of donor funding arrangements and that the donors play no role in determining the agenda of constitutional issues or the options for contents of the constitution that are being considered.

There are also quite different situations where donor funds may be needed for a process to operate but where donors may be reluctant to become involved, because of poor records of effective and accountable spending by a government, or because prospects for peace and security seem poor. In such circumstances, entering into a constitution-making process may be seen as a sign of new beginnings, which may provide opportunities for those involved in the development of the process to work closely with prospective donors to encourage an interest in and understanding of the new possibilities.

Other problems can be experienced in processes either where there is a need to rely on numerous donor inputs, or where the international community interest in the process is so great that there are pressures from many sources to accept technical and other forms of support (or both, as has been the case in Nepal [ongoing process]). In such circumstances there may be considerable overlap in what is being offered by different donors, and managing the proposals from and various conditions and reporting requirements demanded by them can be an extremely onerous task for constitution-makers to manage. Constitution-making bodies that are overwhelmed by offers may be tempted to reject all assistance, or to pretend to accept advice or other forms of assistance but then ignore it. It will be more productive to determine what is needed through the strategic planning process, ask for what is needed, carefully assess what is offered, and reject (politely but firmly) what is not helpful. Staff members put in charge of interacting with the international community should have knowledge and experience in working with aid agencies, embassies, and international NGOs.

Sometimes such difficulties are responded to by efforts to bring some coordination into dealings with the donors. Planning meetings are held with key donors. If this occurs first at an early stage, when the process is being created, early versions of a strategic plan and budget for the process can be presented to the donors, and they can be requested to consult among themselves

Box 27. Establishment of a donor group: Afghanistan [2004]

In Afghanistan, the United Nations Assistance Mission to Afghanistan established a donor group. Although the constitution-making exercise was considered an important benchmark in the political transition process, donors were initially reluctant to fund the process because they perceived it as poorly planned. They felt that previous contributions to hold the Emergency Loya Jirga had not been properly accounted for and similar problems would arise in the constitution-making process. Some donors also did not realize the centrality of the constitution-making process to the political transition and what a complex and expensive undertaking it would be. International constitutional experts, with approval from the leaders of the process, met with individual donors to urge their support for the process.

The United Nations Assistance Mission, in partnership with the head of the Afghan secretariat, then called the donors together to discuss how the process advanced the Bonn Agreement, the details of the strategic plan, the budget, and the role the United Nations would play to ensure proper implementation as well as reporting and financial accounting for donor funds. Through these efforts, the process became fully funded. The United States, however, opted to channel its support directly to the Afghan secretariat. It provided a financial advisor to the secretariat who worked with a national counterpart to establish financial systems and to meet reporting requirements.

and with the constitution-makers and agree on the aspects of the process they will fund or otherwise support, thereby reducing overlap and duplication, and establishing a single mechanism for dealing with donors collectively. Such a mechanism can be used on an ongoing basis, for briefing the donors on developments, and even as a forum where financial reporting and other aspects of accountability are handled.

In some processes, memoranda of understanding about the terms of assistance between a donor and a constitution-making body have been developed, defining assistance to be provided by agreed dates and the responsibilities and duties of each party. For example, if an international organization agrees to lend cars to the process, it should be clear who will maintain the vehicles, who will pay for the fuel, when the cars will arrive, and if (and if so when) they will need to be returned. The memorandum ensures that expectations are clear, and is useful for reference when problems or disagreements arise.

Donors should be encouraged to contribute to the entire budget rather than pick and choose which activities to fund. This will discourage donors from funding only what they might regard as the more attractive civic education or public consultation activities and ignoring other essential costs, such as utilities, computers, rent, and the like.

Donors often have a limited understanding of what is involved in a constitution-making process—particularly the complexities, stages, and costs of participatory constitution-making processes, and the ways in which they may contribute to peacebuilding and transition. Donors tend to be more familiar with the goals and modalities of elections, and as a result are often ready to provide substantial support for elections seen as part of a transition or democratic consolidation. In such cases it may be important for leaders of the constitution-making process, as well as local political leaders, and perhaps friends of the country in question in the international community, to spend time with donor country representatives to explain the importance of the process, its role in peacebuilding, and the plan and costs for the process.

2.3.13 Making the rules of procedure and decision-making—when and who?

An existing constitution, a law, or a peace agreement may set the general course of the process. But detailed rules will be needed about procedures for the various bodies. They will cover, in particular, public participation, management (including financial management), and decision-making.

Rules will be needed especially for a constituent assembly; even the regular legislature may need some special rules for making a constitution, different from its regular rules of procedure. Smaller bodies, such as constitutional commissions, may not have such complex sets of rules, but will still need rules on matters such as how it makes decisions, finances, and how many members must be present to make up a quorum for a meeting.

Codes of conduct will also likely be drawn up: these may not be “laws” in the sense that breaking them is a crime, but they set down ideas of “proper” conduct—and members or staff who disobey may be liable to removal or disciplinary action.

People actively involved in a constitution-making process may have little experience of similar activities. Rules need to be clear and detailed to prevent confusion.

Who makes the rules?

If there is resistance to the constitution-making process on the part of government and the existing ruling groups, it may be wise to try to insist that the reviewing bodies can make their own rules (within reasonable limits). But existing rules of financial probity, covering audits, procurement, and so on, may be appropriately applied to the constitution-making bodies—which should not be held to a lower standard than are existing governmental bodies. For a body that is set up under an existing law (such as a committee of inquiry), there will probably be well-established rules of procedure, though they may not fit this sort of task perfectly.

It is common for a constituent assembly to be given power to adopt its own rules. This reflects

the common practice for legislatures; the right to adopt their own rules was a victory for parliaments asserting themselves against monarchies. The dilemma is that a truly democratic constituent assembly (more democratic than the country's legislature perhaps) ought to decide on its rules, but may include many people who have little experience. The constitution-making road map could set out guidelines for the rules, but this does not guarantee that the rules will be simple and clear.

Adopting the rules can be time-consuming. In Bolivia it took five months to decide on the rules of procedure. In Timor-Leste, where the Constituent Assembly had ninety days to adopt a constitution, the first two to three weeks were taken up by the adoption of rules of procedure. The issue that has often delayed rule-adoption processes (including Bolivia's) has been that of the decision-making majority: should adoption of the constitution require a two-thirds, a three-quarters, or even a simple majority? (In some countries, including Nepal, this percentage is prescribed by the existing constitution or legal system.)

If the constituent assembly is to make its own rules, it will probably do so through a committee; it is not realistic for a large body to draft rules. Where political parties are dominant, they will probably insist on dominating the rule-making committee, and also on proportionate representation of parties on that committee. But if possible, the committee should include representatives from various groups in the country, and it should not comprise only lawyers and people with parliamentary experience. This way, all members can have a fair chance to participate.

In many countries it is possible for a body set up by law to be given the power to make rules that have the force of law—called “subordinate” or “subsidiary” legislation in some systems. The steering committee of a constituent assembly or the chair of a constitutional commission might be given such a power. In many countries such rules would have to be reported to the legislature, which might have the power to negate them by a resolution.

When a process is set up by a peace agreement or a roundtable, it is unlikely that the same body will prescribe detailed rules for any of the organs of the process. But if a legislature designs the process, it may also design the rules.

If a decision-making body is to make its own rules, clearly these cannot be prepared in advance. Some provisional rules will be necessary to cover the period until the final rules are ready. This also means that members cannot know the rules well in advance. In Afghanistan it has been suggested that late release of rules for the Emergency Loya Jirga that adopted a provisional constitutional arrangement created problems.

Sources for rules

For a small body, rules about meetings can be based on common practices concerning

Box 28. Who makes the rules?

In Bolivia, India, and Timor-Leste, the constituent assembly made its own rules of procedure.

In Kenya the rules for the national constitutional conference were prepared, as required by the Constitution of Kenya Review Act, by the commission that prepared the draft constitution and provided the constituent assembly's secretariat.

In the revived Kenya process, the committee of experts made its own rules, except that the quorum was prescribed by law, as was the obligation to work for consensus, and failing that, to decide by a two-thirds majority.

meetings—the role of the chair, how to indicate a wish to speak, time limits, quorums, voting procedures, and so on.

Rules about finance can be usually based on those used for other public bodies, such as audit and procurement rules, even if these are not directly applicable.

Many constitution-making bodies will need rules and procedures that address processes not commonly addressed by public bodies, such as civic education.

In a large body such as a constituent assembly, members who are used to parliamentary procedure will often assume that the rules should be based on the rules of parliament. (This is how Bangladesh managed to adopt its rules in two days.) But there are good reasons why this may not be appropriate; a constituent assembly is different from an ordinary legislature in many ways, as set out in part 3.1.2. A constitution-making body typically must build consensus and the parliamentary rules may not be well suited for this task.

What are rules for?

The functions of rules about finance and about procedures for civic education and the like are perhaps fairly obvious. But it may be helpful to reflect briefly on the functions of rules that concern discussion and decision-making. It is suggested that their functions include ensuring that:

- consensus is built where appropriate;
- decisions are made—and are made neither too hastily nor in too protracted a manner;
- it is clear what has been decided, and why;
- decisions are made on the basis of the best available input in terms of factual analysis and reasoning;
- irrelevant matters are not taken into account;
- all members are able to participate;

- each group within the assembly or the country is able to participate (this may be a particularly delicate issue when a country is made up of different elements coming together—as was the case in India, where the constitutional advisor looked at the procedures that had been used in the Australia, Canada and the United States to ensure participation of their provinces or states);
- all members feel that they have had a fair opportunity;
- the dignity of the institution is upheld;
- the dignity of members is protected;
- publicity is achieved when appropriate, and secrecy maintained when appropriate;
- a good record can be and is kept of decisions and processes;
- outside participation is possible when appropriate; and
- irrelevant pressures are excluded.

2.3.14 Dealing with problems in the process

The path of constitution-making rarely runs smoothly. Indeed, only around 50 percent of processes result in the adoption of a new constitution.

We can look at these problems from several perspectives: Why? How? And (perhaps) when? We should also recognize that not every “failure” means that the process has been a waste of time, and that there may even be situations in which “failure” is not the right word at all for a process that does not end in a new constitution. For example, it may be possible to reach a settlement of the issues dividing a country by nonconstitutional means.

Why processes come to a halt

Processes come to a halt for a variety of reasons:

- Government officials or others in powerful positions are simply opposed to a new constitution.
- It has proved impossible to reach agreement on contentious issues between parties.
- It proves impossible to produce a document that the people will accept.
- Those involved have such a personal stake in extending the process that they are able to drag it out until there is a new government, or the money runs out.
- War or an insurgency commences or resumes.
- It is decided that other approaches—such as a gradual process of lawmaking or amendment—can achieve the objectives.

The last is more likely to be a consequence of “failure” rather than a cause—it will probably result from one of the other “whys” on this list.

How processes come to a halt

Here we are concerned with the mechanisms or processes by which the constitution-making

process grinds, or shudders, to a halt.

- A document is rejected in a referendum (a process that may be genuine popular reaction or the result of political, personal, or ethnic manipulation).
- The money runs out.
- Politicians refuse to play a constructive part in the process.
- Other things (such as a constitutional assembly needing to act in its other role as legislature, political wrangling, wars, or natural calamities) delay matters so that patience is exhausted, deadlines are missed, money runs out, and so forth.
- Those with the power to do so call a halt to the process by, for example, disbanding a commission.
- An interim constitution is amended to become a permanent or long-lasting document.
- An election removes from power those with an interest in continuing the process.
- A coup has the same result.
- The courts are used to declare that a process is inadequate or a draft constitution does not meet certain standards or requirements.

When processes come to a halt

This may happen at almost any stage (and the stages vary from process to process).

- In Pakistan the constituent assembly met only a few times and adopted a resolution setting forth its objectives (1949), but did little else because of political instability, and was ultimately dismissed by the head of state (1954).
- In Israel the constituent assembly turned itself into the parliament (Knesset) and put the constitution-making on hold because of the invasion by the Arab states immediately after the declaration of the state of Israel. It later proceeded to make a constitutional structure by passing different pieces of legislation over the years.
- In Nepal in 1951 a constituent assembly was never set up; the interim constitution was amended so that it provided for all that was necessary to run the country, and it lasted for eight years—because the king lost his commitment to a process of constitution-making that involved the people.
- In Kenya, a court, in a decision rendered immediately after the national constitutional conference had adopted a draft, which was supposed to go to parliament for enactment or rejection as a whole, held that the process used to adopt the draft constitution was invalid, and that there must at least be a referendum. This gave the government the chance to take over and amend the draft—but it was unable to win the subsequent referendum [2005].
- In several countries (e.g., Zimbabwe [2000]) a constitution has been completed and then rejected in a referendum.
- In Nigeria in 1966 a conference of “leaders of thought,” set up to discuss a new constitution,

was aborted within months because of the threatened, and ultimately real, attempt of part of the country to secede, and the consequent three-year civil war.

- In Eritrea [1997], the constitution was completed, but it required the signature of the president to come into effect (which is true in many cases). The president failed to sign it for some time.

So sometimes processes have been aborted when little progress has been made, while in other cases progress was halted when there was already a draft, or even a complete constitution ready to be put into operation. Sometimes it is not possible to avoid the abortion of the process; the cross-references indicated above will lead the reader to discussions of preventive or remedial measures. And in part 2.1.10 we discuss briefly issues concerning restarting such stalled or aborted processes.

It is beyond the scope of this handbook to discuss one of the most common types of failure of constitution-making processes—that is, the failure to bring the constitution fully into effect. This may be an almost wholesale failure to do anything that the government finds inconvenient, as was the situation in Eritrea even after the president belatedly signed the constitution into law. (This was attributed by some to a failure to include a date for its becoming operative, but others believe this would have made no difference.)

More often, the problem arises from the failure to pass laws that in theory the constitution requires. In Papua New Guinea, although the constitution, passed in 1975, requires the passing of an “organic law on the integrity of political parties,” no such law was passed until 2001.

Most implementation failures result from corruption or incompetence on the part of courts and parliaments, a lack of resources, or the failure of the people to make active use of the implementation provisions that do exist. No constitution is self-executing; each one requires the people to use their votes wisely, to go to court, to complain or to petition, and to refuse to participate in the subversion of the constitution.

Finally, we should note another type of failure: one in which a constitution is adopted and comes into force and then is overtaken by a coup or a civil war or some similar cataclysmic event. These events likely lead to the constitution being consigned to the dust-heap, whether by being suspended or abrogated or being so totally disregarded that it might as well not exist. Nigeria amended its 1960 independence constitution in 1963. There was a coup in 1966; various attempts were made to produce a new constitution, which were largely thwarted by a civil war and other coups until a new constitution was adopted in 1979; this was overthrown by a coup in 1983; a new constitution was adopted in 1989; this was ended by a coup, and yet another constitution was adopted in 1999. Fiji’s 1997 constitution has had the novel experience of being “couped” three times: in 2000, then restored as the result of a court case in 2001; modified and partly suspended by a supposedly “proconstitution” coup in 2006; and abrogated as a response to a “constitution-restoring” court decision in 2009.

2.4 The agenda of constitutional issues and generating ideas on the issues

2.4.1 Determining the agenda of constitutional issues

Deciding on the issues that might be included in a new or revised constitution is an important task in many constitution-making processes. Determining the agenda is a separate task from deciding what the constitution will say about any given issue on the agenda. The agenda can be created in many ways, and it usually changes in the course of a process.

The importance of the agenda

How the agenda is determined can influence both the way a process develops and the shape of the final constitution:

- When the agenda is controlled by a group in power, and is used as part of an effort to control the contents of the constitution, the agenda itself can be divisive.
- In some processes where the agenda has been decided consultatively, this has contributed to building consensus on the way forward for a previously divided country.
- Decisions on the agenda can influence other aspects of the process, including:
 - decisions on subjects to be included in public awareness and public consultation efforts;
 - the subjects to be considered by committees of a constituent assembly;
 - the structure of debate in the main constitution-making bodies; and
 - the contents of the final constitution.

What are constitutional issues?

The factors that shape the agenda of issues regarded as constitutional in any particular process can be divided into external and internal ones. External factors include:

- historical and cultural traditions (views on constitutions and institutions created by them can depend on whether a country's colonial links were to France, Spain, Portugal, or the United Kingdom);
- the constitution's role in defining the state so as to ensure international recognition;
- treaties and conventions on human rights and their protection; and
- donor pressure for good governance and accountability, which can make independent institutions to combat corruption into constitutional issues.

Internal factors include:

- ideas about the ideal length of a constitution—it can be no more than a short statement of

principles in some countries, while others accept long and detailed constitutions;

- history of the operation of constitutions in a country; and
- the local issues that contribute to the origins of a constitution-making process, especially in a situation of peacebuilding or a transition from authoritarian rule.

There is no legal limit to the issues that can be addressed in a constitution. As a result, the agenda that could be debated as part of a constitution-making process is potentially unlimited. The main restrictions are practical. An open-ended agenda could contribute to pressures for a long and detailed constitution, covering many general matters that might better be handled later by laws and policies. Such a constitution can be difficult to implement, and can raise unrealistic expectations about the extent of the issues that can be dealt with by a constitution.

Public awareness programs can help people better understand the nature of constitutional issues and have realistic expectations about what a constitution can do.

Deciding the agenda in advance of the constitution-making process

There are several ways in which important aspects of the agenda can be decided in advance of the constitution-making process:

- **Interim constitutions:** Interim constitutions can influence the agenda in at least two main ways. First, in a postconflict or transitional situation (e.g., South Africa [1996], Nepal [ongoing process]), an interim constitution usually provides a new and more inclusive or just system of government intended to operate until a final constitution is adopted. This can provide a new set of possibilities that may heavily influence the agenda. Second, an interim constitution can define principles and features to be included in the final constitution (as in South Africa). In that way it can determine much of the agenda in advance.
- **Peace agreements:** Peace agreements can often play a similar role to that of interim constitutions in setting agendas of constitutional issues in advance of the process.
- **Negotiations in advance of a process:** Governments reluctantly engaging in constitution-making processes are sometimes forced into public consultation with those demanding change. In addition to addressing the design of the process, such talks often result in identifying and clarifying the issues that will need to be addressed during the process. In Kenya, years of pressure for reform resulted in several conferences in 1998 among the government, the opposition, and civil society.
- **Other documents establishing a process:** The law or other legal documents establishing a process often define some of the issues. For example, the 1972 terms of reference set by the colonial legislature for Papua New Guinea's Constitutional Planning Committee, the 1988 statute establishing the Uganda Constitutional Commission, and the 2000 statute establishing the Constitution of Kenya Review Commission all identified key constitutional issues to be considered in the processes.
- **Authoritarian regimes:** Authoritarian regimes sometimes attempt to control processes by

restricting the issues that can be considered. In preparing for some francophone African national conferences in the 1990s, rulers of one-party systems tried to restrict consideration of options for more democratic systems. In multiethnic Nigeria in the 1970s, the military dictator, General Gowon, tried to limit political damage from the constitution-making process by eliminating major divisive issues from the agenda. He directed a constitutional committee to consider all territorial power-sharing possibilities other than unitary or confederal arrangements.

- **Political party “victorious” after conflict:** In a few postconflict constitution-making processes, a victorious political party that dominates a deliberative body such as a constituent assembly can regard itself as authorized to determine the agenda. This occurred in Timor-Leste [2002], when the Fretilin party used its numbers to set the agenda for the elected constituent assembly by centering almost all debate on a draft constitution it had prepared previously, based on the constitution of Mozambique (another former Portuguese colony).

Setting the agenda in advance in these various ways can mean that it is decided by a narrow range of interests. The majority of groups and the mass of the people can be excluded. There are situations where this may be necessary (for example, in the transition from apartheid in South Africa). In other situations, determining the agenda in advance can be an antidemocratic aspect of a process, with long-term effects. For example, the sense of exclusion resulting from party domination of the constitutional agenda in Timor-Leste probably contributed to subsequent violent conflict in that country.

Setting the agenda in the course of the process

It is more common for the agenda to emerge during the constitution-making process. This can happen in many ways.

- **Early decisions made by the main constitution-making body:** When a body such as a constitutional commission or parliamentary committee is set up to consult with the people about a new constitution, often one of its first steps is to decide on the main constitutional issues. In Eritrea, for example, the constitutional commission identified what it regarded as the key issues early in the process, and then developed its material for public consultation with the people about those issues.
- **Consulting the people on the agenda—a special stage in the process:** In a few constitution-making processes, there has been a consultative stage of the process aimed at deciding the issues that should be considered. In some cases this has been specially planned. For example, one of the first things the Uganda Constitutional Commission did after it was established in 1989 was to hold a series of thirty-four district seminars of two days each, which were attended by more than twelve hundred people. The twenty-nine major issues identified by the commission during this process became the central agenda of issues for the commission in all its subsequent work. In Kenya, after considerable controversy about the constitution-making process through much of the 1990s, consultative national conferences involving many stakeholders held in 1998 achieved a consensus on both procedure and the agenda (though a

further three years passed before an agreed-upon process could proceed in 2001).

- **A special body:** National conferences held in French-speaking African countries have in several cases defined aspects of the agenda of constitutional issues that have then been dealt with through decisions made by other bodies. (See part 3.1.3.)

The agenda often changes during the process. There can be many reasons for this. For example, public debate on the initial agenda of constitutional issues may result in new issues being identified. In other cases, what were initially treated as many separate issues might be consolidated into a smaller number of related issues. There are also cases in which public consultation and public debate on issues in the early stages of the process make it clear that there is a consensus on how to handle most issues, leaving just a few issues that remain divisive or contentious.

Focusing on the divisive issues

In most constitution-making processes, there will be a few key issues that are the ones most likely to divide people. When the process is expected to contribute to conflict resolution and to build consensus on future directions in a divided country, great care may be needed in identifying and addressing such issues. In several constitution-making processes there has been a special focus on identifying such issues, and special procedures for making decisions about them.

For example, in Uganda [1995], more than three years of public awareness programs and public debates on the many constitutional issues had, by 1992, contributed to emergence of consensus on most issues. About ten specific issues had emerged as still divisive. They were given special attention through a process intended to resolve divisive issues. (See part 2.5.2.)

2.4.2 Generating ideas on the constitutional issues

A constitutional review may cover a limited range of issues (perhaps designed, for example, to address the previous exclusion of certain sections of the community). But if a full constitutional review is established, and especially if there is extensive public participation, it is likely that many other issues may be raised. Some people will have clear ideas of what they want in the constitution; others will have a sense of dissatisfaction, but no clear idea of what might meet their needs.

Analyzing the defects in the existing constitution

At some point it is wise—indeed, essential—to identify what is wrong with the existing constitution; a constitution-maker should no more try to fix a constitution without understanding what is wrong than a doctor should try to cure a patient without diagnosing the illness. Even if the agenda of issues is short, identifying the problem is important.

Political discourse may be presented in terms of the constitutional problems, but may be on a superficial level or be based on a misunderstanding of the constitution. Political imperatives may prevent any detailed diagnosis before a constitutional review is set up, but the design of the process should build in opportunities for such diagnoses, and a procedure for ensuring that these diagnoses are taken into account when designing the new document.

Dissatisfaction with the existing constitution may flow from various sources, internal or external. In some countries there is a positive commitment to an existing constitutional document, and people may oppose changing it, though not necessarily on rational grounds.

Not all perceptions are grounded in reality (though sometimes it is the perception that matters). Examples of misdiagnosis have included indigenous Fijians' complaint that the 1997 Fiji constitution did not protect their land rights. In Nepal people have blamed the 1990 constitution for many ills, even though many were the result of abuse of power by kings, acquiescence by political parties, corruption, and incompetence.

What may be wrong with the previous constitution?

Occasionally, the existing constitution is fundamentally unacceptable because of its origin or its content—especially if it enshrines the dominance of a now-defeated group, such as the apartheid constitution in South Africa, replaced by the interim constitution of 1993.

Less all-embracing issues may concern the concentration of power, for example, in the hands of an executive president (what has often been described in Kenya as the “imperial presidency”) or in the hands of the national government in the capital city (as in Nepal), or in the hands of a particular class or ethnic group (again as in Nepal).

A second type of complaint is that although concentration of power was not built in to the constitution, that document permitted the usurpation of power by autocrats. The Weimar constitution in Germany in the 1920s and 1930s was seen as having permitted the rise of Hitler and the Nazis.

People may complain that the constitution fails to control corruption, or offers too many opportunities for corruption. This perhaps underlay the assumptions in Nigeria in the 1960s that constitutional reform was needed—certainly corruption, and also election rigging, were identified as major issues even then. (That Nigeria remains one of the world's most corrupt countries despite repeated constitutional surgery should act as a warning against excessive readiness to blame the constitution.)

Sometimes the complaint is that government is too weak—that what is needed is a strong government. Unfortunately there are plenty of examples of so-called strong governments that are ineffective—and all too many of governments that are too strong. This may be a good diagnosis, but untrammelled power is unlikely to be the cure.

Other complaints may surface once the issue of reform has been aired. Former colonies may feel that their constitution was essentially an imposition by the departing colonial power. Somalis complained that their constitution of 1960 was too Italian or too British in inspiration. In Nepal the 1990 constitution is often criticized because it was not prepared in a way that involved the people. President Johnson Sirleaf of Liberia has called for amendment of the constitution, suggesting that changes introduced in 1986 may have been drafted in something of a hurry in order to be able to return to civilian rule.

It is not the function of this handbook to discuss how any of these problems might be constitutionally cured, or even how they might be accurately diagnosed. The point here is simply to offer a warning about the need for carrying out this operation, and for not taking a superficial approach to diagnosis.

Some cautions

Politics is often not at all logical. Blaming the constitution for the faults of a regime or a group may be easier than pinpointing the real problems, which may be divisive. It may also be that what was wrong with the last constitution cannot be fixed by putting into the new constitution what was missing in the old one; the deficits of the old constitution may have produced a new situation in which simply doing this time what ought to have been done last time is not enough. For example, if the problem was exclusion of a certain group (whether by constitutional provision or by poor implementation), it may not be enough now simply to ensure that the group is included. The group may insist that affirmative action is now needed to bring that group forward from its position behind society as a whole.

Sources of ideas

Historically, sources of constitutional ideas have been limited. The drafters of the United States constitution had at their disposal their knowledge of governance and theory in classical Greece and Rome, their experience under the British monarchy and its institutions developed over many years, and the constitutions of the thirteen original states, as well as a flowering of political writing in the late eighteenth century. They knew what they did not want—a monarchy. But many of the institutions they created had clear origins in the British system.

Modern constitution-makers are in a different situation. Few of them read theorists. One might say that most of the active constitution-makers of the present day have a great deal of information at their fingertips, but not much knowledge. But there is a great deal of literature about how constitutions have worked, and much of the older literature would be still valuable if only people would read it.

Where do or might those in need of constitutional ideas look?

- **International law**

Apart from its appreciation of human rights, international law has little to offer the constitution-maker. But human rights should inform the whole of the constitution. The International Covenant on Civil and Political Rights does commit parties (almost all states) to ensure that every citizen has “the right and the opportunity without distinctions [on the grounds of sex, race, etc.] . . . and without unreasonable restrictions . . . to take part in the conduct of public affairs, directly or through freely chosen representatives [and] to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot” (article 25). But this does not prescribe which system of democratic government, or which electoral system, and hardly touches most aspects of a constitution.

The wide range of treaties on the rights of various sections of the community (women, children, people with disabilities, minorities, indigenous peoples) do not necessarily commit signatory parties to constitutional provisions—states agree to take the measures needed, including laws but also including policies and practices of government. And the provisions of treaties are not necessarily suitable for adoption, as are those in a constitution or a law. But they may provide valuable ideas, and those ideas are not necessarily restricted to the context of the particular treaty. For example, the United Nations Declaration on the Rights of Indigenous Peoples makes use of the concept of “prior informed consent” (not found in other human rights treaties but found in environmental treaties). It is a notion, however, that might be more widely applicable.

Specific groups within society often become knowledgeable about “their” treaty. But they may not understand a constitution so well as they understand the treaty. Nor do international NGOs or United Nations bodies necessarily have a good understanding of constitutions. So the inspiration that may be gained from international law will need to be tempered by some constitutional knowledge.

- **Foreign experience**

Especially since the main period of decolonization, collections of constitutions have become common. And the Internet has made most of the current constitutions of the world, and many of the past, available, especially in English. It is easy to develop a collection of provisions on almost any constitutional topic, and international trade in constitutional ideas is brisk.

A few words of caution are desirable. Legal cutting and pasting in any field is fraught with risks. And legal transplants tend to work differently in different political, cultural, and economic contexts because of differing traditions, expectations, and resources. The wealth of material has made finding provisions almost too easy. In the days when constitution-makers asked themselves “What do we want to have happen, and how do we phrase the constitution to try to make sure that it does?” the outcome may have been more successful than when there is a tendency to say “Country X has this provision; it looks as though it might solve our problem—let’s use it,” even though there may be little understanding about the problem in country X that the provision was intended to address, or about how the constitution is used in

country X, and what has been the effect of the provision in country X. Unfortunately, it is far harder to get access to information about the politics and the law of other countries than it is to get copies of their constitutions.

- **Radical change or what is familiar?**

Sometimes constitution-makers are tempted to stick to what they know, for fear that something new may be unpredictable. There is some logic to this, but if there is a serious need to change a political culture, perhaps something significantly different will be necessary. Again, a change in one aspect of the constitution may have an impact on another aspect—and some provision that is apparently the same as it has always been will then work differently. Changing an electoral system may have a marked effect on parties, and consequently on the legislature and even on government.

On the other hand, deliberately choosing to do something radical may have unpredictable consequences. In 1979 Nigeria decided not to reintroduce a parliamentary system but to introduce the United States system. It has certainly not reproduced the United States in West Africa. What was seen as checks and balances between the head of government and the legislature led one state, when the constitution was young, into a complete deadlock as the legislature refused to approve any member of the state governor's cabinet, and concentrated only on finding reasons to impeach him (as it did).

- **Our customs**

Postcolonial resentment has sometimes led to a search for something indigenous by way of a constitution. Identifying what is genuinely “ours” and will also work in an essentially modern constitutional framework is no simple task. Second chambers with roles for traditional leaders and customary courts are perhaps the most common devices. These may work well, and some have been in existence for many years. Agreeing to include such features in a constitution may not be easy in a truly participatory process. Women may not be happy with male-dominated institutions, and “commoners” may resist the entrenchment of chiefly privilege.

Much of the rhetoric is self-interested. Nnamdi Azikiwe, first Nigeria's governor-general and then its president, argued that it was contrary to African tradition and understanding to have a leader without power, a “bird in a gilded cage,” though he himself came from a community that was acephalous (except to the extent that the colonizers found it expedient to invent chiefs).

This is not to say that inspiration can never be usefully sought from tradition. But the reconciliation between constitution and tradition is rarely easy. One might argue, for example, that a parliamentary system is more akin to some traditional cultures of government because of its reduced stress on one leader and its more collective nature. But coupled with a majoritarian electoral system, it is likely to produce a confrontational, two-party system, which is far from conciliatory.

2.5 Debating and deciding the issues

2.5.1 Procedures and rules for debating and deciding

Rules will be needed especially for a constituent assembly; even the regular legislature may need some special rules for making a constitution, different from its regular rules of procedure. Smaller bodies, such as constitutional commissions, may not have such complex sets of rules, but will still need rules on matters such as how it makes decisions, finances, or how many members must be present to make up a quorum for a meeting.

This section focuses particularly on constituent assemblies, and to some extent on commissions, though the issues are relevant to all bodies that engage in constitution-making tasks.

Major issues

Quorum

A quorum is the number of people who must be present before discussion or a vote can take place. The idea is to prevent minorities from making decisions. Many legislatures have small quorums. Less than 50 percent would seem undesirable for a constituent assembly, which is supposed to be a true mirror of the nation. Uganda had the 50 percent quorum rule, but this proved difficult to achieve, especially as some members were ministers. In Nepal the interim constitution says that for most purposes there must be at least 25 percent of the constituent assembly members present. This is quite low; discussion could begin when only women were present, or only men, or only members of one or two castes or ethnic groups.

At least for a vote, a higher quorum should be required. If there is to be a vote that requires a special majority (two-thirds of the membership is common), then at least that number must be present. But it does mean that debate can have taken place with far fewer members present.

The quorum rule can be a source of delaying tactics. The body should clearly be well attended, but members should not be able to exploit the rule to adjourn debate in order to delay decisions. The chair ought to be able to adjourn the meeting, however, if the numbers present clearly make debate pointless.

The rules for committees could be different. They could also make it possible for the chair or convenor of a committee to decline to allow discussion to begin if, for good reason, no representatives of a particular group were present. But no group should be allowed to hold the committee for ransom by failing to turn up.

The quorum rule alone cannot be relied upon to ensure attendance. Other factors include where the body meets (are there too many distractions?), whether for other reasons the process is

allowed to drag on for too long, and the effectiveness of the chair. There is also the vexed question of attendance allowances. They are not unusual, but must be properly policed or members will simply sign and go away. Publicity attached to attendance may help in some societies.

Speaking rules

Rules must recognize the freedom of speech—of all people. In some parliaments a person must “catch the speaker’s eye”—which may work against the less experienced members, and perhaps especially against women. In some assemblies the procedure has been for members to tell the chair in advance that they wish to speak on an article, and the chair will call on them in the order in which they appear on his or her list (e.g., as in Timor-Leste [2002]). Such an arrangement has the disadvantage that successive speakers do not respond to each other but simply deliver their prepared statements on the topic. Another possibility—drawn from the Kenyan National Constitutional Conference—is to provide each member with a large card on which the member’s enrolment number is printed. This is raised to indicate a wish to speak.

It is absolutely essential that there be a way to limit the length of speeches. The length of permitted speeches will probably be influenced by the size of the deliberating body, and by the stage of the process. In Uganda there was a thirty-minute limit during the initial debate—but the body comprised only 214 members. In Kenya there was a ten-minute limit, but there were 629 members. In Bolivia, during the “Vision of the Country” debate at an early stage in the process, each political group had a maximum of three hours. Committees were given two hours to report to the plenary. In debates on major motions, regional groupings had one hour each. At the decision-making stage when votes were to be taken, each member had no more than ten minutes per section to vote. And to make a motion, only two minutes were allowed.

There is a risk that extended time periods might be given only to political parties, rather than to other interest groups. It would be possible to allow other groups—which might include women, people with disabilities, or minority groups that may cross party lines, according to the particular country’s circumstances—to be given extended time.

The rules of the Indian constituent assembly provided that Hindustani (Urdu or Hindi) or English could be used, but, if the president of the constituent assembly took the view that a member could not express himself or herself in one of those languages, that member could address the constituent assembly in his or her native tongue and a summary could be provided for members in English or Hindustani. In Timor-Leste the official languages of the constituent assembly were Portuguese and the local lingua franca, Tetum, but members could express themselves in English or Indonesian (despite hostility from some to the use of Indonesian, viewed as the language of the oppressors). In Bolivia the rules of the constituent assembly provided that plenary and committee sessions would rely on interpreters and translators so that members could express themselves in their native tongues (article 52). Provisions about sign language could also be explicit.

Notice rules

Rules requiring suitable notice of any issue to be discussed help in ensuring that members do know when they should be present in order to make contributions on issues about which they feel strongly. The Bolivian rules usually required twenty-four-hour notice for documents.

Politeness and decorum rules

Also important are rules that ensure that members are addressed and listened to with respect—that other people do not use insulting language, or speak on their mobile phones in the hall, or read the newspaper or gossip with their neighbors. Rules may become rather complex and intimidating on these points, and care should be taken not to be overly formal. There may be other solutions to some problems; the parliament in Nepal has mobile phone–jamming devices.

Decision-making and voting

The majority by which decisions are to be made can be one of the most difficult aspects of the process (and has in some processes been the reason that rule making takes a long time). Different sorts of decisions may require different majorities. Majorities may be defined in various ways, including:

- A majority of those present and voting (sometimes called a “simple majority”); if fifty people are present, and eighteen vote for a motion and twelve vote against it, the motion is carried, even though this was not a majority of all those present.
- A majority of those present (which means that those who are present but abstain from voting are counted as having voted against); where the issue to be voted upon is whether to amend a draft constitution, this rule makes it difficult for the amendment to be accepted, which may be a desirable provision.
- A majority of all the members, whether present or not, and which means a number greater than 50 percent of all members (sometimes called an “absolute majority”); sometimes care is taken to say that “all the members” does not include any vacant seats.
- At least two-thirds of all the members, whether present or not (often used for constitution-making decisions).
- At least 75 percent of all the members, whether present or not (sometimes used to amend constitutional clauses regarded as being of particularly great significance).

Note that these rules assume the normal pattern in formal decision-making bodies: that all decisions are “binary”—a member votes either “for” or “against.” Even if there are several solutions to a question, the decision-making will be structured so that each one is voted on separately.

It is desirable for all these rules to be spelled out clearly.

A note on the “simple majority” question: on the one hand, the interpretation that it requires

Box 29. What is a simple majority? A debate in the Timor-Leste constituent assembly [2002]

The question was: did this mean just the largest number of those voting—or a majority of those present? The latter would mean that a person who was present but abstained was in effect voting against the motion. Members of the assembly were divided. A foreign expert favored the latter interpretation (Kathlene 1994: 565).

more than half of those present does mean that a motion requires substantial support. But the rule drafters could, and should if this is what they meant, have been specific and said “a majority of those present.” The normal meaning of “simple majority” in English is “a majority of those present and voting.” “Absolute majority” would most likely have meant “a majority of those present”—as a member of the Timor-Leste constituent assembly pointed out. To allow silence to be a vote against does make it easy to abstain. When the issue is whether to amend a draft, it favors the draft.

Clear rules should specify a majority of what: “a majority of those present and voting,” “a majority of those present,” or even “a majority of all members,” making the use of the term “a simple majority” unnecessary—and indeed, it is best avoided. Rules often require that those abstaining must also indicate that they are doing so, and that the numbers abstaining be recorded. Such a rule may act as a disincentive to members abstaining, something that is often a form of abdication of responsibility.

Administrative decisions may often appropriately be made by a simple majority (“a majority of those present and voting”)—but care must be taken if these decisions might disadvantage particular groups. In many constitution-making processes the required majority is set at two-thirds of the entire body. The purpose of such a rule is to give groups within the assembly the incentive to persuade others to support them. It prevents a small minority standing in the way of a new constitution—which may be a consequence of a rule requiring a higher majority.

To require total agreement in every human endeavor is unrealistic. But a number of processes have set “consensus” as the objective—as in the South African process [1996], and also in Kenya [2005] and in Nepal [ongoing process]. “Consensus” presumably means something other than unanimity. Many people claim that seeking consensus was the traditional way of doing things in their culture. As the chair of the Uganda Constitutional Commission and (subsequently) chief justice of Uganda, Benjamin Odoki, notes, an Africa consensus involves “settling disputes by listening to everyone and taking into account all views. It is a painstaking exercise, which is most rewarding in the end because it produces no losers since all are winners, and promotes legitimacy and acceptable decisions” (Odoki 2005). In modern politics, however, consensus is often hard to achieve—even in Africa. In South Africa, the concept of “sufficient consensus”

Box 30. Challenges to participation of women in decision-making bodies

Cultural practices and social expectations often make it hard for women to participate fully in public bodies. One writer (Aili Mari Tripp) says, “Even in parliamentary bodies, women have difficulty being taken seriously, being listened to, and are frequently subjected to humiliating stereotypes and derogatory remarks” (Tripp 2011: 153). In Timor-Leste [2002] a female constituent assembly member raised the issue of domestic violence and was laughed at by many male members. There is also evidence of sexual harassment of women parliamentarians in some countries, including in South Africa (Geisler 2000: 618) and Uganda (Tripp 2001: 153, citing Tamale 1999), and even in Sweden (The Local 2007).

Research shows that male interruption of women speaking is more likely than any other type of harassment. In legislative committees in the United States, “women entered the discussion later, spoke less, took fewer turns, and made fewer interruptions than men” (Kathlene 1994: 565). In developing-country legislatures, parties are often weak, with patronage rather than rules being the governing principle—which makes it hard to fight for fair party procedures for women. These difficulties, which may affect other groups that have been marginalized from public life, should be borne in mind by those who draft rules.

was developed; this meant that if the major parties, representing all the ethnic groups, agreed, the process could move on (but this did exclude some groups). In Nepal, consensus was defined as no vote against a provision in the constitution (regardless of how many abstained). Then there was to be a process to try to achieve agreement (through party leaders), and finally, if this proved impossible, a two-thirds majority of all the members would suffice. Consensus may be easier to achieve in small bodies, such as a commission.

A mechanism to handle deadlocks is almost bound to be required at some point, whether there is formal provision for it in the rules or not. (See part 2.5.2.) At different stages of a process, voting may work in different ways. If a document is being adopted for the first time, it is probable that a particular vote in favor will be required. At some stage, however, a draft already prepared by a particular process may then be presented to another body. There are basically two ways for that draft to be considered: either it is to be presumed to be the final constitution unless it is changed, or it is to be viewed as a proposal only. In Uganda the draft prepared by the constitution commission could be changed in the constituent assembly, but only if a motion to change it was moved and it passed by a two-third majority. But in Kenya [2005], the adoption of any clause of the new constitution required a two-thirds majority of the constituent assembly. In Kenya [2010], proposals to a draft constitution could be made by the parliament only by a two-thirds majority of all the members. Although there were at least that number present in the parliament, every time a vote was called members melted away—so that not a single one of

150 proposed amendments was passed, and only one was voted on.

Some constituent assemblies have made provision for secret ballots. This was possible in the Constitutional Loya Jirga in Afghanistan [2004]. In that instance there was a genuine risk of intimidation by warlords. In Nepal some members expressed concern that they might be subject to pressure, and some civil society activists were worried that members from various ethnic or caste groups and women would not have freedom to represent those groups, but would be essentially “vote banks” for their parties and their concerns. Secret voting would give members a way out of this dilemma.

Generally there are strong arguments against secret ballots, which are essentially antidemocratic: the electorate should know how the people for whom they voted carry out their responsibilities. There is also a risk in some countries of bribery; this certainly took place in the Kenyan National Constitutional Conference [2005]. A secret ballot may encourage bribery—because no one would know how individuals voted and would therefore not know whether they have been influenced by factors such as bribery. Some members might be tempted not to think hard about how they should vote, because they would not be answerable for it. Finally, most decision-making will probably take place in committees where secret voting is less feasible—either because voting will be a more open affair, or because smaller numbers will make it harder to conceal how members vote. It is unrealistic to expect political parties to agree to secret voting if they are determined to exercise control.

There are various ways of indicating a vote: a voice vote (where all those in favor simultaneously say “Yes” and then those against say “No,” and the chair judges by the volume who prevails), a show of hands, passing through division lobbies (“Yes” voters through one room and “No” voters through the other, or the equivalent of walking to the front of the hall to place a vote in an urn or box), electronic voting by pressing a button at each member’s seat, and a roll-call vote, in which the name of each person is called out and the voter must indicate his or her response out loud.

The voice vote is partially anonymous: the person sitting next to a member may know how his or her neighbour voted, but the person presiding and the public may not. This procedure was used when the Kenyan parliament adopted the proposed constitution—to go to referendum—in 2010. Though the “Aye” vote sounded overwhelming, it is not possible for anyone to say exactly who said “Aye”—and this may explain why so many members of parliament felt able to argue against the document in the referendum campaign. The roll call was used in Timor-Leste [2002]—not as a routine, but for a few issues of symbolic significance, for example in connection with the flag. Such a voting system is impractical for large constituent assemblies. This technique was used in the French constituent assembly; according to Jon Elster, “a procedure that enabled members or spectators to identify those who opposed radical measures, and to circulate lists with their names in Paris” (Elster 1993: 180).

In Timor-Leste each member had three cards and voted by holding them up: green, red, and

blue (for, against, and abstain). At one point it was suggested that rather than having each group hold up its cards separately, all should hold them up together and they could be counted by three people simultaneously. This would not work with six hundred people (as in the constituent assemblies of Kenya [2005] or Nepal [ongoing process]).

One issue in constituent assemblies is: How far ought party members to be subject to a requirement to vote according to “party line”—or how extensive ought the party line to be? There are topics on which a party may genuinely have a firm position. But “whips” (a term used in some countries to refer to the party officials who exercise voting discipline) are not readily compatible with consensus—unless they are used to encourage party support for a consensus reached among leaders. Even then, if members have to be “whipped” into support, it hardly seems to indicate a national consensus.

Absence of discipline is likely to produce a more well-informed debate. In some countries it is common for matters of conscience to be a subject for a free vote (but this may produce unreasoned populist voting on certain issues). In Nepal, despite much advance discussion, the rules were silent on this—presumably leaving it to party discretion whether to apply party discipline in any particular context.

Caucuses

Should there be a formal possibility of cross-party alliances or caucuses? Women’s caucuses are common in legislatures around the world. Sometimes they are composed of women members from a single party, and sometimes they are cross-party. In the constitution-making process in Uganda, as Aili Mari Tripp noted, the assembly’s female delegates formed a nonpartisan women’s caucus. It offered workshops on parliamentary procedures, speech-making, and how to build a coalition; it also made sure that the women’s views and concerns were represented in a weekly radio program on the assembly’s debates (Tripp 2001: 150).

In Nepal an attempt to recognize a women’s caucus in the rules was unsuccessful, defeated by the parties’ reluctance to lose control.

Openness

The whole process of a constituent assembly should be characterized by transparency. The public should know what is about to be debated, and by whom. Papers on which discussions are to be based should be publicly available in time to permit interested parties to make submissions and get in contact with observers.

But should the sessions themselves be held in public? The South African process was open: all meetings of the constituent assembly and its bodies were accessible to the public. There are risks in openness. In the French constituent assembly the mob terrorized the delegates. Even in more orderly circumstances the presence of a certain group might overawe the members. And

there is the risk that members will be tempted to play to the gallery rather than concentrate on the business at hand. The South African parliament, when debating the constitution, had some experience of this when committees were televised. The Philadelphia convention making the United States constitution decided to sit in secret partly because of a fear that its members would be reluctant to change their minds if those minds had been revealed in public. The Spanish constituent assembly [1978] had a secrecy rule for the committees. Jon Elster, who has studied several processes, suggests that sitting in public inhibits genuine discussion by privileging stubbornness and grandstanding. On the other hand, he suggests that secrecy encourages more interest-based bargaining than deliberation. His conclusion is that committees should sit in private and the plenary in public (Elster 1995: 386).

Relations with the public and the media

The administration of the constitution-making body should be responsible for ensuring that there is a constant flow of accurate information to the public. (See part 2.3.11 on the media.) In Timor-Leste a short daily bulletin was put out in several languages. Other methods include a newsletter and a website (which would be used by a limited range of groups but would be a resource for the media and for NGOs). The rules may not go into any detail on these issues, but it would be wise to make it clear where responsibility primarily lies—though this should not preclude civil society from monitoring and publicizing the work of the body.

One way to set up a structured relationship between a constitution-making body and the public is to have accredited observers to the body. Such observers would represent organizations or interests that did not otherwise have an adequate voice in the constitution-making body. These could be professions, religious groups, ethnic or linguistic groups, or possibly certain major NGOs. They should not be too many in number—which means that they must represent substantial (in the sense of important) interest groups or issues. Narrowly focused groups' concerns could be met by their having access to relevant thematic committees. Observers could have the right to attend all plenary and committee meetings of the assembly, but not to speak or vote. They could interact with members in an informal way, having the right to eat where the members ate. They could thus have the opportunity to persuade, but not in any way to coerce.

Rules for a commission or similar body

The rules for a constitutional commission or a similar body are likely to be simpler than those for a constituent assembly. However, drawing on some degree of common sense, and also on the rules of previous commissions, the following are, we suggest, the main points that ought to be addressed:

- **Quorum:** it would be normal for a smaller body to have a higher quorum in percentage terms than a constituent assembly. This is to avoid the risk that important issues will be decided on by small numbers, and also because each member of a commission may represent different interests; more than in a large body, the absence of a single person is likely to mean that some

voices cannot be heard.

- **Notification of meetings:** especially when a body meets part-time, it is important that all members are given due notice of meetings.
- **Record keeping:** it may more easily be overlooked in a small body that it is important to keep proper records of discussions, and ensure that they are retained in a secure place.
- **Speaking rules:** it can be just as difficult to be heard in a small group as in a large one.

A small group of people may develop a good relationship, and even become friends. But this may make it harder and not easier to impose discipline on members. Rules are therefore important—even if the atmosphere means they do not have to be relied on frequently. And if the atmosphere sours—as it has in some commissions—rules that make all the members feel they have a fair chance to participate may become important.

2.5.2 Dealing with divisive issues

Contemporary constitutions are complex documents, often the products of participatory processes involving ethnic communities, religious groups, professional associations, women, youth, the disabled, and indigenous peoples, and covering what is often a wide range of policy issues. Consequently there are likely to be many divisive issues that may derail the constitution-making process. These issues may not be easily resolved by the formal procedures for decision-making. Some processes include special procedures to resolve divisive issues. Sometimes measures outside the scheme of the process may be used to resolve these issues. A particular difficulty in resolving differences is the transparent nature of many contemporary processes (a result of the high degree of public participation), which makes it hard to negotiate and compromise. The very dual nature of participatory and transparent processes makes handling divisive issues difficult.

What is a divisive issue?

Divisive issues should be distinguished from mere differences of opinion, which are inevitable when so many decisions need to be made when a constitution is drafted. These differences would be discussed and negotiated in the constitution-making body, failing which the matter would often be settled by a vote. Normally the losing party could live with the outcome.

But a divisive issue is a source of tension or even conflict among the people or the negotiating parties. One of the most common (and intractable) issues involves differences about the place of minorities and the role of diversity in state and society. In the constitution-making process in Spain after Franco, the critical issue was the conception of Spain: whether it was to be a centralized state of a unified people, or a state of autonomous regions based on ethnic diversity. With variations this has been an issue in the constitution-making process in many countries—

for example, Bolivia, Fiji, Iraq, Nepal, Papua New Guinea, South Africa, and Sri Lanka. Countries have been divided over questions of political, economic, and social policy (as with differences between Maoists and other political parties in Nepal). Other divisive issues have been internal territorial boundaries, allocation of natural resources, secularism versus state religion, official languages, and systems of government. (Often that choice is between parliamentary and presidential systems.) Clearly what is considered divisive varies with the context.

What divisive issues have in common is that they relate to matters of considerable importance to the material advantages of groups, often couched in emotional terms, based on historical claims, and involving narratives of past discrimination or exploitation, or entitlements to human or group rights. Conflicting interpretations of rights or prior understandings can complicate a settlement. Divisive issues cannot be resolved in the same way as other differences, for example by a vote. There is a considerable emphasis placed on consensus in current notions of constitution-making processes, in part because many constitutions are now made in conflict or postconflict situations, where majority decisions would merely aggravate tensions instead of removing them. Divisive issues can neither be willed away nor handled in any easy way.

A divisive issue may be described as one whose nonresolution can cause fundamental problems, but that should not be resolved by majority vote, which would endanger the legitimacy of the constitution. A different dimension of divisiveness is that without its resolution, no constitution can come into being when it concerns a matter central to the constitution, such as the system of government. For example, if a two-thirds vote is necessary for a decision, and opinion is deeply divided, then a positive decision cannot be made. Sometimes an issue may be regarded as divisive in this sense, even if it is not central—if the vote of one group can lead to the rejection of the draft constitution (as can happen in a referendum). In Kenya [2010], fundamentalist Christian groups threatened to reject the draft if references to Kadhi courts were not deleted.

Some issues divide whole countries; some may be relevant to a particular interest. The former issues include disagreements about the system of government; the latter involve the application of personal laws or the availability of religious courts. They pose different threats, and different strategies may be needed to address them.

Divisive issues can arise at different stages of the process. Sometimes the very question of whether constitutional reform is necessary is divisive. In some tragic circumstances (as in Kenya and the Philippines) the matter has been “resolved” only by battles in the streets. Sometimes it may be hard to get agreement on the main objective of review. In Fiji it took six months to reach a compromise, one side demanding that the primacy of indigenous Fijians should be recognized, the other side championing Fiji’s multiethnic character.

A divisive issue can emerge during the process, for example, because of changed political circumstances. (In Kenya the change of government halfway through the process brought about a fundamental shift in the support of a key group from a parliamentary to a presidential system

of government.) And spoilers may generate a contentious issue out of a proposal on which for a long time consensus may have existed.

Some divisive issues may need to be resolved quickly; they will fester if they are not. Others are best put aside for future resolution. And ways of addressing divisive issues may depend on the body charged with making decisions on the constitution. Thus different approaches are needed depending on whether the decision-making body is an expert commission, a parliament, or a broadly representative constituent assembly, and altogether different considerations apply when there is a referendum.

We now turn to some specific strategies and techniques that have been used to resolve divisive issues.

- Some issues can be resolved by formal and symbolic recognition. Groups that have been marginalized or oppressed are often in great need of the recognition of past suffering and of their place in the new political order. Delicate negotiations may be required for the formulation to find the appropriate balance (as the example of Spain shows). Such recognition may facilitate the resolution of other issues geared more to substantive matters.
- Deadlocks over an important issue can sometimes be resolved by a referendum. Greece and Italy resolved the contentious issue of the future of the monarchy by referendum (an option canvassed in Nepal in 2006, but effectively vetoed by the Maoists). The vexed question of the division of the Swiss canton of Bern to allow the French-speaking inhabitants of the canton a space of their own was resolved through a series of referendums soliciting the approval of interested parties (leading to the establishment of the canton of Jura). The Canadian Supreme Court has sanctioned referendum as a way to resolve the issue of Quebec's secession. Of particular interest is the referendum in the Maldives on the choice between a presidential and a parliamentary system, the divisive potential of which emerged during the course of the proceedings of the constituent assembly. When negotiations failed, the assembly decided to refer the question to the people, and resumed its work only after the matter was settled in this way. Civil society in Kenya, where a similar issue was deeply divisive, advocated that the referendum should offer the choice between a parliament-based constitution and a president-based constitution. In both Uganda [1995] and Kenya [2005], legislation on the constitution-making process provided for referral to the people of issues that were contentious (i.e., ones that could not be resolved by a two-thirds vote). Unlike Kenya, Uganda used this provision for the question of whether to have a single or a multiparty system.
- A referendum will yield a result, and perhaps some legitimacy for it, but it can also deepen polarity. And if the vote is close, divisions in society and politics will continue, and they will affect adversely the implementation of the constitution. In any case it is best to avoid a referendum until a serious attempt is first made to resolve the issue through negotiations.
- It may be possible to resolve the issue by reference to public opinion. This is a likely option if the process has been participatory, people have been widely consulted, and a careful analysis

of views and recommendations has been made. It has similarities to a referendum, but there are important differences: public views can be taken into account at different stages, and balances struck. Both the Ugandan and Kenyan constitutional commissions used public opinion to resolve differences. But with this method there is a considerable danger of manipulating the analysis of public opinion (which can be fragmented, and indeed may be the cause of divisions). There is also a considerable degree of subjectivity among decision-makers.

- Some divisive issues can be negotiated by the expedient of a time limit (a “sunset clause”). The group wanting a particular provision, such as protection for some special right, can be satisfied by being given the right for a specified period. Those opposed to that protection may be reassured by the limited duration of that right. This approach was adopted at the independence of Rhodesia-Zimbabwe, where the protection of special rights for European settlers with regard to land and political representation was limited to ten years. The entire Fiji 1990 constitution was accepted by the Indo-Fijian and other minorities only on the basis that it would be reviewed within seven years of its inception (and indeed, that review led to large-scale changes). To some extent, sunset clauses have the character of transitional provisions, facilitating bargains and providing time for psychological and material adjustments.
- Another device used to help address divisive issues is the opposite of the sunset clause—postponing the issue for resolution in the future. This may be done because the issue is extremely controversial and has the potential to break what otherwise is an overall consensus (as with the decision in Iraq to postpone the settlement of the issue of Kirkuk, a territory disputed among ethnic groups and with a troubled history of migrations and expulsions and the presence of valuable petroleum deposits). Occasionally an issue may be postponed because the members realize that information and public views are not available to make informed, practical decisions, and would not be available in time for the conclusion of the process. Usually the postponement is subject to understandings about what principle or procedure would be applied to address it.
- Examples of postponement include the decision on whether Uganda should be a one-party (nonparty) state or a multiparty state. Iraq postponed some critical decisions on federalism because the issues were raised late in the day, and the request by the chair of the constitutional commission for an extension was rejected under pressure from the United States. In constitutional discussions on the secession and independence of Bougainville, New Caledonia, and South Sudan, the parties agreed to postpone a definitive decision by instituting a system of autonomy for a prescribed period (e.g., six or ten years), to allow time to see if autonomy met most of the concerns of the “seceding unit” (underwritten by guarantees that it would then be able to express its preference through a referendum, as an act of “self-determination”). In the case of New Caledonia (part of overseas France) and South Sudan, the referendum decision is binding, but in Bougainville it is merely advisory, triggering off a fresh round of negotiations between Bougainville and Papua New Guinea.

- Partway between those two devices is the decision to acknowledge principles in the constitution for the ultimate resolution of the issue and leave the details and implementation for later. Often the controversy is about the details. The detailed issues may be determined with the help of expert opinion or a formal enquiry, or through a referendum (as in Spain).
- Raising the divisive issue in the future. Closely connected with that approach is the possibility of raising the issue, whether unresolved during the process or new, in the future. The advantage of this approach is that there is no sense of closure or exclusion; the possibility that groups with specific claims may raise them in the future reconciles them to the constitution.
- There are variations on this approach. The Spanish constitution recognizes the principle of autonomy, but the precise entitlements of regions are left to further negotiation and referendum. In Canada the opportunity to reopen an issue is largely implicit. Significantly, this approach has been made constitutional by the Supreme Court in Canada, in the decision on whether Quebec has the right to secede. A framework was devised within which the wishes of a part of the country to secede must be negotiated. Whether because of this decision or some other reason, the tension between Quebec and the rest of the provinces eased after this decision.
- Leaving the divisive issue to other processes. A specific technique, consistent with some of the approaches mentioned above, is to leave the divisive issue to parallel or later processes, such as joint or special commissions, or the recommendations of expert group. When making its independence constitution [1975], Papua New Guinea set up a special committee, including outside experts, to recommend steps to be followed in order to set up the provincial government for extensive devolution. This approach was common in the process of decolonization, which involved specialist commissions on the electoral commission, regional or constituency boundaries, rights of minorities, and the scheme of devolution. Sometimes a matter was “resolved” by an assurance from the departing colonial authorities or the incoming government that the interests of a particular group would be addressed later. This is not a satisfactory approach in the absence of secure guarantees—there are several instances of failure to honor the undertaking.
- Resolving the issue in the future through ordinary legislation or the judiciary. Sometimes an agreement may be reached to leave the issue to be resolved in the future, not through a constitutional process but in the ordinary working of the parliament, through legislation. Or it may be left to be resolved by the judiciary (for issues such as capital punishment, same-sex marriage, or abortion). But it is unlikely that seriously divisive issues can be resolved in this way. This may have more to do with the strategy of a drafting body, anticipating controversy in the deliberating body.
- Using constructive ambiguity. It may be more common to reach an agreement with both (or more) sides read as supporting their position—what we call constructive ambiguity. Courts, which may be called upon to interpret the relevant provisions, may find themselves in an

unenviable position; it puts unnecessary strain on them.

- Anticipating difficulties on some issues, those who design the process may provide special procedures to resolve them. (We have already mentioned the use of referendums for this purpose.) This may be connected to the methods of voting, a specific negotiating process, or both. South Africans used the concept of “sufficient consensus,” whereby if the two major protagonists agreed on an issue, the smaller parties had to accept it. Sometimes, often informally, differences between two sides may be resolved by reference to the top leaders, who stay out of detailed negotiations among the parties. This happened in South Africa, where the buck stopped with Mandela and De Klerk, and later in Fiji. The Nepal interim constitution provides an interesting example. When an issue cannot be resolved by the constituent assembly through consensus, the matter is referred to the leaders of all parties for resolution. They have fourteen days to form a consensus, to be put to a vote in the assembly. If there is still no unanimity, another vote is taken for which the support of at least two-thirds of the members is necessary. Such a procedure leaves open the possibility that no decision will in fact be made.
- Another example of a specific procedure is the Kenyan process [2010]. In one sense, the whole process was about “contentious issues” (essentially among political parties), which had prevented the adoption of a constitution since 2004. An elaborate process was devised, including an independent committee of experts (appointed by the parliament) interacting with both the people and the parliamentary committee on the constitution. It was for the committee of experts to determine what were contentious issues by comparing, in particular, three previous drafts. Its proposals, finalized after consulting the parliament, were to be submitted to a referendum. Implicit in this law, prepared through agreement among political parties, was the undertaking that the people would accept the legislative scheme.
- Getting the help of third parties. Increasingly, divisive issues are resolved outside the formal framework for the constitution-making process, often with the help of third parties. We have indicated some local means for doing this. In many instances, third-party intervention is provided for by international or bilateral communities. This is particularly the case in conflict and postconflict constitution-making processes: Norway in Sri Lanka; the European Union and the United States in Sudan; eminent Africans and the African Union in Kenya; the United States and the United Nations in Iraq; the United States in Northern Ireland; the United States and the European Union in the Balkans; the United Nations in Afghanistan, Cambodia, Namibia, and Timor-Leste; and Australia and New Zealand in the Papua New Guinea/Bougainville negotiations. Sometimes the role is formal (as in Sudan, and often with the United Nations, and mostly based on United Nations Security Council resolutions). A typical form for intervention is the office of the special representative for the resolution of conflict. Such interventions often result in the marginalization of local communities and generally are contrary to the spirit and letter of the legal framework for constitution-making processes—particularly as in Iraq [2005].

2.6 The constitutional text: Coherence and drafting

2.6.1 Ensuring coherence in the constitutional provisions

The objective of a constitution-making process must be a constitution that is acceptable, workable, and just. “Workability” of a constitution includes whether the design will match the circumstances of the country, as well as questions of the capacity of the country to operate it, its likely cost, whether it will generate a great deal of litigation, and so on. Less important perhaps are other concerns: readability, length, and durability.

“Coherence” (the various aspects all fitting well together) is a bit different because it covers a number of points, some of which may affect workability, while others may affect acceptability, or even be a matter of style.

Incoherence

A constitution may be “incoherent” in various ways, including the following:

- The “working parts” (about machinery and procedures) may not reflect the philosophy set out in parts such as the preamble and discussions of national values and human rights.
- Different parts of the machinery of government may not be suited to work together, particularly where the objective is to set up checks and balances between different parts.
- It may not even be possible for certain parts of the machinery to work together—this may be a question of dates not matching, or some other fundamental incompatibility.
- Drafting styles may differ markedly between different parts.
- There may be great detail in some parts of the constitution and guidelines at the level of principle in others.
- Words may be used differently in different provisions, or different words may be used for the same concept or institution. This is not just a matter of style; it may affect how the constitution is understood and applied.
- There may be repetition—which may cause confusion, difficulty in reading, and also problems of comprehension.
- The document may be so badly organized that it is hard to find specific points, and the reader runs the risk of failing to realize that what she is reading is restricted or expanded by a provision somewhere else in the document.

Incoherence can arise from various causes, including:

- civil society focusing on “values” while politicians focus on power, and experts on “workability”;

Box 31. Parliament as the source of incoherence in the Fiji constitution

In Fiji in 1997, a parliamentary committee took over the final stages of the constitution-making process, after receipt of a full and coherent set of proposals by a commission, and introduced a power-sharing arrangement (which had already been rejected by the commission) under which any party with a significant number of parliamentary seats could take part in the cabinet. The committee members failed to think through the implications for other aspects of the constitution. (And time pressures made it hard for anyone, including professional advisors, to realize the problems that had been created.) A notable example involves the provisions on the senate. To ensure that body included a “nongovernment” element, the original proposal was that the leader of the opposition would nominate some senate members. This was retained by the parliamentary committee. But at the same time the constitution said that those senators must be from parties entitled to sit in the cabinet. So they were to be nominated by the leader of the opposition, but not to be members of the opposition, and not to offer a nongovernment voice.

- making changes at late stages in the process;
- a tendency, on the part of those preparing the constitution, to focus on only one part of the document at a time, or even on only one article at a time;
- dividing the preparation of proposals among committees in a way that leads to overlap;
- asking nonexperts to produce actual drafting language for the constitution, rather than the ideas;
- uneven knowledge on the part of those involved: it is almost inevitable that a body composed of those with some, but not great, knowledge of constitutions (and few countries can command the services of many experts with great knowledge) may seize on some idea without being able to understand all its implications, and even without understanding how it has worked elsewhere;
- cutting and pasting from a variety of foreign models;
- having different drafters with different styles working on different aspects;
- excessive speed; and
- a reluctance to use experts, and a certain arrogance on the part of those (usually politicians but sometimes lawyers) who think they have the skills and the mandate required.

Avoiding incoherence

Careful planning of the process—which is essentially the theme of this entire handbook—should avoid many of these risks. The planning needs to be done not only by those officially in charge of the process, but also by those wishing to influence it, including political parties and civil society generally.

Specifically, the following strategies can help avoid the various pitfalls outlined here:

- having in advance, or adopting at an early stage, a set of guiding principles (see part 2.1.8); however, these are likely to be broad, while issues of coherence are more likely to involve detail;
- civil society focusing not only on the values and rights, but working hard to see how the difficult technical aspects can achieve their aims;
- accepting the necessity for skilled and technical expertise at the decision-making stages, even for carrying into effect the necessary political compromises;
- having a skilled “harmonization committee” (usually found within a constituent assembly) whose responsibility is to put together the various elements of the draft and ensure coherence in the whole;
- minimizing the number of technical drafters, and ensuring that they are both competent and familiar with the style to be adopted; having one person in charge of the drafting with the authority to instruct drafters to use certain phrases and styles; and developing a manual of style for the particular process;
- preparing an explanatory glossary of terms to be used, including translation into major languages, and ensuring that it is used;
- having a workable timetable;
- having a philosophy of work that avoids procrastination, assuming that the timetable is to be taken seriously. Otherwise, important stages toward the end are squeezed; this is an important role, especially for the chairs of the bodies in charge; and
- avoiding superficial knowledge by organizing in-depth study groups on particular issues, including inviting experts, local and foreign, and ensuring that study tours do involve a rounded experience of the topics studied.

2.6.2 Drafting the constitutional text

A constitution is a political and a legal document. Ideally it should be:

- understood by the people;
- usable by politicians and bureaucrats; and
- able to be interpreted by the courts.

All readers should find the same meaning in the document. The aim of the drafter should be predictability; there is none if the people, the politicians, and the courts come to different conclusions about its meaning.

This can be qualified to a limited extent—the people may take away from their reading of the constitution something different than do the lawyers. But those additional meanings should not be about the way the machinery of government operates. It will instead involve a sense of whether this document is “their” document—does it speak to them? Does it have any resonance for them?

The art of the constitutional drafter is to connect with all these readerships. But any lawyer would insist that resonance with the people must not stand in the way of maximum predictability. Unlike many laws, a constitution has a variety of different components, some of which lend themselves more than others to reaching out to the people.

Occasionally it is intentionally left to the courts to decide what a provision means (as in the example from South Africa mentioned above [see part 2.2.3], where although the constitutional assembly could not agree on a position on the death penalty, the issue was left to the courts to decide whether the “right to life” affected the death penalty).

The courts’ approach

Diana Yankova has written that the “draftsman always has to keep in mind that he is writing for a hostile audience—his text will be interpreted by warring sides in the courtroom” (Yankova 2006). The people may find it hard to understand the need to express an idea in a way that the courts can understand, but lawyers will want to use precise language that sometimes seems rather dry, and to use the words used in other constitutions. Managers of a constitution-making process must recognize the importance of careful use of language—even in a process that is people driven. To take a simple example: in the Kenyan process, environmental enthusiasts seized on the notion that at a minimum Kenya should have 10 percent tree cover (a figure below which it had fallen considerably), and drafted a provision that “every piece of land must have 10 percent tree cover”—this in a country with semidesert areas.

When interpreting a legal document, the courts make certain assumptions, such as that:

- language used before is being used in the same sense; and
- a change of language is intended to convey a change in meaning.

They look at how courts elsewhere have interpreted similar language, and at international law if that is where the language comes from. And they will be concerned about detail:

- “includes” is not the same as “means”; and
- “shall” or “must” is not the same as “may.”

There are often well-established traditions about how certain aspects of a constitution are used by the courts. In particular, the preamble and any “directive principles” will often not be treated as rules—though they may be used as guides. Citizens may find these parts of the constitution easiest to read, but might be disappointed to discover that in the courts these parts have limited legal force.

Drafting styles

The tradition of legal drafting in continental Europe, and in countries that have adopted European traditions, is broader, and interpretation focuses more on the spirit and less on the actual words of a legal text, while the common law tradition (used in England and countries

that were once British colonies) is more detailed. Constitutions in the United States tradition also tend to be more concise. But differences are much less marked in modern constitution-making because:

- of participatory constitution-making;
- of the influence of international law;
- of occupying forces, international agencies, and international NGOs;
- of constitutional borrowing; and
- even in common-law countries, constitution drafting is less rigid and complex than ordinary statute drafting (because a constitution is as much a political as a legal document).

In some countries (or for some judges) it is common to look at the discussions that took place when the law was being made; in some countries this is unusual, or even limited by the law.

Stages of text development

There are three “intellectual stages” in producing a constitutional provision:

- adopting the idea (a job for the people with political, legal, and other expertise);
- framing the provision in a legal way (a job for constitutional lawyers, with political scientists and other technicians); and
- preparing a final legal text (a job for legal drafters in close collaboration with a drafting committee).

This neat scheme of things—used in many national lawmaking processes—may not apply in a constitution-making process. A draft of a final text is often produced at an early stage, or else those involved resort to existing texts rather than beginning with the ideas, because:

- lawyers or active politicians find it easier to operate with familiar existing provisions;
- a political party or group produces a draft;
- advisors (local or foreign, national or international) offer concrete suggestions;
- a committee or commission working in advance to generate ideas for the constituent assembly does so in the form of a draft constitution; or
- time pressures exist.

And the technical drafters may be involved at a much earlier stage than is usual in national lawmaking. This is a good thing—so that drafters have an accurate idea of what the people want from the constitution, though it may call on the drafters’ reserves of patience as they have to interact with the people and their demands instead of only carefully formulated drafting instructions. The drafters may need to understand the culture and the symbols of a particular society.

Box 32. Development of the text in some modern constitutions

Fiji: The Reeves Commission, which produced the proposals, included no lawyers, but had two legal advisors. The report includes suggested language for many provisions. But the final drafting was done by a drafter in Australia.

India: The 1935 Constitution of India Act was an important basis for the work of the constituent assembly. The constitutional advisor, B. N. Rau, a historian, judge, and capable drafter, prepared a draft on the basis of the reports of major committees, making use of the 1935 act, the U.S. Constitution, the Irish constitution, and others. A drafting committee (which Rau attended) worked on this further; the drafting committee made the final changes after debate in the full assembly.

Kenya: Legal drafters (from several countries) were involved in the preparation of the first draft, working parallel to the commission. Some provisions were derived from the Ugandan and South African constitutions. Drafters assisted most committees, and then revised the draft in the light of the constituent assembly's decisions.

South Africa: The interim constitution of 1993 was negotiated largely by parties; the 1996 constitution was prepared through the constituent assembly. Both processes used committees of technical experts. A number of drafters worked on the final constitution, and one was appointed with the mandate to produce a plain-language, gender-neutral document.

Uganda: The commission set up a drafting committee, and also used the services of two professional drafters.

Vanuatu: There was no legal framework for the constituent assembly, and most of the drafting was done by the legal advisor to the local political parties (a nonlocal), with contributions from an experienced Papua New Guinea lawyer.

The work of the technical drafter

Legislative drafting is a specialization within the field of law. Most people who become drafters have experience with legal practice, and they will have special training in drafting. Their usual task is to convey what their clients want as clearly as possible, and in “judge-proof” words (that is, words that the courts will understand in the same way the drafters do). In some legal traditions, notably those of Europe, there is no profession of legal drafting; drafting is usually done by legally qualified civil servants.

In constitution-making, drafters have a more demanding task. Understanding what the clients want may be harder when those clients are the people rather than a ministry's lawyers. A

constitution also touches on all sorts of other laws, and the drafters will need to be aware of these implications. Finally, it is particularly important that a constitution be written in clear, even eloquent language. It is important to understand that a drafter is not concerned only with the words. One has said, “To express an idea clearly within the constitution the drafter must first understand the idea and its place in the universe of constitutional ideas.” This sort of drafting is the art of:

- applying imagination, logic, and reason to legal problems;
- matching policy choices to functional purposes;
- designing legal instruments to achieve those functions;
- crafting each legal sentence in a formulation appropriate to its particular function; and
- choosing the best words to communicate those functions effectively and economically.

Drafting the constitutional text

It is tempting for people involved in preparing a new constitution to look at other countries and “cut and paste,” and a lot of this occurs. But it is important to understand not only that a constitution must be understood in the particular historical and political context of the country, but that there are different styles of drafting. We might distinguish:

- the “what is technically necessary” approach; this is the traditional approach, of including only legally binding provisions, and drawing a clear line between what is appropriate for a constitution and what should be reserved for “regular” legislation;
- the “didactic” approach, which is how one might describe the approach used in Papua New Guinea, where the drafters were aware that running a government was something that most Papua New Guineans had no idea about; the result is a constitution that may be the longest in the world (for a few million people) but is a detailed “user’s manual” for government;
- the “explanatory principles” approach, which was used in South Africa, where many of the chapters are prefaced by some principles designed to show the politicians and the officials, and the public, the purposes of the provisions;
- the “reaching out” approach, in which the language is directed as much to the people as to the institutions and individuals charged with operating the constitution; and
- the “let’s put it all in” approach, which has been used in some Latin American countries; it offers great detail, especially on some current issues such as the rights of indigenous peoples (and might be used to describe the constitution probably forthcoming in Nepal).

Differences may arise due to local political and legal traditions, to citizen involvement in the process, to the use of international instruments, to degrees of trust or mistrust in institutions, and to individual drafters’ input. Although there is a general trend toward similarity across countries, traditions, expectations, and practices may change in any given country.

Issues in drafting

The following points will not be new to drafters, but they should be remembered by those who have to explain what they want to drafters, and have to try to understand the drafters' art.

Language

Most countries have a small number of official languages—often only one—and laws may not even be translated into all of these languages. The constitution, as the basic law of a country, is one that ought to be in as many languages as possible. Drafters find that the need to be able to translate affects—and simplifies—the style of drafting in the original language.

In order to help drafters, it will be necessary to develop a glossary of words so that the same word or phrase is always translated in the same way.

The need for legal certainty means that one version of a law must be the authoritative one. Often this will be the one in force when the drafting was done, because it is then that the expert legal input occurs.

A decision will have to be made about when to translate, and whether to translate all drafts. It may be wise to translate the existing constitution for use as a civic education tool. And if this is well done, it will help in future translations. (See part 2.3.9.)

“Plain English”—or other languages

Modern trends have been toward using simpler language in legislation. In South Africa [1996] a legal drafter was appointed specifically to ensure that the final draft was in “approachable” language. But that drafter insisted that although “simplicity, precision, and clarity” are desirable, they are only tools for the achievement of the overarching objective of predictability.

Inclusiveness and approachability

Especially in the English tradition of drafting, there was a “masculine” tendency in constitutional language, and the word “he” was to be read as including “she.” It is possible to draft in ways that avoid this clumsy and sexist tradition. Other languages do not raise the same issue, but there may be other ways in which language can convey certain assumptions about who holds office. The word “president” in Hindi and Nepali literally means “husband of the nation,” which has been controversial. Language carries all sorts of cultural implications, and the drafters need to be sensitive to them.

Length

Many people argue that short constitutions are better. They should not be longer than needed; excessive length may discourage careful reading, and unnecessary words may interfere with

interpretation. But length alone should not be the test; each provision should be there for a reason. Elements that make some constitutions longer include:

- more topics covered;
- more ideas;
- more words than needed;
- the role of the constitution as the “manual for government” approach—as in Papua New Guinea (see appendix A.9) and some recent African constitutions; and
- in the case of a federal system, the absence of separate state constitutions—contrast India, where the state constitutions are included in the national one, with the older federations such as Australia and the United States, where state constitutions are separate.

Constitutional structure

There are ways to organize a constitution that make it easier to understand, including putting details (especially if they may be elaborated in an ordinary law) into schedules (appendices). In some countries (e.g., Papua New Guinea) the constitution provides for special laws to address the details of government, rather than putting everything into the constitution itself. These can include elections and courts. They can be called “organic laws” and be harder to change than ordinary laws, though not so hard to change as the constitution itself.

The very order of a constitution’s chapters may be significant: is the president more important than the parliament? Are rights less important than government?

Risks and dangers

Things may go wrong at any stage in a process as complex as preparing a constitution. Even the technical drafting aspect has its risks—for the process and for the drafters. Spoilers or self-interested individuals may try to influence the drafters, to delay the process or to change the text. Precautions may be taken to:

- make sure that it is perfectly clear what has been decided in terms of substance;
- make sure that it is clear from whom the technical drafters are to take instructions; and
- guard against the risk that the “master” version of the text might get lost or be interfered with.

Some issues for the drafters themselves

This book is not written specifically for drafters, who will have their own professional expertise and experience to draw on and will go to more detailed resource materials. However, here are some important points, drawn from the writing of experienced drafters:

- It is not the role of the drafter to be the “constitutional visionary, negotiator or advocate” (Knight 2008).

- The drafter’s client is not just the group from whom instructions come, but the nation.
- A constitution should be coherent as a document, and last-minute changes should be avoided, as should cutting and pasting from other constitutions without regard to the unity of the whole (Lynch 1988).
- Constitutions should say what they mean, and not rely on conventions and fictions, especially in countries not used to them (for example, one should not say that the head of state must act on “advice” when the intention is that the advice must be followed) (Lynch 1988).

2.7 Adopting and implementing the constitution

Having discussed how the content of a constitution is arrived at, including how the people are involved, we turn to the closing tasks of a process—the formal adoption and coming into force of a constitution, and the process of making a document a reality: implementation.

Adopting turns out to be surprisingly complicated, and may involve a number of separate steps. They are all legally significant steps, but they may be full of symbolism and political significance as well.

Implementation is also a legal process—one of making laws and creating institutions that will have an impact on the country and the way it is governed. But it also is a political issue, and it is a matter of attitudes and will as much as of law.

2.7.1 Adoption, ratification, and promulgation

The most formal acts of decision in a constitution-making process involve accepting the document and bringing it into legal effect. Exactly when the constitution becomes law—when a country can say “this is our constitution”—is surprisingly different from process to process. And before that there may have been a moment when the country could have said “Now no one can stop that document from becoming our constitution.”

We can distinguish various separate acts, not all of which will occur in every process, and which do not have the same legal effect in every process. Here is an imaginary example involving many stages:

- the constituent assembly adopts the document (adoption);
- the constitutional court endorses it as respecting the principles laid down in the peace process (endorsement or certification);
- the people approve it in a referendum (ratification);

- the president signs the document (assent);
- the document is published in the national official record (sometimes called the Gazette) (this might be called “promulgation”);
- the document becomes law (which may be the moment the president signs it, or the moment it is published); and
- some aspects of the new constitution have legal effect at the moment it becomes law, but the constitution itself says that certain aspects will not take effect for a certain period or until something else happens.

In some countries one event only occurs: the constituent assembly adopts the document and it

Box 33. Bringing the constitution into effect in Eritrea [1997]: A mistake

Bereket Habte Selassie, the Chairperson of the Eritrean process stated: “It was a mistake not to fix an effective date, or at least specify a maximum period after which the Constitution would come into full force and effect” (Selassie 2003: 312–13).

immediately becomes law and has effect in its entirety, without the need for anything else to be done. This is more likely to happen in a country without an effective existing constitution. And some countries have more complex traditions on the bringing of laws into effect than others.

Adoption

It would be usual to have a rule that makes the act of adoption perfectly clear—a certain percentage of the constituent assembly or parliament must pass the entire document. Nepal’s interim constitution, unusually, provided only for the preamble and every article to be adopted; there was no procedure for adoption of the whole document. The rules of the constituent assembly say that the preamble will be adopted last, and then a vote must be taken to adopt the whole document. This may turn out to be an unconstitutional provision.

Adoption rules often require “supermajorities,” rather than the usual majority of those legislators present and voting. The support of a number of members equal to more than half of all the seats in the house may be required—or 65 percent, or two-thirds, or even 75 percent. Different majorities may be required for approval of different changes.

Adoption by the constituent assembly could be made the final act—in other words, without requirement of ratification by the people or any formal signature. In a country that is observing the principle of legal continuity, it may be that an act to amend the constitution has to be adopted

by the procedures usually followed for passing ordinary laws. This almost always involves the signature of the head of state. But in Papua New Guinea all laws are passed by the parliament alone; the speaker signs a certificate to say that they are properly passed, but is not signing the act into law. Occasionally it may be unclear whether the ordinary procedures apply to adopting the constitution, or whether some special procedure applies.

There may be requirements designed to prevent the rushing of amendments (a source of abuse in several countries); in Ghana there must be two publications in the government Gazette of proposals for amendment, with three months in between, and for certain changes six months' notice in the Gazette.

Ratification

“Ratification” is a process by which some decision made or act done by one person becomes legally effective by being endorsed by another person. This can be applied to the situation when the people approve a constitution. This would usually be by a referendum or plebiscite. (See part 3.5.) In some countries a referendum on the constitution is prohibited (as in Haiti and Portugal).

Often a referendum would involve a single “Yes” or “No” vote by the whole electorate. If the constitution is for a federal country, it may have to be ratified by the separate vote of each of the states, regions, or provinces. This could involve counting the votes separately for each state in a referendum. But the United States constitution was not effective until ratified by a vote of the state conventions—not the people—of at least nine of the thirteen states. Then the constitution would come into effect—but only for those states that did ratify it. In the end, all thirteen did.

A ratification process will involve something rather like an election campaign, with campaigners for and against the constitution. This is rather different from a public consultation process, because almost certainly it affords little chance to change the document. In the United States process, it was usual for a member of the convention that prepared the constitution to participate in the public debates.

In designing a ratification process, as in designing an election, it would be ideal for the entire country to vote at the same time. In the United States, however, each state organized its own ratification process, and not at the same time as the others. It is hard for later votes not to be influenced by the earlier results; later states may be persuaded to vote “Yes” by an earlier state vote, but equally, an earlier result may affect turnout and distort the later results. (See part 3.4.2.)

Endorsement

In South Africa the constitutional court was required to “certify” that the constitution complied with the thirty-four principles set out in the interim constitution. There may be other forms of endorsement by some body not involved in the preparation of the document. When the secessionist efforts of the province of Bougainville in Papua New Guinea ended, the peace

agreement and the (amended) constitution of Papua New Guinea provide for the adoption of a Bougainville constitution by a Bougainville constituent assembly. The Papua New Guinea constitution provided for certain matters to be included in the provincial constitution, and after adoption by the assembly it would be transmitted to the national government. If the national government approved it as meeting the national constitutional requirements, it would ask the head of state to endorse it. It would not come into force until after that.

Consultation with or the approval of some other body may be required; in Ghana, the council of state (an advisory body) must be consulted.

Assent

There may be a good reason for an ordinary law to be signed by the head of state: it happens either because such a ceremonial act has national significance, or because the head of state is given a role in ensuring the constitutionality of laws. In constitution-making the same reasons may not apply. If the people are giving themselves a new constitution as an act of sovereignty, it may seem inconsistent to ask the head of state (who may not even have been elected) to add the final, enacting touch. Possibly the head of state may not wish to sign—if the new constitution will reduce his or her powers. The South African interim constitution said the constitution “shall [which means ‘must’] be assented to by the president”—but suppose he or she refused? The constitution of Portugal also says the president may not refuse to sign a law revising the constitution. There is a legal principle that says “something that must be done will be treated as having been done”—but this is not a particularly satisfactory way of resolving the issue, and courts might be reluctant to apply the principle to so august a person as the president. So some constitution-making processes do not require the signature of any person, or they require every member (or every member who agrees) to sign the constitution.

Promulgation

The word “promulgation” has various dictionary definitions, including the following: to put into force or effect; the official publication of a new law; to make a law publicly known after its enactment; to declare or announce publicly. Historically the only way for people to know about new laws was for them to be publicly announced, if necessary all over the country. Here we use the word to refer to making the law public. Sometimes that may occur in a public ceremony. The constitution will still have to be published.

Coming into effect

In many countries the moment of signature of the head of state is the moment a document becomes a law. But it may not have any legal effect until later, perhaps when it is published in the Gazette (a word used in many countries for the official government publication that announces new appointments, laws, etc.). And the new law itself may postpone its coming into effect until a specific later date, or until something else happens—often until a minister declares that all or part of it comes into effect. It occasionally happens that a law never comes into effect.

Box 34. Adopting, promulgating, and publishing the Kenyan constitution [2010]

The 2000–2005 Kenyan process never resulted in a constitution. The 2008–2010 process was designed with this history in mind.

Parliament was to be able to propose changes, but there was no requirement that its members vote to adopt the constitution. But after the failure to pass and the proposal of amendments, the adoption was put to a vote. It was overwhelmingly adopted—but suppose it had not been? On the correct reading of the law that would not have mattered, but no doubt parliament would have taken the view that it was not adopted.

It then went to a referendum, and was passed. The existing constitution said that “the President shall, not later than fourteen days from the date of the publication of the final result of the referendum, promulgate and publish the text of the new Constitution in the Kenya Gazette.” It was not clear whether “promulgate” was the same as “publish.” The relevant act of parliament said the president must “by notice in the Gazette, promulgate the new Constitution”—which separated promulgation from publication. It also implied that nothing more than a simple Gazette notice was required. If the president did nothing, the constitution would come into effect anyway. However, clearly the president wanted a ceremony.

Many people assumed that the president would have to sign the constitution. But the law did not say that; the last act needed to make it law was the referendum. The president did sign, but he also read out a statement about the constitution and its background, and solemnly waved the constitution toward the crowd—the true act of promulgation in the traditional sense. It immediately became law (oddly enough, in the middle of the day). The constitution was published (with a “Notice of Promulgation”) in the Gazette one week after promulgation.

How about a constitution? If the constitutional change is made by an ordinary law, the usual rule will apply. Or there may be a special provision for amending the constitution that gives a different date. If the new constitution is made by some process outside the constitution, the coming into effect will probably be decided in the new document itself.

Even if some aspects are postponed, it is wise to make their coming into effect contingent on the happening of an event that is bound to happen—or on a specific date—to avoid the risk that they never will come into force. This happened in Eritrea, where the president simply did not bring the constitution into effect even though the document itself said the people “approve and solemnly ratify officially, through the Constituent Assembly, this Constitution as the fundamental law of our Sovereign and Independent State of Eritrea.”

2.7.2 Implementation

Several contemporary constitutions have failed to take root. Either they are early victims of “coups”; they are replaced by new constitutions; or large parts thereof, dealing with both values and institutions, but particularly values, are ignored. There could be several reasons, connected to the characteristics of these constitutions already discussed in this handbook, that explain why large parts of a constitution are not implemented. Broadly, these are:

- Some of these constitutions address nation-building and state-building; the former cannot be easily achieved without enlightened and committed leadership.
- Some constitutions aim at a fundamental departure from, rather than merely reform of, existing political, constitutional, and social systems, necessitating new institutions and laws.
- The scope of the constitution is wide, for the reasons given above, and there may not be either the political will or the technical capacity to address it in its entirety.
- Some provisions aim to bring about reform of social structures, which goes against the interests of elites and privileged groups.
- The emphasis on social justice threatens the interests of powerful sections of society.
- The integrity and anticorruption provisions are resented by politicians and bureaucrats.
- Many countries do not have a tradition of constitutionalism and the rule of law to anchor a constitution.

In short, unlike the more traditional constitutions, which were not only restricted to systems of government but also imposed on the rulers, contemporary constitutions seek to change state and society and are imposed by the ruled on the rulers (thanks to participatory constitution-making processes and to divisions within the political class). Resistance to implementation is therefore to be expected from several quarters. It is necessary to provide a formal process of implementation and to monitor it.

There are at least two aspects to the implementation of a constitution. One is internal to it, and it involves such issues as the coherence of the document; institutional responsibility for implementation, for example by the judiciary; and provisions addressing transitional matters and the phasing in of the new rules and institutions. The other is external; and it involves such issues as societal attitudes; empowerment of the people; preparing them to participate; internationalization of constitutional values; and the quality of leadership. This chapter is primarily concerned with aspects internal to the constitution.

Implementing, promoting, and safeguarding the constitution

The tasks directed at achieving implementation of a new constitution can be divided into three closely related but to some extent distinct elements.

Implementation

The first involves actions intended to implement the constitution, in the most obvious sense of

giving full effect to its provisions, which include:

- setting up new institutions provided for by the constitution, and providing them with the powers, personnel, resources, and general encouragement that they need to operate effectively; and
- making new laws and policies to give effect to the constitution, and repealing laws inconsistent with the new constitution.

Promotion

The second involves actions intended to promote the constitution, which means going beyond implementation in the first sense, and working to make the institutions and laws operate as the living basis for the way the state operates, which includes:

- enforcing the constitution and the laws made to implement it, and respecting the rights and freedoms of the people;
- ensuring that the institutions established under the constitution are properly resourced and otherwise supported;
- holding regular and free and fair elections (and providing the resources needed to enable them to happen);
- providing access to justice, and resolving disputes in accordance with the constitution; and
- facilitating the people's participation in public and state affairs. (See part 2.2.2.)

Safeguarding

The third involves actions intended to safeguard the integrity of constitution, which goes beyond promoting the constitution, and extends to recognizing its fundamental importance by protecting it in a range of ways, including:

- limiting the possibility of hasty amendments that detract from core constitutional values;
- avoiding practices that distort constitutional norms, including an unnecessary resort to emergency powers; and
- protecting the constitution (in extreme cases) from being illegally overthrown, for example by a military coup.

The three dimensions of implementation are closely related, in that things directed to ensuring that one of them occurs can have positive effects for the other two.

Can a constitution-making process contribute to implementation?

A key question for this part of the handbook is whether there are things that can be done during the constitution-making process that can contribute to successful implementation. With few exceptions, implementation issues received little attention prior to the late 1980s. In the wave

of decolonizing constitution-making beginning in the 1950s, for example, it tended to be assumed that constitutions largely modelled on those of the departing colonial authorities would readily be transferred and work as effectively in new contexts in Africa and Asia as they had done in Europe. In terms of safeguarding the constitution, it was assumed that the institutional accountability involved in the separation of powers and in the constitutional jurisdiction of courts (then mainly in common-law countries) was sufficient. The failure of many countries to implement significant parts of their constitutions, the overthrow of others, and the difficulties inherent in implementing and safeguarding the more ambitious constitutions emerging since the 1980s have caused some attention to be given to things that can be done during a constitution-making process, or included in the constitution itself, that support its implementation in the three senses identified above.

Design of the process—encouraging public awareness during and after

As noted in part 2.2, an open constitution-making process that includes a significant focus on increased public awareness of constitutional options and encourages popular participation in discussions of choices can be expected to contribute to increased public knowledge of, and commitment to, a new constitution. People not previously familiar with democratic values and procedures are provided with necessary information and encouraged to participate in public affairs, enforce constitutional remedies, and encourage governmental accountability. An important issue seldom examined even in constitution-making processes that have involved effective awareness campaigns is how to continue programs of awareness of constitutional issues after the process ends. In South Africa, a wide range of well-designed awareness campaigns (involving numerous rural meetings and mass-media campaigns) meant that knowledge of the new constitution was at its peak in 1996. A final step involved the distribution of seven million copies of the constitution in all the official languages. All of this activity was coordinated by a secretariat to the constitutional assembly that ceased to operate once the new constitution was adopted. As a result, the extensive experience of building awareness was dissipated, and there has been limited additional constitutional awareness work since then.

Constitutions often encourage continuing constitutional awareness after the constitution-making process is over, by such means as offering translations of the new constitution into local languages and its wide distribution (e.g., see section 4 of the constitution of the Republic of Uganda 1995, or section 216 of the constitution of the Autonomous Region of Bougainville 2004). The constitution of the Republic of Ghana 1992 goes further, providing for a national commission for civic education to create and sustain awareness of the constitution; educating and encouraging the people to defend the constitution; formulating programs for realizing the objectives of the constitution; and formulating programs for awareness of civic responsibilities. Together with other significant constitutionally established independent oversight bodies, it is now a well-respected institution in Ghana. Most such provisions have limited effect because governments give it low priority and few resources.

Content and language of the constitution—speaking to the people

Both the contents of a constitution and the language in which it is written can encourage

broad popular support for its implementation. A constitution that people see as addressing the real issues leading to the new constitution and providing a vision for the future can really capture their imagination (as Kenya [2010] demonstrates). Other examples are the constitution of Rwanda [2003], the Indian constitution [1950], and the constitutions of Papua New Guinea [1975] and Uganda [1995]. An example of a statement of governance principles directed to resolving ethnic differences is the compact contained in section 6 of the constitution of Fiji [1990].

Constitutional mechanisms for encouraging implementation and promotion

A number of constitutions passed since the late 1980s (and a few made earlier) include provisions intended to encourage and support implementation. One category of arrangements is intended to address most constitutions' tendency to state broad principles and set directions, and to rely on the legislature later to pass laws establishing new institutions, processes for enforcement of rights, and so on—which may not be passed for many years.

Some specify that particular kinds of laws—usually those needed to establish independent constitutional offices with enforcement, oversight, and similar roles (e.g., human rights commissions, ombudsman bodies, auditors general)—must be passed within a set period. The constitution of Ghana [1992] required that laws needed to establish nine such institutions (including the national commission for civic education, above) had to be passed within six months of the first meeting of the parliament after the constitution came into operation. The constitution of Kenya [2010] includes a schedule of time limits from six months to three years within which laws on more than sixty subjects were to be passed, and provided a right to petition the high court if any law listed in the schedule was not passed within the time specified. (See article 261 and schedules 5 and 6.)

The South Africa constitution[1996] provides time limits within which some implementation laws must be passed (see sections 21 and 23), including implementing rights to information (section 32) and just administration (section 33). But the constitution also includes provisions enabling enforcement of the rights in the absence of implementing laws.

Another approach similar to the latter part of the South African example is found in sections 22, 224, and 225 of the constitution of Papua New Guinea [1975]. Section 22 gives the judiciary the power, in a court case, to make such orders as may be necessary to fill any gap left by the absence of laws. Section 224 requires not only that laws be made providing for powers and procedures, and facilitating the performance of functions, of independent constitutional bodies, but that in the absence of such laws such bodies can provide for any deficiency in their procedures and have all powers reasonably necessary. Section 225 provides that it is the duty of all governmental bodies to ensure that the independent constitutional institutions are provided with the staff and facilities needed to carry out their functions—a requirement that the courts have ruled to be enforceable against the government.

Finally, there are a few examples of constitutions that establish institutions intended to oversee implementation. Perhaps the most far-reaching example comes from section 5 of the sixth schedule of the constitution of Kenya [2010], which provides for a commission on the implementation of the constitution to “monitor, facilitate and oversee the development of legislation and administrative procedures as required to implement the Constitution.”

An example of a body with less-comprehensive implementation responsibilities comes from the lengthy amendments made in 2002 to the constitution of the Papua New Guinea [1975] to give effect to the Bougainville Peace Agreement of 2001. Section 332 provided for a joint supervisory body made up of appointees of the Papua New Guinea government and the autonomous Bougainville government, which is responsible for overseeing the implementation of the peace agreement and the provisions of the Papua New Guinea constitution that implement the agreement.

Constitutional devices to safeguard (and implement) a constitution

Many modern constitutions contain devices for the safeguarding of the constitution that can be divided into two categories. The first involves internal mechanisms to promote its safeguarding in one way or another, the other to build support for safeguarding it from civil society and other sites of influence and power.

Internal devices to encourage safeguarding and implementation

Constitutions often contain provisions directed to encouraging those exercising state power to respect the constitution and accept accountability, including provisions that impose considerable limits on political leaders and administrative officials. Examples include:

Protection of the constitution from coups

Despite the obvious practical difficulties likely to be involved in the enforcement of such provisions, some constitutions make their overthrow unconstitutional (e.g., the constitution of Uganda [1995], section 3). Many call on citizens to protect and defend the constitution. Attempts are made to respond to the threat of security forces overthrowing the constitution by provisions placing the military under civilian control, and in a few cases by provisions giving representatives of the military or former combatants in a civil war strictly limited roles in civilian government (e.g., in the constitution of Uganda [1995], section 78, and the constitution of Bougainville, section 55).

Protection from hasty or damaging amendments

Many constitutions contain provisions regarding the process for constitutional amendment intended to ensure that amendments are not made hastily and are considered with great care. As well as requirements for “supermajorities,” there may be a requirement for lapses of specified periods of time between various stages of the enactment process, or even stipulations that the final stage cannot occur until a general election has taken place.

Limits on emergency powers

Under many constitutions, during a declared state of emergency, laws may be passed and actions taken that would otherwise be contrary to human rights protections, and such emergency powers have often been abused by governments seeking to control the opposition. Modern constitutions often aim to limit abuse of such powers by carefully defining the reasons for declaring emergencies; requiring prompt parliamentary approval of a declaration of emergency; providing parliamentary and judicial scrutiny of exercise of emergency powers; limiting the categories of rights that can be derogated during an emergency; and so on.

Certification of the constitutionality of legislative bills

The government and other authorities placing laws and policies before legislative bodies should be required to certify that in their view the bill or policy—particularly the bill of rights—is consistent with the constitution. This will ensure that questions of constitutionality are placed before the cabinet and other executive authorities and given appropriate attention. It will also alert the legislature to address the constitutionality issue. In the United Kingdom, the requirement for such certification regarding the bill of rights has proved most efficacious.

Judiciary

An independent, impartial, and competent judiciary is indispensable for the enforcement of the constitution and for asserting its supremacy. In civil law states, where judicial review of laws is not possible, the establishment of constitutional courts has been fundamental to upholding the constitution (as in Austria, Germany, Hungary, Poland, and South Korea). In common-law states, the final court, usually called the Supreme Court, has been critical to maintaining and elaborating constitutional principles (as in Canada, India, and the United States). Impunity for corrupt leaders, the result of executive control of the prosecutorial process and the judiciary, has caused major deficits in the rule of law and the enforcement of the constitution.

Independent bodies for accountability and redress, and politically sensitive roles

Many constitutions provide for a set of independent institutions that handle an increasing range of functions where independence from political interference is important. They include bodies with roles in relation to accountability and redress, which often have wide powers (e.g., ombudsman institutions, anticorruption commissions, auditors-general, human rights commissions), and others carrying out politically sensitive roles (such as judicial appointment bodies, public service commissions, and election boundary and management bodies). Independence is protected in a variety of ways, including requiring governments to provide them with staff and facilities (as in Papua New Guinea, above).

Codes of conduct

Enforceable codes (sometimes called “leadership codes”) set strict limits on a range of conduct by politicians and bureaucrats, including conduct that could give rise to conflicts of interest (e.g., Ghana, Kenya, Papua New Guinea, Uganda, and Vanuatu).

Direct democracy

Some constitutions seek to move away from the indirect model of democracy involved in electing representatives who make decisions on behalf of the people, and instead provide scope for citizens to participate directly in decision-making processes. They include arrangements for recall by voters of their elected representatives (e.g., the constitution of Uganda [1995], section 84), citizen-initiated legislation (Switzerland, and some states of the United States), public consultation on policies through plebiscites, and public participation in constitutional-amendment processes through referendums.

External devices to encourage safeguarding (and implementation)

Two aspects of external support for safeguarding the constitution require brief comment. The most obvious involves the people of the country concerned, who should always be the ultimate guardians of the constitution. To play such a role, the people need to be helped to understand the constitution and their rights under it. Encouraging people to play active roles in safeguarding a constitution involves the roles of civil society and social capital more than it does constitutional devices. On the other hand, constitutional provisions can support and encourage popular participation in safeguarding. The constitution can require state recognition of the roles of civil society and NGOs, as with section 15 of the constitution of the Philippines of 1986. Other potentially important provisions include ones guaranteeing popular access to courts and other constitutional bodies for accountability and redress, and provisions for direct democracy.

The second aspect of external support concerns the role of the international community, which since the late 1980s has tended to play a significant part in many constitution-making processes, and often remains involved in supporting implementation in various ways. This often extends beyond support for establishing and operating institutions and laws to various forms of support (direct and indirect) for efforts to safeguard the integrity of the constitution. Of course, there is always a need to balance the value of such support with awareness of political and other dangers of actual or perceived international interference in sensitive domestic affairs.