

Part 3: Institutions, groups, and procedures

The decision to leave the discussion of institutions and procedures for constitution-making processes to a late stage in this handbook was motivated by a conviction that the design of institutions ought to be determined in large part by their tasks. However, the process is often designed the other way round: the decision is expressed as something like “We must have a constituent assembly.” Other than recognizing that the general aim is to make a constitution, what the constituent assembly will do is spelled out only later.

It is also true that, in many countries, national traditions dictate what bodies will have responsibility for the process; indeed, for some readers this part may be of limited interest, because in their countries either custom or existing law is clear on the issue of institutions and processes. However, we venture to suggest that even for those readers this part may offer some insight: for example, not all constituent assemblies are made up or operate in the same way. There are even some differences in conducting referendums, and examining the experience of another country might be useful.

Increasingly, the constitution-making process is negotiated or designed, either in international conferences (Cambodia [1993] or Afghanistan [2004]), as part of interim arrangements (South Africa [1996] or Iraq [2005], Nepal [ongoing process]), in national conferences (Kenya [2005], francophone African countries), or through “roundtable” processes (in some Eastern European countries). In recent years there have been several comparative studies of constitution-making processes. This scholarship is aimed partly—even primarily—at drawing lessons about the most effective institutions and methods. The growing internationalization of processes means that decision-makers have access to several alternatives to their traditional approaches, and conscious decisions on the design are increasingly being made. Recent years have also seen new features of constitution-making processes, such as participation of both the international community and local citizens, which require new forms of institutions and procedures. Much can be learned from the successes and failures of countries that have pioneered innovations. The South African process, generally deemed to be successful, has been studied by several countries.

Having explored what is involved in making a constitution, we now turn to institutions and procedures. Systematic analysis of these also presents difficulties. Table 2 indicates that the same tasks may be performed by a range of different bodies. And drawing lines between different bodies is not easy. A constituent assembly is different from a parliament. But some parliaments carry out the same functions as the assemblies, and some constituent assemblies serve also as parliaments. Some constituent assemblies only debate a draft constitution prepared by someone else. Some carry out civic education, consult the public, prepare a draft, and then formally debate it. A commission may be quite small and expert, or rather large and not so expert, or even small and not expert! It may or not be independent—of government or of politics.

It is possible to view the United States constitutional convention in Philadelphia in the late eighteenth century as an early example of a constitutional commission (though we tend to

classify it as a sort of constitutional assembly). Its mandate was to review and recommend changes to the confederal constitution, which would have been debated and possibly adopted under the mechanism for amendment of that constitution. (As is well known, the convention exceeded its mandate and established a new procedure for the adoption of its draft.)

We should warn against assuming that the same name indicates the same sort of animal in all countries, or that a different name indicates something different. A constitutional convention, a constitutional assembly, and a constituent assembly may be quite similar.

Box 35. Commissions or committees?

There is no real difference between these two words, at least in English. But usage may vary. In English it would be unusual to use “commission” to refer to a section of a larger body. English would refer to a “committee” of a legislature or assembly; Spanish might use “comisión.” “Commission” in English usage suggests a slightly more weighty body. We use “commission” for a separate body and “committee” for a part of a larger body.

Our concern in this part is with how these bodies are formed, including their legal basis, how they operate—and how they might operate better.

Some principles of organization are essential. We have chosen again to focus on function rather than on form. We have grouped together institutions that generally perform rather similar functions. However, they also do tend to cluster in terms of size. So we begin with the big bodies that often carry out a lot of functions. They may indeed be the only constitution-making bodies in a given process: constituent assemblies, parliaments, and national conferences.

Then we turn to bodies with the core function of preparing constitutional proposals—including an actual draft constitution. They may do other things as well, such as civic education. These bodies might be called commissions, committees, or roundtables, and they might be (and usually are) specially formed, but might be longer-term bodies.

Next we look at administrative bodies. We discussed in part 2 the processes of administering and managing a constitution-making body. Here we look briefly at the institutions that carry out this role. We use the term “administrative management body” for these, although this is not the name any actual body is likely to have. These bodies will be called “secretariats or management committees” or something similar. Although the role this body plays is critical to the success of a process, it has largely been ignored in constitutional scholarship.

A lot of other official bodies may play limited roles in constitution-making. By no means will every constitution-making process have them, and many of these bodies will not have been planned from the beginning. They are a slightly “miscellaneous” collection, having little in common other than that they have some function in connection with the constitution. They include government departments, bodies that manage elections, bodies of experts, and the courts.

Many constitution-making processes require a referendum for the final decision on the draft, and less commonly while an effort is made to resolve differences on specific issues.

How the bits may fit together

The case studies in appendix A suggest how these elements of a constitution-making process may fit together. No process will have every type of body or institution mentioned. Some may have only one official body. Here are some possible combinations:

- Constituent assembly or legislature only
- Commission → constituent assembly
- Commission → constituent assembly → referendum
- Commission → constituent assembly → legislature → referendum
- National conference → legislature
- National conference → referendum

Table 7: Comparison of a constitutional assembly and a parliament

Parliament (legislature)	Constitutional assembly
It functions by virtue of the constitution and according to the constitution	It makes the constitution—though this may sometimes be by virtue of law made under the authority of the existing constitution
It makes laws	It will not usually make ordinary laws, but it will make the constitution
It votes money for government (budget)	It has no control over finances
It holds the government accountable	It does not hold the government accountable
It is a body that represents the people—usually through elections and political parties—and functions as their representative, rarely with much active public involvement	It usually represents the people—but its members may be chosen other than through elections, or parties; it may involve the public in its activities far more than the legislature would; it is a manifestation of the sovereignty of the people
In a parliamentary system it constitutes a government (the government will usually be drawn from among its members)	It will not affect the formation of a government
Its own accountability to the people depends largely on periodic elections	It is unlikely to have any mechanism by which it is accountable to the people (other than in that decisions may be submitted to them through a referendum)

In any of these (and other possible) chains of institutions, other bodies are likely to be involved. Government departments and electoral bodies are the most obvious; special committees may be involved, as will (almost certainly) local and perhaps foreign experts. Civil society will offer input and perform a variety of roles.

Different patterns

In the contemporary period, the commission has been used extensively in Africa, including Tanzania [1965], Ethiopia [1994], Uganda [1995], Eritrea [1997], Zimbabwe [1999], Rwanda [2003], Kenya [2005; 2010], and Zambia (four times). We suggest why this may be so in part 3.2.3.

It has also been used in Afghanistan [2004], and in Pacific island countries such as Papua New Guinea [1975], Fiji [1997 and earlier], Bougainville [2004], and Nauru [2010]. States or territories associated with the United States tend to use constitutional conventions, though these may be preceded by commissions—as in American Samoa in 2010.

Asia, Europe, and Latin America have more often used only a constituent assembly. India led the way in Asia [1950] and was emulated by Nepal [1951 and ongoing process]; Indonesia had an abortive constituent assembly [1959]. France [1789] had perhaps the first true constituent assembly, and many European countries have followed suit, including Norway in 1814 and Italy after World War II, and some Eastern European countries in recent years. In the modern era, many European countries have carried out constitutional reviews through ordinary legislatures.

The USSR had a short-lived constituent assembly after the revolution. In Latin America the constituent assembly, without any preparatory commission, remains the major body.

Some francophone African countries, and a few others, have used the device of a national conference. The origin of this can also be traced back to the French constituent assembly—which again shows the difficulty of exact terminology.

3.1 Institutions with multiple roles

3.1.1 Introduction

The bodies discussed here are mostly fairly large, and they are often charged with a number of functions: educating the public, collecting views, developing guiding principles, and drafting and adopting a constitution. (Some perform only a few of these roles.)

The distinctions among the various bodies are also not precise. A national legislature has a clear role. But a constituent assembly may also be a legislature. And the boundary between constituent assemblies and national conferences also is not a clear one. In this section we consider constituent assemblies and national legislatures together. National conferences, a phenomenon largely found in francophone Africa, are addressed separately.

3.1.2 Constitutional assemblies

Here we discuss bodies that fit this following broad description: a body designed to represent the nation, assigned—at a minimum—the task of debating in detail a draft constitution of the country, and of approving that draft. It may or may not also have the task of preparing the first

draft, or have the final responsibility for passing it into law. We use the phrase “constitutional assembly” here because it is wider than the phrase “constituent assembly.” We include “regular” legislatures that are responsible for a new constitution or constitutional revision. If a comment applies specifically to legislatures, we make that clear. Comments that relate to “constitutional assemblies” apply to any representative body charged with making or revising a constitution.

The significance of the common phrase “constituent assembly” is that it refers to a body representing the people that is vested solely (or mainly) with “constituent power.” A Nigerian constitutional authority, B. O. Nwabueze, wrote “[Constituent power] is a power to constitute a frame of Government for a Community, and a Constitution is the means by which this is done. It is a primordial power, the ultimate mark of a people’s sovereignty” (Nwabueze 1974: 292). In some countries it is assumed that the people’s constituent power can be exercised by parliament; in some the tradition is that a separate body is required, and usually such a body does not have the power to make ordinary laws; the parliament alone retains that role. But views may change—especially because of the highly political atmosphere that often surrounds constitution-making. A Kenyan court in 2004 decided that a new constitution could be made only by a directly elected constituent assembly, or possibly a parliament elected for the purpose; failing this, a referendum was required—which was a highly questionable decision.

We can compare the main characteristics of a constitutional assembly and a parliament:

There is no single model of constitutional assembly, and it is not really possible to say that certain minimum requirements define such an assembly. Even names vary; many combinations of the words “constituent” or “constitutional” with such words as “assembly,” “convention,” “congress,” or even “conference” have been used to name (and describe) bodies whose primary responsibility is to change or make the constitution. In some languages there is no distinction between “constituent” and “constitutional.” But in languages that do have both terms, “constituent assembly” has a particular appeal because it implies that it is the people’s representatives who make and adopt the constitution. In Germany this phrase was rejected and “parliamentary council” was used—one of several measures designed to make it clear that it was not the final constitution for a united Germany that was being prepared.

Constitutional assemblies differ in size and composition and in how their members are chosen. They also vary in their roles, although they must at least discuss and adopt a constitution. Some are national bodies preparing a national constitution, while others are subnational bodies—such as the body that prepared the Bougainville constitution [2004], the Kashmir constituent assembly of [1956], and the assemblies of the individual states of the United States.

Legislatures and assemblies: The relationship

Possible relationships among special constitution-making bodies and “ordinary” legislatures are these:

- There is no “regular” legislature at all, and all efforts are focused on the constitution-making process through the constitutional assembly.

- The regularly elected legislature alone has the task of constitution-making or revision (and it is not elected specifically for that purpose).
- The legislature is chosen by elections in which the constitution is the only or a major issue, and it has the task of making the constitution.
- The legislature is also the “constituent assembly,” though it is analytically two separate bodies (e.g., as in India, Nepal, Papua New Guinea, and South Africa).
- All the members of the legislature are members of the constitutional assembly but there are also other members of the constitutional assembly, and the two bodies sit separately; the regular legislature as such has no role in connection with the constitution.
- All the members of the legislature are members of the constitutional assembly, but there are also other members of that assembly, and the two bodies sit separately. The regular legislature also has a role in connection with the constitution (as in Kenya [2005]).
- There are two completely separate bodies, with no (or no significant) overlap in membership, and the regular legislature has no role in connection with the constitution (e.g., Bolivia and Uganda).
- There are two completely separate bodies, with no (or no significant) overlap in membership, and the regular legislature does have a role in connection with the constitution.

If there is both a legislature and a constitutional assembly, each of which has a role in the constitutional process, how are these roles divided? The role of the legislature may be limited to forming the assembly and other organs of constitutional review. But the legislature may insist on having the last word (or a later word). So the constitution adopted by the assembly may have to go to the legislature for further approval (as happened in Kenya in [2005]). This is an unsatisfactory arrangement: if the assembly is inclusive, it is odd that its product should then go to the less-inclusive legislature. And if, as in Kenya, the members of parliament are also members of the assembly, they may be tempted not to engage in that body because they will have the chance to decide on the constitution later, in the legislature.

If one body operates as both legislature and constitutional assembly, how is the difference marked, if at all? In Ceylon (now Sri Lanka) the constituent assembly sat without a mace, the symbol of royal (governmental) authority. The two bodies could sit in separate places, but this would create logistical problems if both needed to sit on the same day. A different person might preside. The session for each might be marked by its own formalities—separate prayers, for example. The rules of procedure might be slightly different—but it would be hard to make them significantly different for similar types of activity. There is a good reason for having more demanding quorum rules for the constitution-making body.

In Nepal [ongoing process] the interim constitution provided for a committee of the constituent assembly to carry out the legislative work. The motive was to prevent the work of the constituent assembly being held up because the parliament needed to meet. However, this was never brought into effect. It seems there was an unwillingness to leave the parliamentary work to a committee. There were twenty-five parties in the assembly and all would want to be in the parliament, yet some had only one member.

Box 36. The nondeliberative constitution-making role of parliament

Parliament may have—or give itself—functions in relation to the constitution-making process other than debating the contents of the constitution. It may well have passed the laws setting up the process. It may have a role in appointing members of a constitutional commission. It may have to vote the necessary resources for the process. It may insist on overseeing the process, even if it cannot control it. In Kenya from 2000 to 2004 and again from 2008 to 2010 the legislature established a select committee that carried out these roles. The committee was important if amendments to the governing legislation had to be passed. Its makeup reflected the party composition of the parliament. In 2008–2010 the committee was also given specific roles by law (including decision-making roles about the content). The Somali process that began in 2009 emulated this model, but the role of its parliamentary committee was unclear.

Arguments for and against separating the legislature and the constitutional assembly

A constituent assembly may be seen as representing the people’s sovereignty. It may also be seen as a way precisely of ending legal continuity, marking a break with an autocratic past, or having a genuinely “home-grown,” or autochthonous, constitution rather than one that owes its legitimacy to its colonial history (as in Papua New Guinea [1975]). It has been argued that it is better to have a constituent assembly, which is somewhat different from the ordinary legislature, make the constitution, precisely because it is not the ordinary lawmaking body and does not have the same vested interest in the document that is to be drawn up; it should not “act as judge in its own cause.” This benefit will disappear if the constituent assembly turns itself into the

Box 37. South Africa: One body, two roles

Under the interim constitution, elections were held for a parliament that was also the main constitution-making body. That election was an important milestone; it was the first time most people had voted. It would have been impossible to produce a separate, more legitimate body to deal with the constitution.

This had other advantages. All the newly elected MPs could be involved in constitution-making. Only one secretariat was involved, and only one building needed. It has been observed that although the African National Congress was the dominant party, “the executive did not control the process, as it might have in an ordinary parliament.”

legislature under the new constitution (as in Timor-Leste [2002], for example). When there is significant distrust of politicians and parties, a separate constitutional body may have greater popular support (for which reason politicians may not be prepared to go along with such an arrangement).

What are the arguments against separating the legislature from the constitutional assembly? Time and expense are clearly relevant; almost certainly a special assembly will take longer than some sort of expert commission process, and probably even than a regular legislative review (although these can also be slow). It will almost certainly be more expensive than if it is parliament that has the role.

From the perspective of interested groups, one disadvantage of a special assembly is likely to be its unpredictability. People who commit themselves to a constitution-making process would like to be able to predict the outcome, in the sense of the constitution they will produce. The more “popular” the composition of an assembly, the less predictable it is likely to be. Designers of the assembly may try to make it more predictable—by bringing in members through political parties, by limiting the voting possibilities of members, and through the internal structures and rules of the constituent assembly. Results of such efforts cannot be guaranteed. Even party discipline may collapse; in the Kenyan National Constitutional Conference it proved impossible for parties to control their members, as ethnic considerations dominated.

Various constituent assemblies have exceeded their mandates. Jon Elster has written:

[T]he [U.S.] framers ignored the instructions from the Continental Congress on three crucial points when they decided to write an entirely new constitution, to seek ratification by state conventions rather than state legislatures, and to require ratification by nine states rather than by unanimity. In France, the constituent assembly decided to ignore the instructions of their constituencies with regard to both the voting procedures and the King’s veto. In Germany, finally, the constituent assembly successfully insisted on ratification by the state legislatures rather than by popular referendum. The German framers also managed to resist some, although not all, of the decentralizing instructions that the Allies had given them (Elster 1995: 375).

Bodies in some processes have been hybrids: legislators are members of the constitutional assembly, but there are many other members. This may seem to be a reasonable compromise, but has its own problems. If the parliamentarians are many, it may be impossible for both bodies to sit at the same time, which may seriously hold up the constitution-making process. They may also have influence greater than their numbers would suggest, raising risks of use of such influence for their own benefit.

Legal status of assemblies

In revolutionary or transitional times, the “legality” of assemblies convened according to the rules set forth in a previous constitution may be doubtful. American commentators have argued

about whether the actions of the constitutional convention were “illegal” and therefore reflected the founding of a new legal order. The French constituent assembly came into existence to raise revenue for the French king. But as the existing system fell apart, it transformed itself into a constitution-making body. Even in this, revolutionary, case, the body itself was convened by the existing authority. In some situations of constitutional crisis, or even vacuum, constitutional assemblies have been brought into being by actions of outside forces, whether in the form of occupying powers, such as the victorious countries occupying (West) Germany after World War II, or the United Nations in Cambodia [1993], or the United States in Iraq [2005]. In Vanuatu [1980], members of the various local parties formed their own constituent assembly, without any formal legal framework, and proceeded to make a constitution. It was accepted by the colonial powers (France and Britain) and became law.

The South Africans, as mentioned earlier, wanted to preserve legal continuity. So the 1993 interim constitution and the final constitution were made by and according to the procedures of the parliaments of the time.

Other assemblies have come into existence in more “normal” times, and have been formed by existing authorities for the specific purpose of making a constitution. Those authorities might be the ordinary legislative process (as in Kenya in the later 1990s) or military authorities (as in Nigeria in 1977 and 1988). In those circumstances it is perhaps easier to design a process and a structure for the assembly. But it is probably rare that a constituent assembly is formed without great pressures from contending forces, even if those forces are not at war. In fact, in less-fraught constitution-making circumstances, perhaps a special constitutional assembly is a less common way to make a constitution. Among the constitutions made or amended in recent times in noncrisis circumstances are those of Finland, Sweden, and Switzerland, where changes were made by the ordinary parliament. This may also reflect national traditions—though Switzerland’s individual cantons do sometimes use constituent assemblies to make their cantonal constitutions.

For the purposes of this handbook, we assume that the important consideration for constitutional process designers will be whether the constitution is acceptable to the nation, something that is likely to depend more on its content and the process of making it than on legalistic arguments about its foundations.

Design

This book is written for those who do have a chance to plan, and there are some lessons that can be learned from the past. At the least, it may be useful to have a checklist of aspects of assembly design. Some main objectives of rational constitutional assembly design are:

- legitimacy in the eyes of the public;
- a body that acts on the basis of its perceptions of public interest and not of self-interest (of its individual members, of itself as an institution, of the parties or groups from which the members come or that they represent); and
- a body that has the necessary competence (including having access to necessary technical assistance).

A purist view would be that a true “constituent assembly,” as the embodiment of the sovereignty of the people, ought to have the entire constitution-making power, subject possibly to the requirement of a referendum. In reality many assemblies have done far less. Past assemblies, on a continuum from widest to narrowest range of functions, include those in table 8.

There is no “right” set of tasks for an assembly. But there are a few considerations that may be helpful in planning those tasks.

On “civic education” (see part 2.2.2), the constitutional assembly may itself need to be educated about its task, and may be poorly equipped to educate the public. And the sort of human, logistical, and other support that the constitutional assembly will have available may not be adequate for the task. However, in South Africa the assembly did take on this role effectively by having its administration hire and train a team of civic educators.

Whether a separate commission or other body should prepare a draft is much debated. One can argue that the people’s sovereignty would be better expressed if the constitutional assembly were to carry out both these operations, because the document prepared in the first stage will almost inevitably impose some restraints on the contents of the final document. If a first draft, prepared by another body, takes account of public opinion, and the document is then revised by a constitutional assembly, it will be, in theory, the outcome of two quite different processes of ascertaining public sentiments (and, if it then goes to a referendum, of yet a third). If the first draft is prepared before the constitutional assembly sits, then one would have to ask when the “political bargaining” would take place: with the drafting commission, or left until the constitutional assembly, in which case is it public or behind the scenes?

Table 8: Functions of constitutional assemblies

Countries	Functions
Afghanistan [2004]	Approving with little discussion a draft that then requires further act of adoption
Cambodia [1993]; Timor-Leste [2002]	Carrying out or supervising the whole process designed by others from draft through promulgation
Nigeria [1979, 1999]; Kenya [2005]	Thorough debate on the existing draft, with freedom to change it; further act of adoption by another body
Uganda [1995]	Thorough debate of existing draft, but needing supermajority to amend draft; final act of adoption by another body
United States [1787]; India [1950]; Bolivia [2009]	Preparation of draft; then full debate; further act of adoption or promulgation required
Vanuatu [1980]; Namibia [1990]; Nepal [ongoing process]	Designing the whole process (other than formation of the constituent assembly, and the adoption process) and carrying it out from public consultation (if any) to draft to promulgation

If there is no other body, the assembly may have to be charged with responsibility for public consultation and provided with the necessary staff members. However, this may be a task that an assembly is not well equipped to carry out—the task requires special expertise, including perhaps computer programmers and data entry personnel. (See part 2.3.4 on the personnel needs of a process.) And, especially if the assembly is also the parliament, or parliamentarians are also members, it may be undesirable for them to conduct public consultation meetings: some of the issues the public wants to raise may be concerned with the competence and commitment of legislators generally, or even the particular members at the meetings, and the public would naturally feel hesitant to speak freely.

Size

Constitutional assemblies have a tendency to be large, often too large, though they have varied widely. (See table 9.) If dissatisfaction with parliament is one reason for having a constituent assembly, it will often be felt that representing the whole people requires a larger body. If, as in Kenya, parliamentarians are members of the assembly, the latter must be larger, and there it was decided that others should outnumber members of parliament. Realistically, if a section of society has one member it may feel some sense of satisfaction, but is unlikely to be able to influence decision-making at least by its voting force (except perhaps if a two-thirds vote is on a knife-edge, or if unanimity is required at some point). But there is another role than that of voting: articulating the issues of the various sectors of society.

Large bodies are hard to control. Decision-making is difficult, even in committees because they will also be big, unless they are numerous (in which case providing secretarial and other assistance and keeping track of what the committees are doing will be hard). With large bodies, there is more risk that members will make rhetorical speeches rather than contributions of substance.

Size will be less of a problem if the function of the constituent assembly is mainly to endorse a document prepared elsewhere (such as Afghanistan's Constitutional Loya Jirga); the body will not really have to understand the document in great detail. Most constitutional assemblies are expected to discuss the issues in detail, and even those that are not expected to may insist on doing so.

Membership

A dilemma in constructing any constitution-making body is how to balance the wishes of the people with those of the political classes, especially of political parties. After or during periods of conflict parties may not really represent the people, and the role and control of parties may be an issue in constitution-making. Political parties have interests as parties, and politicians as politicians.

On the other hand, there is a risk that a constitution that is adopted without being accepted by politicians, and even by the organized parties, will not work. A good working relationship between the politicians and the people is essential, and the final document will probably be a product of compromises between these two groups, as well as among other groups in society.

If the legislature is the constitution-making body, it will be composed according to the usual procedures (though if it is elected with a view to constitution-making, the election results may be slightly different than those in regular elections). If the constitution-making assembly is quite separate from parliament, it may seem pointless to use the normal election method, and permit the parties to campaign in the usual way—the composition of the assembly will probably largely mirror that of parliament. However, different people might be interested in standing for elections.

The composition of various constitutional assemblies is shown in table 9.

This shows that some assemblies have been designed to represent the people, sometimes to the exclusion of traditional politicians (who may be otherwise occupied with the regular legislative business, in a separate body). The categories of “people” include, and indeed often emphasize, those marginalized in the past; their demands may be the very basis of the assembly process, as in Bolivia and Nepal. One problem with such a basis is that new groups tend to emerge, demanding their place in the assembly. This was true in Nepal, where the interim constitution had to be amended to make the membership more comprehensive, and the selection process correspondingly became more complex.

Election and selection of members

Assembly members (other than regular legislators) may be chosen by:

- direct election by the people;
- indirect election by existing political bodies such as local government councils;
- election or selection by bodies, not necessarily normally politically active, that would not usually choose representatives to a legislature (such as civil society or parties—other than in a party-list system—or even an individual such as a king); or
- nomination by the chair of the assembly, or some other person or body, for reasons connected with the makeup of the body and its expertise or to repair shortcomings in its representativeness.

The arguments for and against direct election include the following:

For:

- it is democratic;
- it can lead to fair representation; and
- it is likely to be acceptable to people.

Against:

- it is expensive and time-consuming;
- if the electoral system is faulty (this may be one of the issues to be decided when debating the new constitution), the assembly may not be representative and may have an interest in preserving the faulty system;

Table 9: Composition of constitutional assemblies

Country and body	Composition	Population of country	Assembly size	Women
Bolivia [2009] Constituent Assembly	Directly elected	9 million	255	35%
Bougainville [2004] Constituent Assembly	Members of two existing governmental bodies, 36 in the Interim Bougainville Provincial Government and about 100 in the Bougainville People's Congress	185,000	136	8
Ecuador [1998] Constituent Assembly	Directly elected members	12 million	90	28.5%
Ecuador [2008] Constituent Assembly	Mixed system of some members representing provinces (100) and some citizens overseas (6) and also party lists (24)	13.7 million	130	34%
Eritrea [1997] Constituent Assembly	105 members of the legislature; the rest elected by regional assemblies or selected from representatives of Eritreans abroad	3.2 million	527	30% quota
France [1789] Constituent Assembly	291 deputies of the clergy, 270 of the nobility, and 584 of the Third Estate	28 million	1,145	0
Germany [1949] Parliamentary Council	Indirectly elected (state legislatures elected some of their members)	50 million	65	About 4
India [1950] Constituent Assembly	Mainly elected by provincial legislatures	345 million	About 300	About 15
Kenya [2005] National Constitutional Conference	All members of parliament (222): 3 elected by each district council; (no more than one councillor, at least one woman); 126 chosen by civil society; 1 member from each registered party; 13 nominated by chair to represent other aspects of society; constitutional commission members (29)	31 million	629	About 136
Nepal [ongoing process] Constituent Assembly (Constitutional Assembly in Nepali)	240 members elected by first-past-the-post, single-member geographical constituencies (2 of those elected were nonparty candidates); 335 elected on party-list system; 26 nominated through party-based consensus	26 million	601	197
United States [1787] Constitutional Convention	Elected or selected by individual states	4 million	55	0

Box 38. Members' active participation

The Kenyan constitutional commission looked at the contributions of different types of members to plenary debate. In quantitative terms they found that members of parliament made a somewhat smaller contribution than their numbers would suggest, while members of the commission that prepared the constitution draft that formed the basis of discussion contributed significantly more. Only 61 percent of the members of parliament spoke at all, while 91 percent of NGO representatives did, as did 89 percent of representatives of religious organizations. Only 46 percent of those appointed to represent “special interests” did so. These figures probably reflect the lack of belief on the part of many members of parliament that the process would lead anywhere, and the much greater commitment of civil society and district representatives. It was probably a mistake to include members of the drafting commission in the constituent assembly—they did not have a vote, but some had considerable influence over thematic committees.

- it may be dominated by political parties;
- people of competence and integrity may be reluctant to stand for election (or parties may not accept them); and
- elected members may feel compelled to stick to their mandate and be less prepared to compromise.

Many assemblies are made up by a combination of methods.

It has been argued that, whatever the usual electoral system, broad representation of the people in the constitutional assembly would be best achieved by a list system of proportional representation, with a low threshold, to ensure that even small parties are present. In some countries a national proportional representation list system has been adopted (in South Africa, for example), or a list system but using smaller constituencies (as in Namibia). The system adopted for the Nepal constituent assembly was a mixture of single-member geographical constituencies (240 members) and party lists (335 members). It did not rely on the natural tendency of proportional-representation systems to be more inclusive (because people did not trust the political parties to be inclusive in their selection of candidates) but imposed rigid requirements in terms of gender, caste, and ethnicity for the lists and the seats. In Bolivia a party could not necessarily hold all three seats from a district even if it won sufficient votes to do so: if there was another party with at least 5 percent of the votes in the district, it would take the third seat. This was designed to protect small parties. But proportional representation systems do give a great deal of power to political parties.

However, some assemblies have included members drawn from lists not put together by parties. For example, half the lists for the election to the Geneva constituent assembly established in 2008 were party lists, with the other half being lists of people with particular interests (such as

homeowners, women, and retired people), including one list put together by a federation of 480 local organizations of all sorts). It is common for a proportional representation list system to provide that a party will only have any members elected as members of parliament if it achieves a certain threshold percentage of the votes cast—at least 1, 3, or even 7 percent. The aim here is to prevent fringe, even extremist, parties from winning seats. But the threshold might be lower for a constituent assembly precisely in order to encourage inclusion of a full range of national interests.

Entitlement to vote in an assembly may be wider than for parliamentary elections. In Eritrea some members of the assembly were elected by Eritreans abroad (though in some other countries, claims by the diaspora of the right to vote have been rejected). Afghans in refugee camps in other countries were also to vote for the Constitutional Loya Jirga. In the case of a country emerging from serious conflict there may be many exiles, but tensions can exist between exiles and those who remained. In Kenya a court held that prisoners could vote in a referendum; they were debarred from voting for parliament. A similar possibility might exist for voting for a constitutional assembly—depending on the words of the existing constitution; if there were no constitution, an expansive view of the right to vote might be possible.

Some other selection process by civil society has been used in a number of constituent assemblies, including Afghanistan [2004] and Kenya [2005]. There are risks in such a system, including those of undue influence or even bribery in “small-circle elections” resulting in new sorts of distorted representation. But if the alternative is that elections are exclusively dominated by unreformed parties, this may be a risk worth running, and in a system where civil society is genuinely responsive to society those risks may not be realized.

Nomination of a small number of members could be designed to bring in representatives of groups and sections of society that are underrepresented or individuals whose experience will add weight to the deliberations or legitimacy to the body. Such a nomination could be made by the chair of the body (as in Kenya, where the chair used the power to appoint some persons from the business sector, including media). But in some instances the chair is not identified in advance. It could be by agreement among parties, as in Nepal, but there the parties to some extent undermined the understood purpose (to bring in expertise without regard to party affiliation) by sharing out the slots among the major parties and not necessarily using them to bring in experts.

Relatively few countries make voting a legal duty. It has been suggested that, even in a country with a practice of compulsion, this should not apply to elections for a constituent assembly. But in New Jersey in 1966 only about 3 percent of the voters voted for the constituent assembly members, which rather makes nonsense of the idea of people’s participation.

Campaign

If public funding is usually available for election campaigns, arguably it should also be available

for campaigns for election to the constituent assembly. But there may be many nonparty candidates in such an election. It has been suggested that there should be a publicly financed information sheet to educate the public about all candidates. A few countries have banned separate party rallies and campaigning, providing only for joint, publicly financed election meetings (e.g., Tanzania in the one-party state period). That plan might be worth considering for elections to constitutional assemblies.

Federations or federating countries

Indirect elections (usually by a lower-level legislature) are common in federating countries, as in the United States at the time of the constitutional convention, and to some extent in India in 1946. The shortcomings of this approach are that:

- it may make the assembly a process of bargaining among units and not a process of the people; and
- it may mean that the assembly mirrors distortions in the makeup of the federal state—the very distortions that may be involved in the disputes underlying the demand for a new constitution.

Should representation of units be based on equality or population? The former favors smaller units. Issues of representation should be looked at in the light of voting arrangements, among other things: what number of votes is needed to carry a motion and what number is needed to block one?

Qualifications of members

One might argue that to make the assembly as representative as possible there should be no requirement other than being a citizen, and perhaps a registered voter. Some countries might consider allowing members of the national diaspora to be members of the assembly, even if they are not citizens. They may have left the country against their own wishes, under oppression or conditions of insecurity, and may not have given up aspirations to return to it.

Qualifications imposed in actual cases have included Nigeria's requirement in 1977 that members be "indigenes" of the state they represented (meaning that their tribe is one that "belongs" in the state). Nigeria excluded traditional paramount rulers in 1988. Both Nigeria and Nepal (2007) excluded current public servants, and Nepal precluded payment to anyone from government funds. Nigeria in 1977 and 1988 required that a person have paid taxes for the previous three years (which might discriminate against women); while Nepal excluded anyone owing the government money. Nepal's concern to exclude the corrupt led it to bar anyone convicted of crime involving "moral turpitude" or corruption, or of any electoral offense in the previous two years. It went to the extent of barring those blacklisted (under law) as defaulters to banks. And Nepal also barred those under twenty-five years old—thus excluding the voice of youth.

Having a large number of candidates can be confusing for voters. Requirements to show a certain level of support may reduce those numbers. In Nigeria in 1977 the number required was

ten. In Nepal in 2007 only a proposer and seconder were required. Another device for discouraging frivolous candidature is to require a financial deposit. In Nepal an individual standing for a geographical constituency had to put up a deposit of 3,000 rupees (about \$45 in United States dollars) and a party putting forward a list for the proportional representation election 20,000 rupees (about \$300).

Experts as members?

Elster has suggested that experts should not be members because the constitution should be the outcome of bargaining between the representatives of the people, rather than an expert affair: “Lawyers will tend to resist the technically flawed and deliberately ambiguous formulations that may be necessary to achieve consensus” (Elster 1995: 395). But experts have the same right as any other citizens to stand for election, and this exclusion may produce a distortion of expertise. Some countries have provided for specific seats for persons with certain expertise, while in many others some members will have expertise, with lawyers often being prominent. In India political parties sought to ensure that some leading experts were included in the constituent assembly.

Nonmembers with special relationships

In Kenya [2005], certain observers were permitted to attend, and to interact with members informally during breaks. These were drawn from civil society, and were selected by a committee (from thousands who applied). One principle was to allow groups that had important potential input, but were not formally included in the assembly, to be present. The observers could attend plenary sessions (as could other members of the public) and were assigned to relevant committees (unlike members of the public), but could not speak or vote in either. Twenty-eight organizations were also accredited, which meant they could lobby members, distribute literature, and hold meetings on the grounds of the constituent assembly.

In other contexts, government observers have also been included—perhaps unwisely. In Afghanistan [2004], constitutional commission members who prepared the draft were included as observers along with the transitional cabinet and the heads of the judicial and human rights commissions. They did not have the right to vote or express an opinion unless they were asked a question by one of the members of the Constitutional Loya Jirga.

Payment of members

If constitutional assembly members already hold paid public positions, perhaps as legislators, there is little reason to pay them more for their constituent assembly roles. But in some countries legislators are adept at claiming allowances for everything they do. People who otherwise would not be paid, or not paid much, would have a legitimate claim to be paid for this public service. Ideally, salaries should not be fixed by the members of the constituent assembly themselves. This could lead to abuse, discrediting the assembly.

Structure of the assembly

It seems unnecessary to have a second chamber for a purely constitution-making assembly. It is meant to represent the entire people, and it does so in one chamber. Conflicts with any other body should be avoided. The one purpose that a second chamber could serve would be to prevent a body that is otherwise not subject to any realistic constraints from straying beyond its mandate. To be able to do this, the second chamber would have to have great public legitimacy—which might falter under the strain of disagreement.

Committees

It is common for much of the work to be carried out in committees. In addition to committees to discuss substantive issues, there will probably be some addressing administrative matters. Some may resemble the committees often found in legislatures (on the discipline of members, for example). Others may be needed because the assembly is a new body without an existing structure. For example, there may be a committee concerned with the welfare of members, their housing, transportation, and so on. And the special nature of the work of the assembly may necessitate special committees such as those on civic education, the collection of views, and the education of members. Committees have included:

- a capacity-building and resources-management committee and a committee for public opinion collection and coordination in the Nepal process; and
- a staff and finance committee, a credentials (members') committee, a house committee (concerned with housing, library, and other facilities), a press gallery committee, a steering committee, and an order of business committee (to plan the future course of the constituent assembly) in the Indian assembly.

How should topics be assigned to committees? Sometimes the structure of the existing constitution may be used as the model. This has the disadvantage that the structure of that constitution may be dictated by that of the old, because of the committee structure. Sometimes the committee structure closely reflects national concerns, as it did in the Bolivian constituent assembly, which included committees on “education and interculturality,” “hydrocarbons, minerals, and metallurgy,” “water resources and energy,” “integrated Amazon development,” and “coca.”

The South African assembly was divided into the following committees:

- Committee I—Democratic state (preamble, citizenship, equality, supremacy of constitution, elections, freedom of information, accountability, separation of powers);
- Committee II—Separation of powers, legislative procedures, constitutional amendment, structure of government at different levels, legislatures, electoral system, traditional leaders, executive;
- Committee III—Relationships among levels of government;
- Committee IV—Fundamental rights;
- Committee V—Judicial and legal systems; and

- Committee VI—Public administration, financial institutions, transformation, security services.

The following criteria might usefully be borne in mind:

- Committees should be no larger than about thirty members if the benefits of having a smaller body are to be realized.
- Though it is useful to have expertise in committees, it is not practical to give members a free hand to choose their own committees—committees will become uneven in size. Also, it is often important to have nonexperts on committees as well as experts; the whole idea of a constitutional assembly is to have the people’s voice, rather than only experts, involved).
- The membership of committees should be balanced in gender, ethnic, and other terms, if possible.

If parliament is in charge of the process, the committee structure may be different. Parliament has many other functions to perform, and other committees will exist. Parliament may therefore decide not to assign all its members to the constitution-making process, but to set up one committee with that responsibility. That committee may operate essentially like a constitutional commission.

In Zimbabwe [ongoing process], a parliamentary select committee had an oversight role in the constitution-making process. It appointed seventeen “thematic committees” with 30 percent legislators and the remaining members drawn from “stakeholders” outside parliament.

Place

It may seem natural for the assembly to have its main seat in the national capital for symbolic reasons, and because that is likely to be the most accessible town. There may be good reasons for having it sit elsewhere:

- to be away from the seat of the national legislature;
- to symbolize the break with the past;
- to avoid a place still affected by turbulence; or
- to avoid the constituent assembly being subjected to undue pressure from the people and organizations of the already powerful capital city.

Similar factors may suggest not using other cities. In Bolivia the constituent assembly sat in Sucre, an old colonial capital, but not the current national capital where the parliament sits. But to some extent the constituent assembly became hostage to the demands of the Sucre people about the city’s constitutional status.

It may also be necessary to strike a balance between protecting the security of the members and ensuring that the security forces are not in a position to overawe them.

Even if the assembly sits in the same town as the legislature, it would be best for it not to sit in the same venue. But it may not be easy to find a place large enough for the assembly, which must have not only a hall for plenary sessions, but many rooms for committees, for support staff and facilities,

and (if public access is to be permitted) for public facilities. The Kenyan body sat in a large hall designed for dance performances before tourists (chosen in preference to a city-center conference hall to minimize the risk of delegates slipping away to their offices or to shop). It was not easy to see or hear delegates in the spectator seats; a shortage of rooms was to some extent solved by the use of tents, but this meant that secrecy of deliberations was impossible. In Nepal the use of a conference center meant that the chair was on a stage, and the stage was the only part of the hall visible from the public gallery. In Afghanistan, a large tent was erected.

Support and facilities

The constituent assembly will need:

- an administrative management body—which will probably require staff members with a wider range of skills than a normal legislative secretariat (see part 3.3 on establishing this body);
- logistical arrangements for members (possibly including housing);
- printing facilities of its own, or access to good facilities elsewhere;
- communications (radio, computers, TV studio, and the like);
- vehicles or access to vehicles if it is to travel; and
- security arrangements.

(For a more in-depth consideration of what is needed, see part 2.3.)

Duration

Predicting how long it will take a constituent assembly to complete its work may sometimes be hard—especially if the assembly has the entire constitution-making role. If it is set up to debate a full existing draft, a clear timetable may be possible—especially by limiting the life of the constituent assembly in order to limit its role.

Time limits prevent groups with more patience (but not necessarily more concern for the national interest, whose interest may be in financial gain) from obtaining advantage. On the other hand, an assembly composed partly of people unused to deliberative work of this type may take some time to understand and feel comfortable with its role. If the process is too rushed, more experienced members (probably seasoned politicians) may have the upper hand.

What happens to an assembly once it has finished its task?

It is important that the law (if any) should be clear about what happens when the assembly finishes its task. The interim constitution of Nepal is a little unclear: “The term of the constituent assembly is to be two years from the first sitting” but “on the day of the commencement of the Constitution promulgated by the constituent assembly” its task is to come to an end.

Turning the constitutional assembly into the first legislature under the new constitution may not be desirable. The assembly may be quite different in its makeup from a regular legislature,

as we have seen. But it is not easy to prevent this by existing law if the assembly is perceived as having full constituent power—in other words, it creates the new legality, which overrides existing law.

Conclusion

The context, as well as national tradition, may often define the choices listed above. Designers of the process need to follow models of other countries with care, and to learn from their own country's past efforts and experiences.

3.1.3 National conferences

National conferences (sometimes called national conventions) are usually large, unelected bodies composed of representatives nominated by a wide range of interests established to discuss constitutional and other options for the future in situations of intense national crisis in the period of transition from authoritarian (single-party or military dictatorship) regimes to more democratic regimes. They were established mainly (but not only) in French-speaking countries in Africa from the late 1980s to the early 1990s. They were usually established rapidly, in response to a crisis, and often provided the first opportunity in two or three decades for wide-ranging public discussion of the issues facing the country. Their proceedings were generally broadcast live on television and radio.

In addition to government representatives, most national conferences consisted of representatives selected by interest groups such as opposition political parties and civil associations. They tended to be much larger than constituent assemblies; the national conference in the Democratic Republic of the Congo, 1991–1992, had more than three thousand participants. In terms of the constitution-making tasks that they performed, a minority of national conferences developed and adopted a constitutional text, in much the same way that some constituent assemblies do. More commonly, however, the main constitution-making roles involved development of principles and proposals that were shaped into a constitutional text by a transitional legislature established by the national conference. And in part because they often declared themselves sovereign and replaced the existing national executive and legislature, many national conferences had extensive roles beyond constitution-making.

Organizing and managing a conference could be difficult due to the combined effects of such factors as the speed with which conferences were established; the emerging opposition to the existing regime being weak and disorganized in many cases; their large size; and the many groups represented in them.

Origins of national conferences

The origins of most national conferences can be found in intense fiscal and political crises, some involving the collapse of banks; the inability of the state to pay the salaries of public

servants; national strikes; and violent clashes of unions and opposition groups with military forces. Such crises have usually been exacerbated by international community pressure—from the mid-1980s, for structural reform of economies, and from 1988 to 1989, for political reform. The extent of the crises meant that the government had little or no legitimacy and so was unable to advance reform through existing institutions. Further, in most cases, political parties had long been banned or were extremely weak, resulting in little support for establishing a new national legislature or an elected constituent assembly as the way forward. There needed to be some other institution that enabled a national government with little legitimacy to engage with a wider set of interests that had not coalesced into a legitimate opposition party or group.

The best-known national conferences are those that were held in French-speaking Africa, the first being in Benin in February 1990. Subsequently they were held in Gabon, Republic of the Congo, Mali, Niger, Togo, Democratic Republic of the Congo, Madagascar, and Chad in the period from 1990 to 1993.

French and other influences

The choice of the national conference as a constitution-making institution in so many countries in crisis in French-speaking Africa was partially influenced by the ongoing connections of those countries with France, which had been the colonial authority in all cases, and continued to maintain close links in most. The significance of an institution that was to be seen as a model for the national conference—the États Généraux, which had met in Paris in 1789 on the eve of the French Revolution—was highlighted in the 1989 bicentennial celebrations of the French Revolution held in France and widely reported in French-speaking Africa. The education of the elites that organized the national conferences in France or in French colonial schools had emphasized the importance of the revolution and the États Généraux.

On the other hand, there were other influences than French links. In particular, large gatherings with some similarities to national conferences were also part of political reform processes developing in other parts of Africa from the late 1980s in countries without a French background, including Ethiopia, Namibia, Somalia, and South Africa. Further, not all French-speaking African countries established national conferences, though there were strong calls for them in the early 1990s from opposition groups in some such countries, for example, Burkina Faso, Cameroon, the Central African Republic, Côte d'Ivoire, and Mauritania.

It is also true that the national conference has not been solely a phenomenon of French-speaking Africa. The first one in Africa was in formerly Portuguese São Tomé and Príncipe, where a December 1989 conference of about six hundred mainly ruling party members had a limited constitution-making role. (It made recommendations for political reform to the ruling political party.) In part because the possibility of using an institution such as the national conference was opened up as a result of the experience of French-speaking Africa in the early 1990s, countries from other historical and cultural backgrounds have also established bodies with some characteristics of national conferences. Examples include Sierra Leone [1991], Russia [1993],

Indonesia (1999–2002 process leading to amendments), and Rwanda [2003] (though most of these might better be regarded as “hybrid” bodies, as discussed below).

Some features and problems of national conferences

Some closely related features commonly found in national conferences, and some associated issues and problems arising in their operation, require brief comment. They concern:

- processes for making initial decisions about establishing such a body;
- the variety of roles and tasks that they carry out, with particular reference to their constitution-making tasks;
- the large size, the composition by representation of interests, and the short duration of the conferences, and some difficulties associated with those characteristics, in particular
 - difficulties in their acting as effective deliberative bodies; and
 - management difficulties, including translation; and
- issues about chairing national conferences and the importance of a forward-looking perspective.

All of these features and issues can readily be considered in light of the experience of the nine national conferences held in French-speaking African countries between 1990 and 1993. Some basic information about those national conferences is summarized in table 10.

In addition, brief comments are required on the constitutional outcomes of those same national conferences.

Processes for establishing national conferences

The haste with which crises forced (usually) reluctant authoritarian governments to establish national conferences meant that there was seldom any detailed agreement negotiated between the government and the loose opposition groups about the goals, composition, and operation of the conference. The lack of such agreements made the work of some of the conferences particularly difficult, with government and opposition groups taking antagonistic stands and failing to cooperate. In Togo, soldiers supporting the president surrounded the conference venue on various occasions, enforced a presidential order to suspend proceedings, and later held the transitional legislature hostage.

The main preparatory work was usually limited to establishing preparatory commissions that decided which groups would be represented. In general, they played no role in selecting representatives of such groups, it being left to the groups to decide their own selection methods. Benin was an exceptional case, where a roundtable process was established in advance of the conference in which the government and the main opposition leaders negotiated basic agreements on the process and some initial principles that the constitution to be developed by

Table 10: National conferences in French-speaking African countries, 1990–1993

Country	Dates/duration	Participant numbers (approx.)	Role: Preparing constitutional principles or proposals, with transitional legislature established by national conference to develop and adopt new constitution	Role: Preparing and adopting draft constitution, usually requiring approval by legislature, head of state, referendum, or a combination of these
Benin	1990, 10 days	488	Yes	No
Gabon	1990, 3 weeks	2,000	Yes	No
Republic of the Congo	1991, 5 months	1,202	Yes	No
Mali	1991, 15 days	1,800	No	Yes
Niger	1991, 4 months	1,200	Yes	No
Togo	1991, 52 days	962	Yes	No
Democratic Republic of the Congo	1991–1992, 17 months (intermittent)	3,000+	?	?
Madagascar	1992, 10 days	1,400	No	Yes
Chad	1993, 3 months	830	Yes	No

the conference would follow. In the process, a degree of understanding was established among key actors in the conference, something that probably contributed to the success of that conference compared to most others. (A case study of the constitution-making process in Benin can be found in appendix A.2. Roundtable processes are discussed in part 3.2.2.)

Roles and tasks

National conferences were multipurpose bodies. Concerning their constitution-making tasks, there were two main variations. Most of the conferences developed some proposals about guiding principles for, or recommendations about, the text of a new constitution. Largely because of time limitations, they then usually established a transitional legislature and executive (at the same time ousting the existing executive and legislature) and gave the transitional legislature the task of developing the guiding principles or recommendations into a new constitution. (In practice, the transitional legislatures normally delegated that work to a

committee.) In most instances the conference also stipulated that the new constitution be approved by a national referendum. In some instances, as in Chad in 1992, a preparatory commission readied the initial draft for the national conference to consider.

The other main variation involved the national conference developing its own draft constitution (usually together with other basic laws, such as a new electoral law). The short duration of the national conferences meant that in the few cases in which this occurred, most of the work of developing the draft had to be done in committees and working groups. While few developed a draft constitution, there were more that initially decided to take to themselves authority to do so, but when time pressures meant they could not meet for long enough to complete the work, they ended up being among the majority of conferences that delegated their authority to some form of transitional council. Chad was one such case. The national conference had authority to debate, amend, and adopt the draft received from the preparatory commission. But when the process took much longer than expected, the conference delegated the completion and adoption of the draft to a transitional legislature, which then took two years to complete the task.

When a conference did delegate authority over drafting the constitutional text to a transitional legislature, it could nevertheless influence the development of the new constitution in two main ways. The first was in establishing principles and proposals that the transitional legislature was required to take into account when determining the content of the constitution. The second was by determining the membership of the transitional legislature.

In addition to their constitution-making tasks, some national conferences addressed past crimes and human rights abuses. When they assumed sovereignty (as many did), they might also take on responsibility for establishing new transitional governmental institutions and planning elections. Without their functions being clearly defined, it could be difficult for participants to give constitution-making tasks their full attention.

Size, composition, and duration

The size, composition, and duration of conferences varied considerably. Table 10 indicates the wide range of numbers of participants in the nine conferences in French-speaking Africa, from a low of 488 in Benin to a high of more than 3,000 in the Democratic Republic of the Congo. Six of the nine cases had more than 1,000 participants. The numbers are approximate because official membership lists often changed, and because there were often many observers without voting status.

Participants were not selected through elections (as is usually the case with members of a constituent assembly). Rather, they were generally nominated to represent an institution, a political party, or an association of some kind. A huge variety of groups was represented, including labor unions, students' and teachers' organizations, human rights groups, professional associations, traditional leaders, religious communities, women's and farmers' groups, and educational institutions. The number of parties, groups, and associations represented varied from

as few as about fifty (Benin) to about five hundred (the Democratic Republic of the Congo).

Generally speaking, a broadly representative organizing body (usually called a “preparatory commission”) would consult before determining the parties, sectors, and groups to be represented, and the number of seats to be allocated to each. It would then be a matter for each party, association, or group to decide on the method of appointment of the delegates to fill the number of positions allotted to it. Some political parties and associations were newly established in the weeks or months before the conference was set up, sometimes primarily for the purpose of getting conference representation. Jennifer Widner reports that it was easier to select representatives of associations and interest groups in countries where there was a tradition of national level “peak” associations, as in Europe, than it was in countries with a decentralized interest group model of the kind more common in British Commonwealth countries. The former were seen as legitimately selecting representatives, while in the latter cases every small association wanted its own representatives. In general, despite claims of national conferences being representative (in Benin the president claimed that the conference would represent “all the living forces of the nation”), the membership selection process resulted in overrepresentation of the political class and the educated elite in countries where the vast majority of the population was neither (Widner 2008).

The duration of the public sittings of conferences included in table 10 varied considerably, but most sat for much shorter periods than is usually the case with constituent assemblies. Six of the nine sat for periods of three months or less, and two for just ten days. These are remarkably short periods for a body intended to negotiate new constitutional arrangements intended to respond to deep crisis and conflict. Among the reasons for this phenomenon is the large size of the bodies, which can make them difficult and expensive to administer.

Issues arising from large size, complex composition, and short duration

The large size and short duration of national conferences are characteristics that could place obstacles in the way of their being effective bodies to deliberate on major constitutional questions. Such problems could be exacerbated where conferences have not been preceded by roundtable processes encouraging initial understandings between opposing groups. Further, short durations sometimes contributed to a tendency to rush the process, making it difficult for opposing interests to enter real negotiations at the conference. There was pressure on allied groups to make agreements and prepare draft texts in advance, or for the conference to delegate most responsibilities for developing the constitution to another body.

Large size and short duration also tended to reduce the opportunity for careful consideration of and negotiation about difficult and divisive issues. Indeed, it was often hard to organize the time needed for all delegates to speak, although there was usually pressure for that to occur. The more time that needed to be allocated to speeches by individual delegates, the less was available for serious debate about reform proposals. Further, there are particular difficulties in

managing deliberation and negotiation in large bodies, especially where there is a high degree of public scrutiny (as was the case with most national conferences). In such circumstances, with little time to speak, participants are often under pressure to take polarizing positions. The pressure can be worse if elections are likely to follow, as participants may then be under pressure to stake out clear positions that appeal to potential constituents, something that in itself can encourage the adoption of polarizing positions.

The size, composition, and short duration of these institutions can also give rise to difficulties with their management. Locating the funds needed to run large conferences was difficult, especially in situations of financial crisis (so this was a factor in the short duration of the majority of the conferences). Their large size and composition through representatives of groups contributed to their unwieldy nature. Tasks such as the registering of participants were sometimes extremely difficult. It was common for unaccredited participants to slip into parts of the proceedings. Short durations made it difficult to arrange basic services such as translation of documents and speeches, something often critically important in a multiethnic situation. In Chad, a divide that developed in the national conference between French-speaking and Arab communities was made worse by delays in translating proceedings and documents into languages other than French.

Chairing, and looking forward

The chairing of national conferences was critically important. Where chairs were positive, inclusive, conciliatory, and forward-looking, they made valuable contributions. But in circumstances in which the chair placed heavy emphasis on the conference's role of addressing past crimes and human rights abuses, there was a tendency to look backward, with extensive airing of grievances and demands for revenge, rather than looking forward to what a new constitutional dispensation could have to offer. This was a particular problem in the Republic of the Congo and Togo, and one that was avoided (in large part by effective chairing) in Benin.

Constitutional outcomes of national conferences

While most national conferences did play important parts in processes that resulted in the adoption of new and more democratic constitutions, research by Jennifer Widner shows that the new constitutions offered lower levels of rights protections than countries that used constituent assemblies (Widner 2008). Further, they tended to fail at a higher rate (in the sense that there tended to be a return to higher levels of violence or suspension of the new constitution). Hence there is little evidence that national conferences have had a particularly positive record in terms of outcomes in constitution-making. On the other hand, it is not easy to determine the extent of the contribution to such outcomes of the constitution-making process as opposed to the kinds of economic and political circumstances existing in the countries in question at the time of these constitution-making processes.

Practical tips

This survey of the experience of national conferences gives rise to some practical suggestions for consideration by anyone considering developing an institution such as a national conference:

- Careful consideration would be required about whether the circumstances are such that a national conference with features similar to those discussed here would be the most appropriate institution for undertaking significant constitution-making tasks. The institution has attractions mainly in a deeply divided crisis situation, where pressures for resolution of the situation are urgent and where there are limited aggregations of interest in established political parties. There are other institutions or procedures that can be used in some such circumstances. One is the roundtable, though it tends to be used where opposition groups are more clearly defined than has usually been the case preceding national conferences.
- Given some of the difficulties experienced in operating many national conferences, in advance of establishing such an institution, a process similar to a roundtable (see part 3.2.2) should be used in an effort to establish some initial agreement on process and on the principles to be followed by the new constitution, and some political understandings among the parties involved.
- The size of the membership of the conference should be kept as low as is practicable in the circumstances, as this can reduce management problems and improve the prospects of the conference being effective as a negotiating and deliberative body. Because processes of negotiation and reaching compromise can be undermined by rules and other arrangements under which all members are given time to make opening statements (often creating pressures on speakers to take polarizing positions), it may be preferable to give members opportunities to speak in committees and working groups. Further, if the conference is large, it is necessary to ensure that as much as possible of the negotiation and decision-making about constitutional issues is conducted in broadly representative (and competent) committees.

If associations and political parties are to be represented in a national conference, then to avoid problems with such bodies being established purely for the purpose of representation in the national conference, every effort should be made to agree on basic preconditions to accreditation for representation, including such things as the period for which such a body should be required to exist and the minimum number of members it must possess before it can be accredited.

Every effort should be made to ensure that the chair of the conference is a highly respected figure who is able to keep the work of the conference focused mainly on what is required for development of future arrangements that will reduce conflict and resolve problems, rather than focusing on how to address past abuses by government (there being other processes available to handle past wrongs).

3.2 Institutions that develop proposals about which final decisions are made elsewhere

In this section, the main distinction is between roundtables, which are generally relatively

informal bodies, often formed in situation of crisis to put together constitutional proposals, and commissions and committees that are already in existence and are given that same task, or are specially created (usually by law) for that purpose. What they have in common is that they are not like legislatures (though they may be committees of legislatures) because they do not have any power to enact a new constitution.

We have also included here parties to peace processes; we are not concerned with their peacemaking roles, but with those aspects of their roles that relate to the content of a new constitution. It is an important assumption of this handbook that in constitution-making after (or even during) conflict, making a constitution may be an important part of the peace process. Where parties to a conflict are divided over an essentially constitutional issue they are unlikely to give a free hand in constitution-making to a commission or a freely elected constitutional assembly.

As is often the case, the boundaries may not be clearly defined. For example, a roundtable may be a peace process. Because a peace process will usually begin before more formal institutions can be set up, we begin with this topic.

3.2.1 Parties to peace processes

Peace processes intended to end violent conflict often have close links to constitution-making processes, especially when the cause of conflict has been access to state power. Such links can make the parties to a peace process significant, even dominant, actors in the constitution-making process. These parties can have interests and modes of operation different from those of parties involved in the more specialized bodies and processes that usually have the main roles in constitution-making processes.

There can be risks and opportunities in linking conflict resolution and constitution-making. Among the major risks are dangers that, in a situation of violence and insecurity, communities may draw inward, resulting in increased sectarianism, pursuing short-term solutions that protect sectarian interests or that constitutionalize and perpetuate divisions (as, for example, in Burundi). Further, there can be a strong tendency to try to exclude noncombatants. (Some specific dangers involved in that situation are discussed below.)

On the other hand, getting parties to a violent conflict to consider constitutional issues may present opportunities. Where conflict has resulted from perceptions of exclusion, putting the possibility of constitutional change on the table may be one of the few ways to get serious consideration for the idea of ending violence. It does so by creating space for political discussion that may open up possibilities for better understanding of opposing positions and of the possibilities for compromise. Constitutional debate can help opposing parties redefine their concerns. For example, the 2005 Comprehensive Peace Agreement in Sudan redefined the issues from a violently contested demand for Southern independence to how best to meet opposing concerns through constitutional arrangements for autonomy and a deferred referendum on independence. If it is possible to involve leaders of opposing armed groups in discussions with

other groups and interests as part of constitution writing (though, as discussed below, this does not always occur), this can expose those leaders to a broader range of needs and concerns, and help moderate polarized positions.

Formal statements of the links between a peace process and a constitution-making process are usually found in the peace agreements made as part of conflict-resolution efforts. The extent to which peace processes have links with constitution-making varies greatly. A peace agreement may set out a road map for the peace process, which often includes the road map for making a new constitution and may not go any further (e.g., toward determining the contents of the constitution). Some peace agreements do deal extensively with constitutional content, in a variety of ways. Some set out guiding or immutable principles upon which the proposed new constitution should be based. Others state quite detailed proposals either for changes to the existing constitution or for a new constitution, usually leaving it to some other body or process to enact the proposals. In a few cases the peace agreement is in fact a constitution, as was the case with the interim constitution of South Africa of 1993. Alternatively, a completely new draft national constitution may be attached to the peace agreement, as with the constitution for Bosnia-Herzegovina attached to the Dayton Accords of December 1995.

Peace agreements are usually intended to be binding on the parties, and so often contain sequencing and other arrangements intended to encourage implementation by the parties (including implementation of provisions on constitutional process or content). In addition, international community actors are often involved in the development and signing of peace agreements (as mediators, facilitators, parties, or witnesses). Such roles may subsequently involve them in encouraging or even actively supporting implementation of the constitutional aspects of the agreements.

The links among conflict-resolution processes and constitution-making in any particular case vary greatly, depending on the nature of the conflict and the goals of the main parties. Such variations can have significant effects on demands about the constitution-making process and the roles parties seek to play in it. Examples of peace processes where key parties may seek to define changes to the constitution but not seek major roles in important aspects of constitution-making include efforts to end secessionist conflicts in which neither the national government nor the secessionist rebels have won a clear victory. In such cases the secessionists may be interested mainly in seeking agreement on the details of constitutional change needed to provide autonomy for the secessionist region, and in a few cases also a deferred right to a referendum on independence, as with New Caledonia in relation to France in 1998, Bougainville in relation to Papua New Guinea in 2001, and South Sudan in relation to Sudan in 2005. In those cases, the peace agreement defined agreed-upon constitutional changes, and left the process for making those changes to the existing national legislature.

The situation can be quite different in cases of conflict involving attempts by a party expressing grievances about previous marginalization and so seeking to capture control of the state. The rebels may be less interested in providing for the content of the final constitution in the peace

agreement, and more concerned with obtaining both a commitment to complete replacement of the constitution and a guarantee of a significant, even dominant, role for the rebels in the process of making the final constitution. Where an interim constitution is involved, the rebels can also be expected to have a strong interest in determining its contents. Thus in Nepal (in the case of the Maoists) and South Africa (in the case of the African National Congress), the peace agreements provided for interim constitutions (in South Africa providing guiding principles for the final constitution), which guaranteed the Maoists and the African National Congress significant control of or influence over the interim governments and the processes for making final constitutions.

The different interests and modes of operation that parties to a peace process may have in relation to constitution-making when compared to groups operating within more specialized constitution-making bodies can have significant effects on a constitution-making process arising from the peace process. Several interrelated potential issues (some of which have already been touched upon) require brief discussion, including possible responses to problems that may arise.

First, issues of sectarianism, short-term thinking, and resistance to compromise in situations of violent conflict and insecurity have been mentioned already. The closely related difficulty of limiting participation in the constitution-making process to combatant groups can be a particularly strong tendency when negotiations occur in a situation of ongoing conflict. In such circumstances the parties to the peace process may concur that a lasting agreement will be more likely if confidentiality and secrecy are maintained and the process is controlled by and restricted to the leaders of the warring groups. Further, there could sometimes be risks that opening a negotiating process at an early stage could empower groups and interests without real power or status, and could contribute to substantial elaboration of the agendas of issues. While these may be real dangers that do contribute to the difficulty of the decision-making process, there are usually other important issues involved. In particular, injustices can be done to significant groups that are excluded, something that may exacerbate social divisions. (An example of this is Sri Lanka, where the exclusion of Muslim and Indian Tamil communities from successive peace processes where constitutional issues were a significant part of the process has had ongoing divisive effects.) Limiting those involved in constitution-making decisions to combatants has other dangers. They may lack legitimacy in the eyes of the wider community. The success of any new constitutional arrangements may rely too much on the commitment of the narrow group of negotiating parties, and may fail to respond to broader social needs. The new constitution may then lack the social foundations needed to gain the widespread support it requires to be sustainable.

A second, related set of problems arises because in a constitution-making process linked to conflict resolution, the issue of who has seats at the table will be seen as determining access to power in the long term, through decisions on the constitution. So access to seats in the process becomes critical. The result can be splits in fighting groups, or even the emergence of new groups. Alternatively, because so much is at stake, leaving out any faction can result in the emergence of spoilers.

Problems of both these kinds are sometimes handled in a two-stage process, the first involving mainly the warring parties, which is intended to build confidence and establish order, and the second, more participatory stage, in which the “final” constitution is made. The access of parties to the first stage (usually involving negotiations of peace process matters and short-term constitutional arrangements) can be flexible. Thus in South Africa, the interim constitution (inclusive of guiding principles) was negotiated mainly among the key parties, with some parties joining quite late in the process. The constituent assembly process that developed the final constitution was more participatory. Another approach could involve provision for a mandatory review, within a specified period, of a constitution negotiated between limited parties.

Third, problems can arise from the privileged roles of combatants as parties to the peace process contributing to demands for constitutional provisions that maintain their privileged status under the new constitution. For example, the army or security forces of the state may seek provisions that give them special constitutional roles or protections. Rebel groups may seek incorporation into the state’s armed forces. Another danger concerns a narrowing of the range of constitutional issues that may be considered as part of a constitution-making exercise based on a peace process. There may be a tendency to limit them to issues of major concern to the parties to the peace process, contributing to a lack of balance in the constitution and undermining its wider legitimacy.

Fourth, parties to a peace process can usually be expected to understand well the political context they face, it being that which usually drives them to demand particular constitutional concessions. There is often a tendency to focus mainly on issues about access to political power under a new constitution, and a lack of proper attention to other vital issues. Further, parties may have limited interest in, or even understanding of, the longer-term legal implications of their constitutional demands. Combatant parties to peace processes (especially, though not only, rebel groups) sometimes have limited constitution-making expertise. They may have limited ability to express their grievances and concerns in terms of constitutional issues. Further, they may see constitution-making as just one of many possible strategies for achieving their goals, and keep open the possibility of a return to violence.

As a result, there can be special needs for helping parties to peace processes better understand what is involved in constitution-making. Legal advisors to parties in peace processes may need to be involved early in order to help the parties frame their concerns as constitutional issues, something that can often help redefine issues and transform conflict. (This has occurred in many peace processes, including Bougainville, New Caledonia, South Africa, and South Sudan.) Facilitators of peace processes should give special attention to the need to encourage continued commitment to the constitution-making aspects of the peace process.

A fifth set of issues arises because increasingly, even in peace processes responding to conflicts internal to a particular country, third-party mediators and international actors play significant roles. Often it is their timetable concerns and other agendas that tend to dominate the process. Such actors may be concentrated on resolving the violent conflict, and have a limited understanding of constitution-making processes or issues. These difficulties suggest a need for

improved understanding of and training about constitution-making on the part of international actors involved in the many peace processes that are associated with constitution-making.

3.2.2 The roundtable

Roundtables are informal consultative processes sometimes used to negotiate initial steps in a constitution-making process during a period of transition from an authoritarian to a more democratic regime. They usually occur in situations of national crisis, where the existing national constitution does not provide a legitimate basis or adequate guidance for a workable constitutional reform process. Pressure to escape the crisis results in members of the national government consulting the political opposition (and sometimes other interests) about the steps needed to initiate and advance a solution to the crisis, including agreement on constitutional reform that is then usually undertaken in accordance with the requirements of the existing constitution.

The roundtable process therefore usually enables the maintenance of legal continuity, which can be important in situations where those controlling the existing regime remain powerful and would consider a break in legal continuity illegitimate. In this respect, a roundtable is different from many national conferences (institutions also often used in situations of national crisis) where loss of the legitimacy of the existing regime and the extent of the national crisis are often so great that the national conference seeks a break in legal continuity by declaring itself sovereign and establishing transitional constitutional arrangements while a new constitution is being developed. (See part 2.1.9.)

The use of the term “roundtable” in relation to constitution-making processes is a relatively new development. It is most commonly used with reference to the processes in Hungary and Poland in the late 1980s, both part of transitions from authoritarian socialist regimes. (The case study of the constitution-making process in Poland—see appendix A.10—provides an overview of how a prominent example of a roundtable process operated in practice, and also outlines subsequent steps in the constitution-making process in Poland that began with the roundtable.)

The term has also been applied to other processes in Eastern Europe from the late 1980s—particularly those in Bulgaria, Czechoslovakia, and the German Democratic Republic (Eastern Germany)—as well as some in Latin America (notably Chile in 1989 and Colombia in 1990) and to processes in Spain (in 1976) and South Africa (in the early 1990s). Similar arrangements have been used in many other processes without being described as roundtables. Examples include the processes used to establish some of the national conferences (see part 3.1.3) held in French-speaking African countries from 1990 to 1993, the best known example being Benin. (See the case study of the constitution-making process there, in appendix A.2.) The process in pre-independence India from the 1930s for consultation among local actors about decisions on constitutional progress toward independence might also be classified as involving a roundtable.

Roundtables themselves usually involve at least two major steps. First, government and opposition groups engage to decide on structures for negotiations (numbers of representatives,

chairing arrangements, working groups, and so forth). Such negotiations can take time—six months in the case of Poland. Second, meetings of the agreed-upon roundtable structures are held, and can often (though not always) be completed in quite a short time—just a few in the cases of both Hungary and Poland. The structures used vary greatly from case to case, there generally (though not always) being a high degree of flexibility in the arrangements, for example concerning criteria for public participation, determining the agenda, and setting decision-making rules. Some roundtables are less flexible. For example, in Hungary in 1989 a three-tiered structure was established. There was also agreement among the nine opposition groups that participated in the process that all their decisions would be made by consensus. One result was that each opposition group had a veto on decisions on joint opposition positions, and hence considerable influence on the roundtable process. Much of the work is usually done in committees and working groups and informal consultations. The work of the roundtable often occurs in secret, or at least without any media or involvement of members of the public.

Because a roundtable has no basis in constitutional or other legal rules, there is usually no hierarchy among the participants, no formal rules for its operation, and no preassigned status even to its most fundamental decisions. When the process starts, the participants will often be quite unclear about the direction in which things will go. The key point is that public participation in the process represents a commitment to negotiating a solution peacefully rather than using the alternative of resort to open conflict and violence.

The main reason why the period within which the roundtable itself meets is quite brief is that the roundtable process is used only to negotiate limited initial steps in a reform process; the legal steps will be taken elsewhere, in institutions with a legal basis. There are cases, however, where roundtable processes take far longer, usually because either the changes being negotiated in the particular case are far-reaching or because the government tends to see itself as still negotiating from a position of strength.

South Africa is an example of far-reaching change being negotiated through such a process. There the process was used to negotiate the concept and content of the interim constitution. The negotiations to establish it, along with the negotiations held to determine transition arrangements, constituted the roundtable phase. The negotiations to establish those processes began in the 1980s, while the negotiations on the arrangements eventually incorporated in the interim constitution were undertaken through the Convention for a Democratic South Africa (CODESA 1 and CODESA 2) and the multiparty negotiating process that ran from 1991 to 1993. In Chile, the government installed by the 1973 military coup continued to see itself as in a fairly strong political position, despite the defeat of the dictator, Pinochet, in a presidential plebiscite in 1988 held under a constitution imposed by the military in 1980. But that unexpected defeat created pressure for political and constitutional change that resulted in almost ten months of intense negotiations among the military government, the main opposition political parties, and political parties that supported the military. Although ultimately successful, the negotiations came close to collapse on several occasions.

After the roundtable has completed its work, the constitutional change agreed to through the process happens elsewhere. In a majority of cases the agreement covers the details of constitutional amendments and also the idea that the amendments will be made through an existing constitutional reform process. That was the case in Chile, Hungary, and Poland, where liberalizing amendments to be made by existing but undemocratic parliaments were agreed upon. Similarly, in South Africa, the contents of the interim constitution were agreed upon, as was the use of the existing parliament to adopt it (thereby providing the legal continuity of such importance to the ruling party). In a few other cases, and especially in preparations for a national conference, a roundtable is less focused on details of constitutional amendments than on the next steps in a reform process. The roundtable process in Benin, for example, did agree on basic principles that should be met by any new constitution, but was much more concerned with agreement on the need for and structures and other arrangements for the national conference.

The high degree of informality and flexibility involved in a roundtable makes it quite different from most peace processes and from legally defined constitution-making institutions such as constitutional commissions and constituent assemblies. There can be advantages to informality (which is often accompanied by secrecy) in that the participants can avoid loss of legitimacy or stature if the process does not achieve particular outcomes. They can then be freer to make some other move to initiate change than would otherwise be the case. There may also be advantages in the flexibility regarding possible outcomes that is permitted by a roundtable process, as this can include arrangements for incremental progress in reforms that can be revisited as the fruits of initial progress are tasted.

On the other hand, where the roundtable marks the beginning of a process that continues to have limited popular involvement (as was the case with the process in Hungary for many years after 1989), secrecy and the lack of public involvement in the roundtable process can contribute to a lack of legitimacy of the constitution resulting from the process.

There can be immense pressures on those involved in attempting to establish or operate within roundtable processes in situations of deep crisis, where there is a grave risk of violence in the event of failure, as was the case in Eastern Europe and Latin America in the late 1980s. Final responsibility rested with those actors. This was a different situation from that of pre-independence India in the 1930s and early 1940s, where most Indian actors felt that the British colonial government had final responsibility, and they could afford to remain relatively disengaged.

Roundtable processes can sometimes offer other advantages in situations involving extremely undemocratic and repressive regimes where inflexible constitutional arrangements have made liberalizing reform difficult to achieve. First, the process can provide legitimacy for a reform process in a situation where the existing regime has little legitimacy, by enabling an inclusive process in a situation where democracy was absent. It allows inclusion of a wide range of actors in a process intended to reach common agreement on the way forward. Second, in situations such as Hungary (and many others) where there is no coherent opposition, a roundtable can provide a framework within which opposition groups can emerge and learn to cooperate,

negotiate with the government, and participate in constitutional decision-making, in preparation for participation in government. Third, it can provide a form of limited power-sharing arrangements (between the government and the emerging opposition) where none was possible under the existing constitution. Fourth, it can permit concessions to be made by groups in opposition to the old regime (as was the case in Chile, Hungary, Poland, and Spain) without those concessions necessarily being incorporated into final constitutional arrangements. Instead, the opposition groups remain free to engage in developing more permanent constitutional arrangements when the agreed-upon reforms have worked to change the balance of political forces, thereby opening possibilities for more significant change to occur. Fifth, it can provide for learning (by both the old regime and emerging opposition groups) about constitutions and constitutional limits. Sixth, a roundtable can help develop cooperation among opposing factions (government and opposition) and their leaders that can contribute in many ways to progress in later stages of reform processes.

Practical tips

The following practical tips are offered for anyone considering making use of roundtable arrangements as part of a constitution-making process:

- A roundtable is mainly restricted to use in situations where there is both an authoritarian regime that retains a reasonable degree of authority but is becoming open to the possibility of reform, and also some coherence and leadership in the opposition groups that enable them to cooperate effectively.
- It should normally be as inclusive as possible, in terms of elements in the existing regime and the various opposition groups. Only by being inclusive will it give sufficient support to the reforms agreed on through the roundtable process.
- The practical arrangements for the roundtable process should normally be flexible, and permit the parties to work together in whatever way enables the process to make progress.
- In addition to working toward agreement on constitutional change and next steps in the constitution-making process, a roundtable should aim to contribute to the development of understanding and working relationships between government and opposition leaders.
- There are often advantages for opposition groups if a roundtable process agrees to a limited degree of reform that may open the way to more extensive reforms later. There can be a risk for opposition groups that agreement upon too much detail at the roundtable stage may lock in concessions that offer little advantage to them at a later stage of the reform process.

3.2.3 Constitutional commissions, committees, and other specialist bodies

In the introduction to this part, we drew attention to two types of bodies that have been central to drafting and adopting constitutions. One, legislatures and constituent or constitutional

assemblies, was discussed in the previous section. The other is constitutional commissions, committees, or similar bodies. These bodies have limited, specific functions related to the constitution-making process. They can vary from the important task of drafting the entire constitution to providing specialist advice (for example, on financial aspects of a decentralized system, or on the independence of the judiciary) to another body, which will prepare or adopt the draft constitution.

Here we use “constitutional commission” to refer to a body (other than a committee of the assembly, or “parliamentary committee”) that is formed for the purpose of preparing a draft constitution for consideration or adoption by another body. So we are drawing a distinction among three types of bodies that are charged with this responsibility:

- special constitutional commissions/committees;
- committees of a legislature; and
- bodies with other responsibilities that are for a while given constitution-drafting responsibilities.

In this section we shall also look briefly at other committees and commissions that may have more limited roles.

Commissions are different from the legislature or the constituent assembly in at least three ways: function (they do not make final decisions on the constitution, being advisory), qualifications (primarily expert, rather than political or representative), and size (small, and therefore with different dynamics from assemblies). The effect of these differences is evident from the precise mandates, independence, and procedures of the commission and the assembly.

The range of tasks assigned to a commission will vary from process to process, but it may include:

- carrying out (or coordinating and supervising) civic education;
- collecting and analyzing public views;
- preparing a draft constitution;
- seeking and collecting public views on the draft constitution; and
- organizing and being part of a constitutional assembly (a rare role for a commission, and an unsuitable one).

Whether to have a commission

There are two main issues here: first, what the general arguments are for and against having a separate commission as one of the elements in a constitution-making process, and second, what the complex of factors, some logical and some more a matter of tradition, is that leads individual countries to adopt or not to adopt this model. We are here talking of a commission, not of a committee of the legislature or assembly.

General rationale for independent commissions

Although the use of independent commissions, at least those with responsibility to prepare a

draft constitution, is limited, it offers considerable advantages, most of which follow from its expert membership and political independence.

- It can do considerable preliminary work for the deciding body, and for this reason the work of the assembly can be accomplished relatively quickly.
- It can promote civic education and knowledge of the constitution-making process and constitutional issues.
- It may be a more efficient body to receive and analyze public views and recommendations.
- It brings appropriate constitutional experience to bear on public consultation and decisions that may be beyond the capacity or even the interest of most politicians.
- There are greater chances that a commission will put the national interests above sectional interests than would a parliamentary committee. Because it is relatively more disinterested, it is also likely to be more effective in building a national consensus; its small size and expertise are more likely to allow a deliberative process than would an assembly. An analyst of the Brazilian process [1988], in which the constituent assembly, which started without a prior draft, had 559 members divided into 24 thematic committees, concluded that this made a coherent constitution nearly impossible, in particular given the weak presidency and party system.
- There is also the advantage in the division of labor: one body to propose the draft and another to debate and adopt it, based on the notion that technical and professional expertise is required to draft, and a more political process is needed to adopt, the constitution.
- There is considerable suspicion in most countries now of both the intentions and the competence of politicians, so an independent commission restricts choices open to assemblies and forces them to consider recommendations of a broader cross-section of society. A commission that is not independent, such as that of Afghanistan [2004], will often be chosen to represent government interests, thereby thwarting the benefits of a commission.
- The chances that the commission will produce a draft are quite high, and in this way the process will be sustained despite acute differences between political and social interests.
- An independent commission seen to be both neutral and expert, which discharges its responsibilities conscientiously and transparently, can legitimize both the process and the outcome.

Some weaknesses

It is also necessary to be aware of the drawbacks of a commission. It is likely that politicians may have more sense of ownership if the draft is prepared by them or on their behalf by a parliamentary committee. Learning opportunities for politicians may be lost, including those that come from hearing firsthand the views of the people during public consultation. There is the danger that the commission may isolate the constitution-making drafting process too much from the politics of the day. It may not succeed if there are significant differences that must be resolved directly by parties to the previous conflict. And as we have already noted, the commission can be manipulated by the government or other powerful interests. Although the work done by the commission may relieve the assembly of some of the load, the overall length of the process is likely to increase due to the overlong conduct of civic education, the receipt and analysis of

public submissions—and the self-interest of the commissioners. And under pressure from the members of the public, who are unlikely to have a proper understanding of the appropriate function of the constitution, the commission may include recommendations that may be considered by many as unsuitable for a constitution, such as matters of policy. (See part 2.2.) A recent comparative study undertaken by the United States Institute of Peace of nineteen constitution-making processes observed that of those processes that used commissions, these bodies did not seem to produce a better result than those using a constituent assembly or parliamentary drafting committee with experts. However, this was a limited sample of cases.

Explaining the use of commissions

The prevalence in Africa of the use of commissions may be due partly to the resistance of politicians to political reform, and doubts about their competence. But it may be a response to the lack of an organized civil society, which results in an uninformed public and provides few channels for the expression of views. Few African countries have effective or ideological political parties that might play a leading role in the process (unlike in countries where the assembly process can be used, such as in Europe). Parties tend to represent only themselves as politicians in Africa, while in developed democracies, political parties represent social, class, regional, and economic interests—and in this way represent the larger society.

Committed to a participatory process, these countries find that an essential preliminary is civic education, best carried out by an independent commission. Moreover, traditional systems of governance, with which some people may be familiar, are not seen as relevant to a modern multiracial state. Foreign experiences become a source of ideas, mediated by an expert commission.

Important exceptions to the English-speaking African tradition are Namibia and South Africa. South Africa used no commission, perhaps because the conflict was too serious to be resolved in this way; direct negotiations between political parties were inevitable to break the deadlock that would have ensued otherwise. Multilateral talks that led the way forward and proceeded to draft what became an interim constitution, sometimes referred to as a roundtable process, also had elements of a commission, although it was dominated by political parties. In Namibia the absence of a commission can perhaps be accounted for by the active role of the United Nations and the need to negotiate with South Africa on independence, and also by several informal meetings and conferences having developed sufficient consensus to facilitate a formal process (under principles established by the United Nations Security Council).

An independent commission is more likely to be established if civil society is involved in the negotiations leading to principles and procedures for a constitution-making process. On their own, politicians are less likely to want an independent commission. Although one was proposed in Nepal [ongoing process], there was great resistance from key political parties. (It is likely that a commission might have greatly facilitated the process, especially given the rather unsophisticated and disorderly procedures followed in the constituent assembly.) In the former Communist states of Eastern Europe, the Communist and democratic leaders preferred direct

negotiations, mostly in the form of roundtables. (See part 3.2.2 on roundtables.)

Designing an effective commission

Many of the advantages suggested above depend on the commission being expert and independent, and having enough resources for its tasks (which can be multiple). It is useful if the commission is also representative of different interests, without compromising integrity. However, these conditions are not often met. There have been allegations that most African commissions were not independent, either in their method of appointment or in operational autonomy. Various methods of appointment have been used, some more conducive to independence and competence (a competitive and transparent process), others less so. (In most countries the appointment has been by the executive or political parties.) The government and political parties have not been able to resist the temptation to influence or even instruct commissioners (especially in Afghanistan [2004]). Nor have the commissions always been sufficiently funded; some commissions had to secure funding from foreign sources to complete their tasks.

So to get the best results from the commission, it is best to ensure its independence. In some countries commissions are appointed by the executive under a general law for commissions of enquiry—legislation designed more for enquiries into administrative or policy issues than for constitution-making. Such a law gives the executive the power to define terms of reference, appoint and dismiss the commissioners, terminate the commission before its task is done, or refuse to publish its recommendations. These qualities have discredited commissions in Zambia and Zimbabwe, and complicated the goal of new, acceptable constitutions.

Another aspect of independence is the relationship of the commission to the legislature. Sometimes a legislature has a role in the appointment of the commission (often on the basis of party deals), but it is important that once appointed, commissioners should be left alone to do their jobs. In some countries, commissioners have to swear an oath that they will exercise their functions without any influence from political parties—and indeed may be required to sever relations with political parties. Parliament may appoint a select committee for liaison with the commission—and there will be need for this, but care must be taken that the select committee does not start to give instructions to the commission.

Similar issues arise in relation to funding and staffing. Enough funds should be provided, but, subject to the normal official procurement rules, the commission should be allowed to manage the funds. It should also be entitled to appoint its own staff, subject possibly to some general rules of inclusion, particularly in multiethnic states. In practice, commissions have seldom been allowed autonomy in all these matters.

Membership

In some countries, foreign experts have been appointed to enhance both the expertise and the independence of the commission (in Fiji [1997], the chair; in Kenya [2010], three of the nine

members). Otherwise the issues are whether the commission should be expert (and exhibit what sort of expertise) or representative (at least of different aspects of the nation), or whether it should try to combine both features.

Normally the commission should be restricted to a small size (say from twelve to twenty-five or so, to ensure the range of skills and representation) so that there can be proper deliberations. But in Fiji [1997], the commission consisted of three, one a foreign actor (too small a commission, especially too small to be representative, including of women), whereas the commission numbered five hundred in Zimbabwe [2000] (too large).

Legal framework

Commissions in some countries are established by special legislation, sometimes enjoying constitutional entrenchment, which sets out the essential components of the whole process of constitution-making (as in Kenya in the 2000 and 2008 laws, although the 2000 law was not entrenched—a serious omission that was rectified in the 2008 process). In Britain, considerable use has been made of royal commissions, in some respects similar to commissions of enquiry mentioned above. Generally the royal commissions enjoy great prestige and independence, though their terms of reference are decided by the government. A major review of the British constitution was undertaken by a royal commission from 1969 to 1973, with a focus on devolution.

Many countries, especially within the common-law world, have laws about commissions of enquiry, which are ad hoc bodies appointed to inquire into a particular matter. Commonly a commission is appointed by the government (perhaps even personally by the president). It may comprise one or several members, and the commission will usually take evidence from people and produce a report—which it usually has to deliver to the person or body that appointed it. In many countries there is no guarantee that any report will be published. And the appointing authority may simply stop the proceedings at any time.

In 2001, Uganda set up a constitution review process using its Commissions of Inquiry Act. Zimbabwe used this vehicle for a constitutional review in 1999–2000 (it called it the “constitutional commission”). The large number of people appointed to the commission shows the flexibility of the institution. But one international NGO noted that under the act, the constitution was under the control of the president and potentially reversible by the government.

Many countries have permanent bodies with the mandate of considering proposals for reform of the law—whether those suggestions are generated by themselves or by the government (sometimes called the “law reform commission”). One advantage of making use of such a body might be that it already has a library, staff members, including researchers, and (often) legal drafters. On the other hand, law commissions usually face the issues of law and practice that concern lawyers, rather than issues with broad social and political implications. The Indian commissions have produced reports on the appointment of judges (at least twice), a constitutional bench in the Supreme Court, and the appointment of prosecutors. These issues

all have constitutional dimensions, but they are narrow, and not the sorts of issues that are likely to divide a country in conflict.

In Malawi [1994], there is provision in the existing constitution for a law reform commission, but for reviewing its constitution Malawi formed a special law commission under that article, comprising lawyers and judges, church people, academics, and others.

The Indian National Commission to Review the Working of the Constitution was appointed pursuant to a government decision in 2000. It came under the Ministry of Law, and did not have independent research facilities, which were provided by the ministry but supervised by the commission. It had its own funding, which came through the ministry. The government appointed the members and set the deadline.

At various stages Nigeria has set up bodies by order of military governments, whether formally (by law) or by governmental order. One of these was the “fifty wise men” constitutional commission that proposed the shift to a United States-style system, adopted in 1979. The dynamics of constitutional reviews are different under military (and other undemocratic) regimes. Legal form matters relatively little when the government is not accountable. One commentator on the 1979 commission noted that the Nigerians were not told where the commission’s instructions came from, or why their parliamentary system had been changed to a presidential one.

Separate commission or committee of the legislature or assembly?

The type of drafting commission discussed in this section is similar in some respects to the committee often set up by the assembly or legislature in order to undertake some preliminary functions on its behalf, including public consultation and preparing a draft constitution.

The two types of bodies (commission and assembly committee) are different in important respects. The constitutional commission is based on assumptions about the virtues of a separate and independent body; the other is pragmatic, making up for deficiencies of the assembly as a large and deliberative body. There is an obvious difference in the composition of the two bodies (though in Zimbabwe [ongoing process], the parliament set up thematic committees that include those who are not members of parliament. (See part 3.1.2 on constitutional assemblies.) The status of the draft produced by a commission is often higher than that of a committee, over which the plenary has complete control. The commission may be a more effective body for civic education and public participation, but the committee may be more effective for transmission of public views to the assembly—often the ultimate decision-maker. The recommendations of the committee may carry more weight with the assembly, as they are often the result of negotiations between political parties represented in the assembly. The rules by which the committee makes rules (normally a majority) may be different from the rules binding the commission.

Box 39. Questions to think about when establishing a commission or committee

- Does the mechanism being proposed allow for the members to use their expertise to deal with a wide range of issues, including politically sensitive issues, or is it dominated by lawyers or some other group?
- Will the body be perceived as being representative of the people (and is that important for this body)?
- Is it sufficiently independent?
- Is the body able to invite and evaluate large numbers of public submissions?
- What happens to its reports—are they necessarily published, and is there any machinery for ensuring that they are considered?
- Are the body’s resources sufficient for the major exercise of constitution-making?
- Can the work of the body be stopped at any time by those who set it up?
- Is the body genuinely being used to advance reform, or is it really a mechanism for NOT doing something?

What happens to the commission draft?

The primary function of the constitutional commission is to prepare a draft constitution for consideration and adoption by another body. In many countries a commission could claim to have reflected the people’s preferences more accurately than politicians do. Generally, people place importance on values and principles, and politicians on institutions. There is some danger that values and institutions may not converge, creating internal inconsistencies and tensions. So it is desirable that commission drafts should be protected to some extent from ill-informed changes. One way this might be achieved is if the commission establishes a good rapport with the people and wins their confidence. Perhaps if the Fiji commission [1997] had involved the people to a greater extent than it did, the parliamentary committee would have found it harder to resist its recommendations; as it was, the committee made several changes to the draft, driven by political expediency rather than by principle, so that the document became a bit incoherent. Another way is to make it hard to change the draft; see the note on Uganda and Kenya below.

Most often a commission’s draft goes to a constitutional assembly or the legislature. But most unusually, the interim charter of the Somali Republic (2004) provided that the draft of an independent commission would be referred directly to a referendum. Generally it is thought wise to provide for some political “vetting” of the draft (if only because of the need for party acceptance).

Even when the draft goes to an assembly or legislature, there is no standard pattern. In Kenya

[2005], the draft was to be debated by the public before the National Constitutional Conference began its deliberations. The draft approved by the conference was to be submitted to the national assembly “for enactment within seven days.” (Since the constitutional provision on constitutional amendments applied, enactment would have to be by a two-thirds vote, and parliament could reject, but not amend, the draft.) A further twist was added by a dubious decision of the constitutional division of the high court that a referendum was also needed. A referendum held a year later clearly rejected a draft that the legislature had changed in some fundamental respects from the conference’s draft.

The route to the draft in Kenya [2010] was even more complicated. The expert committee, whose principal task was to produce a “harmonized” or consensus draft, had to submit this draft to the public for debate and discuss it with a reference group (consisting of civil society actors). On these bases, it had, if necessary, to revise the draft. The revised draft was to be submitted to the parliamentary select committee for comments (the law was somewhat unclear what to do with the committee’s comments, but the expert committee took the view that, on contentious issues, it had to accept them). After further revisions, the draft was taken to the legislature, which could propose amendments by a two-thirds vote. Finally the draft was submitted to a referendum and was adopted.

In Uganda [1995], the draft went to a constituent assembly elected as such; the commission’s draft could be amended only by a two-thirds vote, and the assembly had the option to refer any matter for final resolution to a referendum, but a referendum as such was not required for approval. In Eritrea [1997] the draft was submitted for public debate, and then sent to the national assembly, which could amend it. It then underwent another round of public debate before it was put to the public in a referendum. In Zambia [2010] it went to the president and the cabinet, which issued a white paper (rejecting many provisions), and the revised draft was submitted to and approved by the legislature. The president of Zimbabwe made major changes to the draft (although the commission was largely handpicked by him). It then went to a referendum in 2000, where it was rejected.

In Afghanistan [2004] the commission was not independent and the draft was heavily revised by the transitional government through a process of horse trading among political leaders, warlords, and clan leaders. It was then submitted to the Constitutional Loya Jirga established to approve the draft. Further horse trading and demands made by the United States and the United Nations, as well as by women and minorities, resulted in further significant changes to some parts of the draft. The government made changes even after the draft left the Constitutional Loya Jirga.

In Fiji [1997] the commission’s draft went to parliament, which referred it to a joint committee of both legislative houses. There was a period of public debate before the committee began deliberations, but it was not officially organized and did not reach many people. The proceedings of the committee were secret even from the expert advisors to the parties.

In Iraq [2005] the draft produced by the parliamentary commission (which was extended to include some Sunni nonparliamentarians, as few were elected to the assembly due to a Sunni boycott) was ignored by party leaders who, under pressure from the United States, negotiated fundamental decisions and completed the draft in secrecy.

This account shows that the drafts created by commissions have an uneven record of success. This assessment assumes that the aim of the drafts is that they be adopted with as little change as possible. But it can be argued that the aim of the draft is to start or reinforce a nationwide debate on a set of proposals, provide some orientation or direction, or identify crucial issues on which decisions must be made through democratic procedures. And commissions perform other functions besides producing a draft. They have to conduct civic education with the people and increase public awareness of democratic values and the capacity to participate in national affairs.

Other, specialist, bodies

Commission-type bodies have been used to perform specific tasks short of producing a draft. Their role may be to produce ideas that may streamline specific proposals. A two-person committee was set up in Papua New Guinea to propose details of a provincial government; likewise in South Africa [1996], the assembly was helped by experts to design a provincial government. The South African assembly was also assisted by a panel of constitutional experts to clarify interpretations of proposed provisions or to resolve differences, and another body enabled it to draw in a greater number of the more recalcitrant Afrikaners into the process. The Eritrean commission was assisted throughout by a fourteen-member board of foreign experts, lawyers, historians, political scientists, and anthropologists. Other areas where assistance has been sought from specialist bodies include fiscal federalism, boundary adjustments, and the electoral system. A special kind of commission was used for the independence constitution of Malaysia—composed entirely of foreign experts, in the search for an objective analysis of problems facing Malaysia and looking for a consensus. (See part 3.4.1.) In part 2.5.2 on dealing with divisive issues, we discuss briefly the formation of special bodies to address particularly divisive issues in a constitution-making process.

Conclusions

It is perhaps less likely that a commission would be established when there are effective and representative political parties, which may prefer to negotiate the principles and procedures for review (most likely through the legislature). A parliamentary committee may then be used to negotiate the detailed provisions. When parties lack clear policies and the degree of public support is uncertain, or when the divisions are ethnic or sectarian, a commission may provide both direction and ideas, and help develop some sort of consensus. It can also give visibility to the process and promote public debates. Its civic education role has often been most significant (as evidenced by constitution-making processes in Uganda [1995], Eritrea [1997], and Kenya [2005; 2010]). A commission is perhaps the most effective way to engage the public. Sometimes

it has given shape to the process through its own dynamics, and had played a critical role in the management of the entire process (as in Kenya [2005]). Commissions on special topics, such as fiscal, environmental, electoral, and decentralization issues, often outside the knowledge of traditional constitutional experts, can make important contributions and help constitution-makers avoid errors that may later turn out to be quite costly or administratively problematic. Although it is not indispensable, the use of commissions should be considered by those responsible for designing the process.

3.3 Administrative management bodies

In many processes, the administration and management of the process have been afterthoughts and have been handled in an ad hoc fashion. This has led to confusion and disagreements about who does what—and even to the failure to perform key tasks. Because of the dozens and even hundreds of tasks that need to be coordinated and managed, some form of an administrative management body is usually needed. (See part 2.1 for examples of the range of tasks this body may handle.)

For the purposes of this handbook, we have used the term “administrative management body” to take into consideration the wide range of experiences of administering and managing the process. We have defined an administrative management body broadly to include any organization, business, institution, committee, unit, or small group of administrators that implements the policies and plans of the constitution-making process and provides technical support. Such a body can range from a two- to three-person management committee for an uncontroversial reform process to a secretariat with hundreds of staff members to support a participatory process. In this section we discuss how these bodies are established, their roles and powers, who directs them, and how they are structured and managed.

Establishing the administrative management body

A decision should be made at an early stage about whether a new administrative management body should be created or whether an existing body can serve the purpose, and when to establish the body. In countries with a standing parliament, the secretariat or a similar body sometimes becomes the administrative management body. In Brazil [1988], the senate’s information and data-processing center, which supported the standing legislature, also supported the constitution-making body. While this may be convenient, there can be drawbacks. The existing body may not have staff members with the skills required, such as civic educators. The staff members are also responsible for sensitive tasks such as analysis of the public views and the technical task of drafting the text. There may be questions about the degree to which government actors in general can maintain a position of impartiality toward all interests, groups, and individuals. In South Africa [1996], some constituent assembly members viewed parliamentary staff who had served during apartheid with deep suspicion. If the constitutional reform is noncontroversial and parliamentary staff members are sufficiently qualified to support the process, this can be a

convenient option (as in Finland [2000]).

In postconflict countries there may not be any existing institution able to serve the function of an administrative management body. In both Afghanistan and Timor-Leste, a new secretariat was put in place before the main constitution-making body to hire and train staff, plan activities identified in the mandate, and handle any procurement, infrastructure, or logistical tasks needed to prepare for the process. In a context where infrastructure has been destroyed and both human and material resources are scarce, simply finding office space and hiring staff can be time-consuming. Designers of the process need to plan sufficient time to get the administrative management body up and running in these situations.

In some processes, multiple administrative management bodies have been established. In Uganda, a secretariat supported the Uganda Constitutional Commission from 1988 to 1993 and was disbanded and replaced by an entirely different secretariat that supported the work of the constituent assembly from 1993 to 1995. However, in processes that engage in civic education and public consultation and use more than one constitution-making body, having a single administrative management body can more effectively ensure continuity and coordination of all the “moving parts.”

Administrative management bodies have hired or been linked to external organizations, ministries, or businesses to assist with some of their core tasks—in particular, civic education. The tasks can also be divided among more than one body. In South Africa [1996] the logistics, catering, flights, and accounts were managed by the Independent Business Council—a local business-sponsored nonprofit organization regarded as politically neutral. In Zimbabwe [ongoing] the secretariat linked with advertising agencies to assist with producing public information materials. An administrative arm of the constituent assembly was also established to manage research and drafting as well as tasks associated with public participation. In Afghanistan [2004], the secretariat performed all tasks except for finances, which were handled by the United Nations Development Programme.

Depending on its role, the administrative management body may need a certain level of independence from the executive arm of government (including the cabinet, ministers, and public service management bodies). Otherwise it risks being perceived as biased in favor of governmental interests.

Role and powers

Generally, the leaders of the constitution-making body (such as an executive committee, or government actors) make policy decisions, and the administrative management body plans for and implements these policies. For example, a constitutional commission may decide that civic education and public consultation will be held in all regions, and then the administrative management body implements the decision. In practice, the role and powers of the constitution-making body and the administrative management body (if separate) may not be clearly defined by law or any other means.

A lack of clarity regarding roles and powers has led to serious tensions. In Timor-Leste, the secretariat to the constituent assembly did not have a clear mandate or reporting lines. This resulted in the president of the constituent assembly firing the first director for making decisions that the assembly members felt were beyond her authority.

Directing the administrative management body

The director should be impartial and independent of government and parties or other key stakeholders. The chairperson of a commission or constituent assembly can also direct the administrative management body (e.g., as was the case in Eritrea [1997] and Kenya [2005]).

Box 40. Nepal [ongoing process]: A poorly planned management structure

The constituent assembly in Nepal in 2008 set up several committees to handle different tasks, but without an overarching coordination mechanism. There was a secretariat that provided limited administrative support but that did not resolve the disagreements among the committees about which was to do what and when. This led to planning problems such as launching a public consultation process without a strategy for how the thousands of views would be analyzed and shared with the assembly members.

There are potential drawbacks associated with a chairperson directing both the political tasks of the process and the day-to-day administration and management tasks:

- A chairperson or president of the constitution-making body is typically chosen to lead the constitution-making body because of his or her political skills or acceptability to all key power brokers. He or she may not have the requisite management skills also to direct the administrative management body.
- The chairperson or president of the constitution-making body will have significant responsibility for overseeing the political and intellectual tasks of preparing the constitution; the administrative and management tasks may become a distraction from this role, or he or she may not pay the administrative and management tasks enough attention.
- The chairperson or president of the constitution-making body may not be impartial, and may manipulate the outcomes of certain tasks so that they favor his or her party or group. For example, he or she may ensure that the analysis of the public consultation process favors his or her views and interests.

For these reasons, it can be helpful for the director of the administrative management body to

be someone who is not a member or leader of the constitution-making body. He or she can then be hired, seconded, or appointed specifically for his or her management expertise and acceptability to all stakeholders. Headhunters have been used to find experienced and acceptable managers. Some designers of the process have held wide-ranging public consultation to ensure that the director was acceptable to all key stakeholders. It may take considerable work to identify the right person.

If no local actors are appropriate, foreign foreignactors could be an option, but ideally their role should be to mentor local actors. In Timor-Leste [2002] the secretariat was headed by a Brazilian, through the United Nations. Relationships are likely to be more delicate if the administration is foreign, or partially so. In many countries there is little experience of constitution-making and sometimes even little experience of constitutions. National participants may lack self-confidence; at the same time they have been given an important responsibility. Careful management is necessary to ensure that national participants feel respected and in charge of the process, even if their management experience is limited. It may be hard for experienced international managers to watch things being done inefficiently, but in the long run it is likely to be counterproductive for them to try to take things over. There can also be charges of undue international influence. At least in Timor-Leste, a local actor could have been found to do the job just as effectively or more, and an opportunity was lost to develop local capacity.

The director typically reports to the leaders of the constitution-making body, but he or she could report to the executive or some other governmental body if the constitution-making body is not independent. Here are some of the conditions that lead to tensions between the leadership of the constitution-making body and the director of the administrative management body (if they are different persons):

- The director is not involved during the decision-making process and is directed to implement policy decisions that are not feasible because of lack of resources or time, or logistical constraints.
- The director of the administrative management body may make decisions that do not reflect or support the policy decisions of the constitution-making body or other relevant body.
- The powers, duties, and reporting lines may be unclear, which can lead to confusion about what has been decided and what is being done. For example, in Afghanistan, the director of the secretariat had reporting duties to the United Nations, President Karzai, and the chair of the constitutional commission. At times each would direct him differently and he had to manage these tensions. In particular, the chair assumed he could make decisions about establishing the Constitutional Loya Jirga although he had no formal role and was not involved in the decision-making process being guided by the executive and the United Nations.
- Corrupt members of the constitution-making body may try to influence the director to provide additional resources to them, or to give contracts to family members. Or members will simply demand a role in procurement and budgetary decisions. The legal mandate or a code of conduct could specify that members should not be involved in procurement or budgetary procedures and specify the powers of the director in this area, as well as how oversight will be provided. (See part 2.3.3.)

- The administrative management body may be requested to resolve tensions or disputes between the leaders or members of the constitution-making body that could jeopardize its role as an impartial provider of technical and support services (e.g., Albania [1998]).

Clear reporting lines, powers, and duties, as well as regular meetings between the director and the constitution-making leaders to discuss issues as they emerge, can resolve some of these tensions. Other problems will simply require strong diplomatic skills. A mechanism should be established that would allow the director to report corruption or conflicts of interest on behalf of constitution-makers attempting to influence administrative and management decisions.

Creating specialized units or departments

An administrative management body that undertakes a number of complex tasks is often divided into specialized departments or units named after each core function. There is no preferred model for how to structure an administrative management body. Funding and the availability of resources will place limitations on the number of departments and positions that the body can afford, if any.

In South Africa, the constituent assembly administration was led by a directorate (with an executive director and two deputies) that oversaw the following departments: the secretariat, the law advisor's department, and the research, finance, administration, media, and community liaison departments (the last of which also handled civic education and public consultation). Some of the departments also hired consultants to assist them, such as external evaluators and caterers. Many administrative management bodies have also included field offices to assist with outreach to the rest of the country (as in Eritrea [1997], Afghanistan [2004] and Kenya [2005]).

Here are some generic potential departments or units, with brief descriptions of what they might do. The list is not exhaustive in terms of the departments or their functions; it is a tool to assist in planning for what may be needed to administer and manage a complex process.

- **Office of the director**—implements policy, manages all units and field offices, and ensures that all tasks are carried out in a timely, ethical, and professional manner. Reports to the constitution-making body or other body as specified in its mandate.
- **Personnel**—assists with recruiting and hiring staff, develops or adopts any needed staff policies, develops job descriptions and terms of reference, sets salaries, and helps with any problems that arise.
- **Financial administration**—prepares the budget and maintains all budgets for donors, ensures that budgets are spent according to donor or governmental requirements, prepares necessary financial policies or procedures and trains the staff as necessary to adhere to policies and procedures, oversees cash-flow projections, approves all cash and wire transfers and maintains cash, controls and tracks expenses, prepares and makes payments for payroll, reports on how the funds are used, and works with external auditors as needed. Engages with and coordinates

donors, responds to donor queries, writes or coordinates donor reports, and advises on compliance with donor requirements.

- **Administration**—manages large conferences or other bodies, and organizes all interpretation and translation services, printing services, secretariat (minute taking, secretarial services) and general services, infrastructure, logistics, and procurement.
- **Communications and outreach**—is responsible for civic education, public consultation, and media and stakeholder relations. One manager should oversee these three interrelated tasks because careful coordination is needed so that each task is carried out in a timely way. For example, media campaigns and civic education should precede and support a public consultation meeting.
- **Security**—advises the director on security issues and creates, if necessary, basic security procedures or adopts those of a similar institution already established; creates and enforces safety procedures (specific protocols for travel to insecure areas, communication, fire, bomb threats and detonations of explosive devices, gunfire, theft, physical assaults, health issues, and evacuation); establishes liaisons, where appropriate, with national police, local security personnel, intelligence units of the national government, peacekeeping forces, embassies, and other relevant actors to ensure security at various events or at the main constitutional bodies; produces regular security briefings where necessary; and manages hired or seconded security staff and other security officers.
- **Legal and research department**—drafts constitutional provisions and other documents as instructed by the constitution-makers (the administrative management body may or may not have responsibility for drafting), maintains the official electronic version of the draft constitution in a secure environment with version control, researches requested issues, and advises on all legal questions or aspects related to the draft constitution as well as issues relating to rules of procedure or any codes of conduct or other legal issues. Could also assist with the public consultation process and analyzing, collating, and reporting on the views of the public.
- **Archiving and documentation**—prepares guidelines and procedures for documenting the proceedings; establishes a system for sorting, coding, storing, and archiving text and nontext-based materials, including committee meeting minutes, reports, voting records, audio and video recordings, and photographs. Also may handle collecting, collating, and entering into a database all of the public views gathered, and transcribing oral views.
- **Information technology**—advises on the technical needs for the process and provides computer services and maintenance, network services, user support and training, data processing services, and technical solutions. This may include supporting an election or voting process, creating the system for entering into a database the public's views, or helping establish an official website for the process.
- **Capacity development**—assesses the skills needed to carry out all core tasks and plans and conducts training to ensure that all staff members are adequately prepared to perform their roles.
- **Field-office coordination**—assists in establishing field offices and coordinates with all other

departments and units to ensure that the field offices are supported and linked with the head office. Communicates regularly and visits field offices to ensure proper functioning.

The departments can be subdivided or combined in any number of ways. Some specialized tasks could also be outsourced. (For a discussion of how these tasks should be administered, see part 2.3.)

The need for an organizational chart

An organizational chart for larger processes is useful when defining the lines of authority and reporting, both within the administrative management body and between it and the constitution-making body or any other body or institution to which it reports. Regardless of how it is structured, it will be important to view the organizational chart as flexible, depending on what is needed at any given phase of the process. For example, departments may need to be expanded, reduced, or added.

Practical tips

- Establish the administrative management body early enough in the process so that the staff members are not scrambling to try to support a process with too little time to do all the required tasks—in particular, civic education and public consultation.
- Create well-defined mandates, duties, and reporting lines as well as organizational structure.
- Schedule regular meetings between the director and the leaders of the constitution-making body as well as between the director and the staff to ensure that proper coordination and communication are ongoing.
- Allocate sufficient resources and funds to the administrative management body.
- Don't usurp the work of the constitution-makers. It is better that the administrative management body try to work with the actual constitution-makers rather than against them. It is likely to be more effective to try to bolster their self-confidence and make them feel that they are in control of what is happening and the document that will emerge is their document, so they have some pride in their work. Otherwise there is the risk that they will rebel and may simply not turn up.
- Be transparent. In South Africa, journalists were invited to sit in on the administrative management body's planning sessions; others have posted their budgets and work plans online.
- Consider the level of independence for the administrative management body. Structural independence can be provided for in the legal framework establishing the mandate, but it can take many forms, depending on the context of the process.
- Create an impartial administrative management body. The public should trust that the administrative management body will not unfairly advantage any group, political party, or governmental interest but will seek to balance all interests to the greatest degree possible. The director should not express opinions on or promote particular constitutional or political agendas or accept gifts from any stakeholders in the process.

3.4 Specialist or technical input institutions

An undertaking as complex as making a constitution inevitably involves a large number of specialist bodies and individuals. Here we look at aspects of arrangements as experts (who may come as single “spies” or in battalions), bodies that run elections and referendums, government departments, and courts. In the previous section, under commission and committees, we noted briefly that special committees may be constituted or used in constitution-making processes.

3.4.1 Experts

History

Experts play critical roles in constitution-making. But the roles have changed over a long period, as have the types of experts. The roles depend to a considerable degree on the relationship of experts to the constitution-makers. Until recently, lawyers, often academic lawyers, played a central role. They would draft constitutions on behalf of monarchs. With the rise of parliamentary institutions, the role of experts became that of advisors to political parties, who made the final decisions. During the decolonization period, academics in the metropolitan states would be recruited to advise on, and often draft, the constitution. Sometimes the whole process would be dominated by the expert, within the overarching aims of the colonial power or the newly emerging elite. With the shift to mass participation, the locus has moved, not disregarding experts but reducing their role increasingly to technical matters. Mass politics and mass participation have dented the mystique of experts and their monopoly on knowledge.

Changing roles of experts

The roles and types of experts have also changed with the changing nature of the constitution. The contexts of constitution-making have altered significantly in the last fifty years or so (after the wave of decolonization). Many constitutions have been made in the wake of, or to settle, internal conflicts. In such circumstances, the skills of the traditional advisor, whom we may call the “generalist,” covering all aspects of the constitution, were not sufficient. The specialist entered the field. The need for specialists increases when the constitution-making process is embedded in complex processes of peacebuilding and the sharing of power (as in Bosnia-Herzegovina, Northern Ireland, and Sudan); they must address such issues as what to do with weapons disposal, merger of armed militias, return of refugees, and transitional justice. There are now competing theories of how peace and harmony are to be achieved, and of the negotiating process (each with its special jargon). Some constitutions, in the post–Cold War period, aimed at democratization, have been dominated by theories of transition to democracy.

Another change is in the scope of constitutions. The lawyer-generalist sufficed when the focus was on systems of government, informed by the theory of the separation of powers, particularly the independence of the judiciary, and occasionally the protection of minorities, restricted to civil and political rights. The lawyer-generalist was often not well versed in the policies or intricacies of electoral systems or the politics of ethnicity, the complexity of land issues, or concerns with

social justice. For the most part these were omitted from the constitution and left to the political process. Today people look to a constitution to solve a myriad of political and social problems, including representation (of women, the disabled, minorities), exclusion (when the state is dominated by one or two communities), social justice (perhaps through affirmative action), power sharing (including decentralization), identity (particularly in multicultural states), social reforms (for example, addressing oppression within society), environmental sustainability, accountability of security forces, and tighter financial and budgetary processes. Increasingly these require specialist knowledge, and so the range of experts who become involved in advising on the constitution has increased exponentially. And the coordination of these experts becomes critical.

A further development is the enlarged role of the international community (defined to include participation of other states, regional or international organizations, and international NGOs) in national constitution-making processes. This may come about because of the collapse of a state or other serious circumstances that require international help and assistance (such as in Cambodia [1993], Bosnia-Herzegovina [1995], Timor-Leste [2002], Afghanistan [2004], and Kosovo [2008]). The role of the foreign expert has been facilitated by the desire of some countries to play an international role, the emergence of international norms whose incorporation in a constitution is deemed to require specialist help (indigenous peoples' rights, gender issues, environmental sustainability, transitional justice), and the rise of international NGOs, funded mostly by Western governments, which can be sustained only if they generate business. International institutions such as the United Nations Development Programme also seek to play a role. Consequently a class of professional experts (as opposed to other types, who are at best part-timers) has arisen, assuming the dimensions of an industry, with an interest in conflict.

The internationalization of constitution-making processes also means that experts come from many different legal traditions. Few are comparative lawyers; certainly few common lawyers know much about civil law systems, and the converse is also true. This may make it difficult for them to work well together, because approaches, concepts, and preferred institutions may vary among them. A commentator on the Dayton process for Bosnia-Herzegovina noted the clash of legal traditions and styles, and said that cultural differences among lawyers (some from the United States, some from Europe, some from the Balkans) slowed the drafting but also allowed ideas to be examined carefully and provided for cross-fertilization among traditions while keeping Yugoslav notions foremost (O'Brien 2010: 337).

Presumably the varied background of experts matters less in more technical areas such as security, environment, and electoral systems. The role of experts has also been greatly affected by the rise of the participatory process. No longer is it the case that experts are invitees of the government. International agencies bring their own experts, without clearance from the government. Many experts come on the invitation of local NGOs, but they are usually funded by grants from outside. Both special groups and individuals consider that they have the necessary expertise to negotiate and decide on constitutional issues; many want to draft the text. These groups and individuals do not generally operate under the auspices of political parties, and thus it is difficult to bring them under "control." The tendency to usurp the role of experts

is accentuated if the legislature or the constituent assembly sets up thematic committees for decision-making. And there is serious danger of poor drafting and an overall lack of coherence in the document.

Functions of experts

Experts perform different functions. Some transmit foreign examples, in the hope that there is something to be learned from what has occurred elsewhere. (An advantage of this is that the experts do not need to show any knowledge of the local scene—but they should be careful not to suggest that institutions from other countries can necessarily be copied, and their listeners should scrutinize those experiences carefully.) Some perform a more exalted role; they may be experts in conflict resolution. Some play their most effective role as negotiators (often in postconflict situations). In South Africa, apart from experts brought in by local groups, the constituent assembly appointed a panel of local experts to advise it on interpretations of the draft constitutions and to help resolve differences, particularly on legal issues. Frequently experts' views are sought on a draft constitution before final revisions and adoption (as in Eritrea, Kenya, Nepal, and South Africa).

Experts, particularly perhaps generalist lawyers with a range of legal knowledge, can play a useful role if they have a good understanding of the local context (including culture) and can establish a good rapport with their clients (for more discussion of such issues see the discussion of foreign advisors more generally, in part 2.3.6). Sometimes parties who are negotiating an issue are not really well acquainted with the issue and are afraid to take a position, which they fear will disadvantage them. If the other party suffers from the same syndrome, negotiations can be complicated, drawn out, and bitter—full of suspicion. But if each party has an expert whose advice it respects, a lot of issues can be addressed, leaving the critical questions to be resolved at the level of principals. South Africans used experts from political parties to great advantage in this way.

Some experts come for a specific task: for example, “Tell us what electoral system will ensure that more women or more marginalized groups or more persons with disabilities can be elected to the legislature.” Or “What shall we do about land?” Some advise on how to plan and administer civic education, or analyze public views given to the constituent assembly. Some may be asked to advise on the actual design of the constitution-making process. Many experts may appear only as speakers at workshops. A useful role for experts may be at the start and at the close of the process, the former for an idea of what may be entailed in a good process and some useful comparative perspective, and the latter for comments on the draft constitution before it moves to final approval and ratification. Sometimes experts can be of great help when the issue is either controversial or complicated (such as devolution or federalism); here a panel of two or three experts may show the way forward as well as warning of risks and dangers.

Some experts are closely associated with decision-makers, as advisors to political parties or to the constitutional commission or the constituent assembly. Others operate at the periphery,

nested in a local or international NGO. Many come unsolicited, often without a clear role, and offer their services on arrival. Some experts are part of teams and some operate on their own. A foreign expert backed by her government may enjoy privileged access to decision makers.

Local versus foreign experts

In recent years, foreign experts have begun to play an important role in advising on constitutional issues. At the same time, the number of nationals with knowledge of comparative constitutions has increased. What are the comparative advantages of foreign versus local experts?

Sometimes foreign experts are seen as better able to provide objective advice. When Malaya's independence constitution was to be drafted, agreement seemed difficult due to local political differences. Consequently a panel of international experts was set up to make recommendations, which were largely, but not completely, accepted. Similarly, Namibia's constitution was drawn up, at the request of the constituent assembly, by three foreign experts, within a broad set of principles agreed to among the political parties. The foreign experts were South Africans who were acceptable to all key political and other interests. In 1996, when Fiji had to draw up a new constitution, the process was held up for several months, as one side wanted a person to serve as chair of the constitutional commission, but that person was distrusted by the other side; progress was possible only after an agreement was reached on a foreign dignitary to serve as chair. And in a situation such as Sri Lanka before the government unleashed an all-out war on the Liberation Tigers of Tamil Eelam, or in the negotiations between the two parts of Sudan, the role of foreign advisors (at the political and technical levels) seemed inevitable. Since the 2008 political election violence in Kenya, most commissions established under new processes intended to resolve deadlock on constitutional and political issues have included foreign members in order to provide objectivity and impartiality.

If experts are sometimes necessary, it is also generally more important for them than most other categories of foreign advisors (see part 2.3.6) to be well informed about local history and contemporary circumstances. Those who are not attuned to local circumstances may tend to rely on what they feel has worked successfully in other countries, in which case some local factor of critical importance is likely to be overlooked. The chances that there are solutions that will work universally are slender. Local experts would generally have a better understanding of local circumstances and nuances. Third World experts, who would have a better understanding of local social and political circumstances, have been not favored by international agencies, much less Western governments.

Practical tips

Experts have important roles to play in constitution-making and implementation processes. With increasingly participatory processes, it is necessary to work out the precise role of experts and the modality of their contribution and participation. The role of the generalist (often a lawyer) as a person to integrate different inputs and ensure the coherence of the constitution needs to be recognized.

With the proliferation of “experts” and their sponsors in some processes, it has become evident that control and coordination become necessary, although neither is easy. Competition among states and international organizations to provide experts (and advocacy of their national models as the answer for another country’s problems) has often undesirable consequences. And to increase the usefulness of foreigners, the suggestions made in part 2.3.6 in relation to foreign advisors generally should be applied with rigor (that is, such foreigners should either already have extensive knowledge of the local context or be required to take courses or be given prescribed readings in local social, political, and constitutional history, demography, and economics. (For more on the role of the international community, see part 4.)

3.4.2 Electoral management bodies

Elections are managed by different bodies, sometimes by a government department and, increasingly, by separate bodies. There are basically two models of electoral commission: those that are designed to be independent of government and parties (a bit like courts), and what might be described as “balanced” commissions, in which each major party nominates members.

Usually the same body will have responsibility for any referendum; indeed, some bodies are officially named “commissions for elections and referendums.” In Ireland there is no electoral commission, and a separate commission is appointed every time a referendum has to be held. In some countries—usually in the civil law tradition—the courts also have some responsibility in connection with elections, including certifying the results.

An electoral management body may find itself involved in a constitution-making process:

- when an election is needed for a legislature that will have the task of making a new constitution or for a constitutional assembly with the sole task of making a constitution; or
- to conduct a referendum on either the adoption of a whole constitution or one or more specific issues.

If the electoral management body is a “balanced” body, designed to be fair to all parties, it may not be the most appropriate body to carry out these functions, especially if elections for the constitutional assembly are not to be conducted on ordinary party lines.

Election issues

The first resembles the ordinary work of an electoral management body. However:

- the timetable may be different from that applying to normal elections;
- the electoral system may be different;
- those entitled to vote may be different for a specifically constitutional assembly (for example, even if nationals overseas are not usually able to vote, the diaspora may be entitled to vote; in Kenya [2010] prisoners could vote); and
- civic education on voting for a body to make a constitution may present different challenges.

Box 41. An election for a constituent assembly

In 2008 Nepal elected its constituent assembly—to make a new constitution, and also to be the national legislature. The challenges that faced the electoral commission included:

- the commission itself being totally new, the old one having been viewed as consisting of supporters of the old and discredited regime, and disbanded;
- the need to register new voters;
- the need to operate a new electoral system (with not only 240 single-member constituencies, as in the past, but 335 members to be elected through party lists);
- political maneuvering, which meant that the details of the system (including numbers of seats) changed perhaps three times; and
- the need to carry out voter education that recognized that this was about a constitution (but would also lead to the formation of a government).

The elections were postponed twice, once because the commission felt it was not ready. When the election was held, a huge number of ballot papers had to be printed in a short time. (About forty million were printed.) And this election having been part of an internationally monitored peace process meant that there was great international interest, and all sorts of foreign advisors.

Because of the historic importance of a constitution-making process, an electoral management body might be able to get more assistance (indeed, might find more assistance thrust upon it) than is available for a regular election.

Referendum issues

Some countries have had referendums only on new constitutions. In some ways organizing a referendum may be simpler than running an election: the whole country may operate as one constituency, and the ballot paper may be simple. On the other hand, the range of actors in the campaign may be quite different from that involved during an election campaign. Parties may not be organized for a referendum campaign. Even if they are, there may be many other groups that wish, or are permitted to campaign that would not do so in an election situation. The Kenya [2005] referendum campaign demonstrates some of these issues.

There will likely be a separate law that deals with administration of referendums. Conducting a referendum may be quite different from conducting an election. Instead of being asked to choose between individuals and parties, the electorate is asked to choose among two or more ideas—unfamiliar ideas for many.

Issues of framing the question are addressed elsewhere. (See part 3.5.) We should note here that

sometimes this is the responsibility of the electoral management body itself, and sometimes of other bodies.

3.4.3 Government departments and agencies

In this section we discuss the range of governmental authorities (ministers, and departments and other agencies) that often carry out specialist, technical, coordinating, and support roles in relation to constitution-making processes, which roles may be extensive. They can include taking legal and administrative steps needed to establish constitution-making bodies, providing and managing funding for the process, organizing aspects of the process such as civic education or public participation, organizing transportation and meetings for a constitution-making body undertaking public consultation, providing security, providing legal advice or legislative drafting support, and developing and introducing into parliament laws to implement the constitution. Such roles on the part of a wide range of government authorities can be critically important to constitution-making processes. These roles do not usually involve direct public participation in making decisions about the constitution. They can, however, open the way to attempts to exercise influence, sometimes giving rise to tensions and conflict with constitution-making bodies. Further, government authorities do sometimes participate directly in constitution-making processes, for example through ex officio representation in constitution-making bodies.

Box 42. Oranges and bananas - Kenya [2005]

Kenyans were invited to vote on whether to adopt a draft constitution. The main campaigning groups were not political parties, but they were not civil society organizations. The Election Commission had to assign a symbol to the Yes campaigners and the No campaigners—just as they would to parties or candidates in an election. They gave the Banana to “Yes” and the Orange to “No.” There is no reason to suppose that this was other than random. But an orange proved an easier symbol to use than a banana—though both are local fruit. In fact the orange (symbol of the group that won the referendum) inspired the name of a totally new political alliance).

In truth the issues in the campaign were less the constitution than the performance of the government and ultimately ethnic loyalties.

Governmental authorities and the roles they play

There are great variations among different constitution-making processes in terms of the extent to which different kinds of governmental authorities carry out specialist, technical, coordinating, and support roles. There are some processes where there is little or no role for such authorities. Examples of these include situations where international actors play the roles in support of the

Box 43. Ministers of constitutional affairs

The laws providing for Uganda's constitutional commission and its constituent assembly (the two main consultative and decision-making bodies in that process) provided key roles for a minister of constitutional affairs, supported by a public service department (the ministry of constitutional affairs). The minister and his department were established in 1986, and largely developed the policy and legislation providing for the constitutional commission and later the constituent assembly. The Uganda constitutional commission statute of 1988 then gave the minister a number of significant roles in relation to the commission. They included roles in the selection, nomination, and appointment of the twenty-one-member commission, determining if the commission should submit interim reports, extending the period within which the commission was required to complete its work, approving employment of consultants or experts by the commission, and determining (in consultation with the minister for finance) the allowances payable to the members and staff of the commission. There was only one mention in the statute of the ministry of constitutional affairs: a provision requiring the funds of the commission to be "administered and managed by the Accounting Officer in the Ministry for Constitutional Affairs." The constituent assembly statute of 1993 also made provision for important roles for the minister. In addition, it provided for a commission for the constituent assembly, which not only conducted the elections for the 288-member assembly, but was also required to convene its first meetings, provide administrative support for the assembly, and (if necessary) conduct any referendum that might be required under the statute to resolve any contentious issues that the assembly could not resolve. There was no provision in either statute guaranteeing the independence of the constitution-making bodies. Considerable tensions developed among the constitutional commission, the minister, and his ministry. To an extent, this reflected that the establishment of the constitutional commission reduced the public stature of the minister. There were also other tensions, mainly over what the minister saw as the excessive time the commission was taking to do its work, and concerns by the commission about control by the ministry of funding for the commission's work to a degree that adversely affected that work.

Another case in which special authorities were established to both coordinate and support the constitution-making process was Albania [1998]. A parliamentary constitutional commission was established as the main constitution-making body. A ministry of institutional reform and relations with the parliament was established to assist the commission by organizing the consultative constitution-making process envisaged by the parliament. Lack of financial and other resources saw the minister responsible for that ministry cooperate with several donors to establish an independent agency (the Administrative Centre for the Coordination of Assistance and Public Participation). Its function was to act as a liaison between Albanians and international actors to facilitate

the widest possible participation of citizens and NGOs in the process. In doing so it worked in close cooperation with both the constitutional commission and the ministry.

The Albanian arrangements were developed on an ad hoc basis, and were not the subject of statutory provisions. The Uganda arrangements are unusual in the extent of the detail in the statutory provision about the roles of supporting authorities, and in the extension of the roles to the point of giving the minister and his department extensive control of the process. It is more common for existing ministers and departments such as the attorney general or the Department of Justice to provide support roles. Those roles seldom give as much control over a process as was vested in the Ugandan minister for constitutional affairs.

Among the difficulties with arrangements giving government authorities key roles in establishing constitution-making bodies is that those bodies then take center stage. The previously important minister and department are left with little of significance to do. This experience can contribute to tensions between a minister and a supporting department, on the one hand, and the constitution-making body. If the minister retains important powers of control over the constitution-makers (as in Uganda) there is then the potential for conflict over timetables, directions in the work of the constitution-making body, and control of funds and other resources. Where differences over substantive constitutional issues arise, attempts to interfere in the operations of the constitution-making body may occur. In some constitution-making processes, provisions about the independence of constitution-making bodies are included in the statutes or other documents that establish them. In part, such provisions are intended to reduce problems with interference by ministers or other government authorities.

constitution-making process that governmental authorities would normally play. These include situations such as those in Afghanistan, Cambodia, Iraq, Somalia, and Timor-Leste, where conflict prior to the constitution-making process has largely destroyed state institutions. There are also other postconflict situations where, although state institutions may exist, for one reason or another international community support for a constitution-making process extends to providing all or most of the support the constitution-making process requires, as in Namibia.

In the more common situation where government authorities—both political (e.g., cabinet ministers) and administrative (e.g., public service departments)—do carry out specialist, technical, and support roles, the authorities and the roles they play can be categorized in many ways. The following discussion divides them into three main categories.

Authorities established mainly to provide support for the constitution-making process

In some processes, special authorities are established to undertake particular roles in

establishing, coordinating, and supporting constitution-making bodies in various ways. They can be both political and administrative authorities. Such authorities can sometimes have responsibilities that extend to regulation and exercising a degree of control over the work of the constitution-making body. The laws establishing the main constitution-making institutions for the Ugandan constitution-making process from 1988 to 1995 provide an example.

Preexisting authorities that are given additional roles providing support for the process

In processes where new and specialized constitution-making institutions are required, it is common for authorities such as existing ministers and public service departments to be given the kinds of roles in establishing those institutions that the minister for constitutional affairs carried out in Uganda. In Kenya, for example, it was the attorney general who was required to submit to the president names of nominees for appointment to the Constitution of Kenya Review Commission.

Beyond their involvement in establishing institutions, existing ministers and departments play many other specialist, technical, and support roles. Police departments or other agencies may provide security for the process. The department of finance provides funds and perhaps manages the accounts. The department responsible for government information, and district or provincial administrations, may help provide civic education, and perhaps also help organize public consultation meetings about the people's views. The department of justice helps the constitution-making institution prepare the constitution-makers, and perhaps aids in analyzing views. The government's legislative drafting service usually provides the legislative drafter who develops the draft constitution in accordance with the instructions of the constitution-making body. More generally, the public service commission ensures that the constitution-making body is provided with the staff needed to carry out its work.

Sometimes such roles are the subject of provisions contained in the law or other document establishing the constitution-making institution. For example, it is common for statutes establishing constitutional commissions or constituent assemblies to make provisions about public service commissions providing necessary staff. But often the support and other roles are carried out because such work is regarded as part of the general responsibilities of the authority asked to provide the support.

Most, if not all, such roles can be of great significance in a constitution-making process, where the specialized constitution-making institutions will seldom, if ever, have all the resources available needed to operate independently of other governmental institutions. Almost always there is a need for close cooperation with other authorities, both political and administrative. At the same time, the need for support means that outside authorities may gain the ability to block, interfere, and politicize the process. While provisions guaranteeing the independence of the constitution-making body may help, they can seldom solve all potential difficulties.

External authorities that can influence or participate directly in the process

There are various situations where external authorities may influence, or participate directly in, the constitution-making process. An example of external influence concerns government control of appointments to constitution-making bodies. There are situations in which it is accepted that political considerations should determine the composition of a constitution-making body. Examples involve committees of a parliament (whose membership often reflects the numbers of seats that political blocs hold in the parliament) as well as constitutional conferences, roundtables, and peace processes. But when constitution-making bodies purport to be expert, neutral, or broadly (rather than politically) representative bodies, there can be risks in appointment processes controlled by government authorities. In politically charged postconflict situations, processes for appointing members of constitutional commissions, or particular categories of nominated members in constituent assemblies, can readily be heavily influenced by political factors. In the process, the credibility, and often the actual capacity, of the constitution-making body may be damaged.

As for direct participation, sometimes key government agencies have *ex officio* representation in a constitutional commission. In Kenya, the attorney general was *ex officio* a member of the Constitution of Kenya Review Commission and of the later committee of experts. (See appendix A.7.) The twenty-one-member Uganda Constitutional Commission included two *ex officio* members, one a senior army official and the other a senior official in the ruling party secretariat. Similarly, in some instances constituent assemblies have included members nominated to represent government authorities. The 284 members of Uganda's constituent assembly included ten to represent the army and ten "appointed by the president in accordance with the advice of the cabinet." Further, the chair and deputy chair had to be elected by the assembly from a list of five names submitted by the president.

The most obvious dangers arising when particular governmental interests are represented directly in constitution-making bodies involve pressure to protect governmental political interests generally, or pressure to protect the interests of particular parts of government (for example, the interests of the army, or of the attorney general, where a senior army officer or the attorney general holds a position *ex officio*).

Direct participation can also occur through government authorities making submissions to the constitution-making bodies. This can be dangerous, particularly if a government authority making a submission is particularly influential. On the other hand, when submissions of views are encouraged from all sources, it will be reasonable that government authorities use this avenue for seeking to influence the process.

Relations between constitution-making bodies and other authorities

On the basis of the discussion of the roles played by government authorities, it will be evident

that the main potential problems concern possible political interference by such authorities in the work of constitution-making bodies. The extent to which such dangers arise varies considerably. There are many factors that may influence the extent of the danger in any particular case.

As already noted, there are constitution-making processes in which political influences can be expected and will tend to be open (e.g., parliamentary processes, constitutional conferences, and roundtables). With constitutional commissions and constituent assemblies, there may be less open political interference, but processes for appointment or nomination of members may lead to such influence being exercised. Whether such influence occurs depends to a large degree on the extent to which both the political and the bureaucratic arms of government are unified, well structured, and organized. Where a government is dominated by a well-organized and tightly structured political party with a clear ideological position, it may well seek to influence any constitution-making process in order to achieve its preferred outcomes. On the other hand, where the ideology of such a party supports democratization, conflict resolution, and peacebuilding, there may be far less pressure to interfere. By contrast, where a country has numerous political parties that tend to be dominated by narrow agendas of their leaders or a narrow ethnic base, there may be multiple motivations driving efforts to influence appointments to and decision-making by constitution-makers.

The following practical suggestions for ways of establishing constitution-making bodies so as to reduce problems in relations with other government authorities have particular relevance to bodies that are intended to be neutral, broadly representative, or expert:

- Where practicable, when there are provisions for the appointment of members, the founding legal documents should avoid politically dominated appointment processes, and endeavor to provide for neutral or bipartisan processes.
- Statutes and other foundation documents should provide for the independence of constitution-making bodies from political direction and control, and should also include independence in codes of conduct for members of constitution-making bodies.
- As far as practicable, constitution-making bodies should be empowered to manage their own resources, so as to reduce the need for dependence on support from other government authorities.
- In general, statutes and other founding documents should avoid giving ministers and other external government authorities legal control over resources and work programs of a constitution-making body.
- Where international community actors are providing funding and other support to the constitution-making process, they should do so in ways that encourage and support the independence of the constitution-making body.

3.4.4 Courts

Courts may also be important in constitution-making. Sometimes a role for the courts is designed in the process, or even required; sometimes that role is an anticipated possibility, and sometimes courts play an unexpected role. It is more likely that a subnational constitution will

be challenged. It is not a supreme law, but must be compatible with the national constitution—and national constitutions sometimes state this specifically.

Courts with integral roles in constitution-making

Occasionally a constitution-making process cannot be completed without some involvement from the courts. The role of courts in certifying compliance with certain principles as to content, and perhaps procedural requirements, has been discussed in part 2.1.8.

In some countries, courts have a role in elections; they sometimes serve as the electoral management body, and sometimes have the function of certifying compliance with the law. That role might include certifying the result of a referendum on the constitution, as in Burundi [2005]. This sort of role for the courts is more common in the civil law tradition.

Courts with the possibility of blocking change

It is somewhat more likely that the courts will be invited to declare that a constitutional change is improper than that their positive approval will be required. And it is also more likely that amendments to a constitution will be challenged on the basis of procedural failures than that the substance cannot be validly introduced.

A constitution or peace agreement may specify certain principles on content of the new constitution without requiring a court, or any other body, to certify that the requirements have been satisfied. The only way to use such a provision may be to bring a court challenge to the document. A few such cases have gone to the German constitutional court, including one arguing that an amendment to agree to the creation of the European parliament was unconstitutional. Various constitutions say that certain parts may not be amended at all—and a challenge may be mounted to amendment on that ground. The Turkish constitutional court has ruled that an amendment to say that people's rights to higher education could not be restricted "because of their apparel" was invalid because it infringed the unamendable secularism provision. The background was the intention to permit women wearing the "Islamic headscarf" to attend universities.

The South African interim constitution provided that one-fifth of the constitutional assembly could refer any proposed draft provision to the constitutional court for a ruling on whether it complied with the thirty-four principles, rather than waiting for the complete draft constitution. No such challenge was made.

There is no limit to amendment specified in the constitution of India, but the Supreme Court created the principle of the basic structure of the constitution, according to which certain features may not be changed. It has spelled out what these are in later cases, but in no case so far has it held an amendment ineffective. Courts in a few other countries have adopted a similar approach, including Bangladesh, and in one case Sierra Leone.

Courts and referendums

Various constitutions permit courts to block constitutional change because they can, or must, rule on the constitutionality of a referendum. This is true of the Turkish constitution, and the Albanian one. In the latter the court must review the constitutionality of issues put to referendum within sixty days—including whether the issues relate to constitutional provisions that cannot be changed.

In 1992 the Russian constitutional court declared that a referendum planned in Tatarstan (one of the Russian republics) was unconstitutional, because it essentially declared Tatarstan to be sovereign and a subject of international law. The Tatars ignored the court and held their referendum, but later renegotiated their relationship with Russia.

Special roles in implementation

In addition to the role played in most legal systems by the courts in implementing the constitution—by adjudicating on violations of rights and on the constitutionality of laws and acts of the authorities—some more specific roles have been given to the courts under constitutions. In countries where much of the law is made by judges (essentially the countries of the English common-law tradition), the courts may be directed to develop the law in a way that furthers constitutional objectives. (The South African constitution is an example.) The Kenyan constitution [2010] also provides for the possibility of the chief justice advising the president that laws have not been enacted as the implementation provisions require, and that the parliament should be dissolved and elections for a fresh parliament held; in that case the president would have no choice but to dissolve the parliament.

Problems

The risks of court challenges holding up constitution-making may be considerable where the process is controversial and political litigation is common. In Nepal, there have been court challenges to the interim constitution. In Kenya there have been many court challenges—some undoubtedly politically motivated, essentially designed to sabotage the process. This is not true of all instances, though; in one the court held that prisoners were entitled to vote in the referendum on the constitution.

Substantive challenges raise other issues. The courts may rightly view themselves as the guarantors of the constitution. But some existing constitutions are not genuine products of the people's will, and there is a risk that the courts may stand in the way of that will being reflected in a new constitution.

In a country in serious need of constitutional overhaul, the courts may not be independent—of government, politicians, or business. Even if they are, assessing the contents, as opposed to the process, of constitution-making may require skills that the existing courts do not possess, because reliance on courts for constitutionalism has been limited.

In most countries there is the possibility on the one hand of “judicial activism” and the other of excessive “judicial restraint,” both of which may be politically motivated.

The Turkish “headscarf” decision has been roundly criticized as violating human rights, especially those of women. It takes a broad view of the implications of secularism, and is probably unconstitutional because it deals with the substance of the amendment, while the constitution says constitutional changes can be challenged only because when specified procedural irregularities have occurred. The constitutional court continues this activist approach, requiring the government to change some of the 2010 constitutional amendments—those relating to appointment to the court itself and another body that appoints senior judges.

The constitutional court of Kyrgyzstan in 2007 declared unconstitutional various amendments to the constitution hastily passed in response to popular demand. When the dictator Bakiyev was finally ousted in 2010, the interim government, under a new constitution, simply scrapped the constitutional court, in reaction against its earlier activism.

On the other hand, when the constitutional court in Albania “lost the opposition’s complaint” about a referendum and did not use its power to take a case about it on its own motion, there was suspicion that this decision was politically driven. (Some judges resigned in protest.) Otherwise, restraint may reflect division within the court—or a genuine reluctance to get involved in political matters.

Even discussion about the role of the courts is often politically charged. Allowing the courts to interfere with constitution-making is obviously controversial, even if the courts can be trusted to be neutral politically. They are impinging on the most fundamental act of people’s sovereignty: determining how they will be governed.

Special courts

Fear of court challenges has led the designers of some processes to create special courts. The South African constitutional court was designed to bring in a new style of judging; it was not created only for the purposes of the process. In Nepal the interim constitution provided for a special court merely to hear cases about elections to the constituent assembly. In Kenya [2010] a special court was created to hear cases about the process with both Kenyan and foreign judges. One reason for this was probably the expectation that the new constitution would include a provision involving the removal or at least the scrutiny of all existing judges, who had been subject to much criticism on the basis of both their competence and their independence.

Practical tips

A few points to bear in mind about designing a role for courts in constitution-making:

- When designing a specific role, such as certification, for the courts, it is important to be sure why this is being done—what will be achieved?
- Can the courts be trusted, and will their decisions have broad legitimacy?

- If a special court is created, it may be necessary to amend the current constitution to legitimize taking jurisdiction away from the regular courts.
- Strict time limits should be imposed to prevent litigation holding up the process indefinitely.
- The courts should not be expected to sort out woolly thinking on the part of the designers of the constitution-making process about the way it should go.
- The courts themselves should be prepared to recognize the limits of their own powers and competencies, act with restraint, and not thwart the will of the people unless that will clearly violates human rights.

A final point: a provision in a constitution that says “This constitution may not be challenged in court” contains a logical contradiction, namely that if the challenge is to the legal validity of the constitution it is a challenge also to the “no challenge” provision. A court may rationally decide that such a provision is ineffective.

3.5 Referendums and plebiscites

3.5.1 Approving and ratifying the constitution

The constitutional referendum is but one form of the referendum; others include referendums on secession or merger with an existing state, legislation, treaties, and policies. The focus here is on the constitutional referendum on fundamental changes to an existing constitution, or the adoption of a new constitution.

Two important elements in designing a constitution-making process are the institutions and rules for making decisions on the constitution. Often the choice is dictated by political and legal traditions. An obvious distinction is between unitary and federal states; the constitution of a federation affects more than the federal government, necessitating a more complex set of institutions and rules for voting. In many cases, the deliberative body that made the draft, usually the legislature or the constituent assembly, also adopts and ratifies it. Britain and some former colonies dominated by the notion of parliamentary sovereignty leave constitutional issues to the legislature. In civil law systems, there is a preference for a referendum (though there are a number of examples of parliament making the final decision). In states under some kind of international trusteeship or custody, there is likely to be a constituent assembly or a referendum (such as in Iraq [2006]), unless there have been recent general elections to the body making the constitution (as in Cambodia and Namibia).

The purpose of this section is to examine the necessity and desirability of a referendum for the adoption of the constitution. Rules for decision-making by constitutional commissions, legislatures, and constituent assemblies have been discussed in previous sections. As a rule, a referendum ratifies a decision made by another body, usually a political body, the legislature, or the constituent assembly. (An exception is the current Somali process, in which the draft

constitution is required to be submitted directly from a constitutional commission to the people under the Somalia Transitional Charter—though this is unlikely to be feasible in the current circumstances in Somalia.) In principle it is desirable that the draft constitution should be considered and approved by a more deliberative body prior to the referendum, since the referendum does not normally provide a proper opportunity for the canvassing of views on issues in the constitution, or the accommodation of different perspectives. And the only choice in the referendum is “Yes” or “No,” not a nuanced answer.

Uses of referendum

It is possible to use the referendum to resolve a particular controversy about the design of the process or a substantive issue. It has been used, particularly in Latin America, to ask the people if they would prefer a constituent assembly to draft the constitution, or to secure the mandate for negotiations on a new constitutional order (as in the referendum of the white community in South Africa), on the mandate of the constitution-making body (as in France in 1957), or on secession and independence (as in Saint Kitts and Nevis in 1998; Timor-Leste in 1999; Bougainville, Eritrea, Montenegro, New Caledonia, South Sudan in 2006; it is also a possibility for Canada, in relation to Quebec, as result of a Canadian Supreme Court decision on the subject). A similar referendum in Kurdistan in 2005 on independence was held by the regional authorities, to secure, as expected, a big “Yes” vote to strengthen its negotiating position on autonomy with respect to the rest of Iraq. The referendum to settle a contentious issue is best exemplified by the decision of the Special Majlis (constituent assembly) in the Maldives to adjourn its proceedings to refer the major contentious issue—the system of government—for resolution by the people. Both the Uganda [1995] and Kenya [2005] processes provided for similar possibilities, but these were not taken up, either to put pressure on the constitution-making body to reach consensus, or because they were daunted by the complexity of the issues. But Uganda used the referendum five years after the constitution to settle the outstanding question of whether the country should move to a multiparty system. Decisions on the retention or abolition of monarchy have been made by referendum in several countries (such as Greece, Italy, and colonial Rwanda).

Our principal concern, however, is with the referendum for a new constitution or major amendments, for at least two reasons. First, for the purposes of constitution-making, the referendum makes people a key institution, whose approval is necessary to bring the draft into force. This role of the people flows from the sovereignty vested in them, and is a manifestation of the fundamental component of the principle of self-determination. Second, for certain constitutional changes, the direct participation of the people in the referendum is seen as a necessary condition for the validity of constitutional change. Courts in India and Kenya have held that fundamental constitutional changes cannot be made by the ordinary process of constitutional amendments, especially when undertaken by the legislature. And, a fortiori, a constitution cannot be replaced by the ordinary amendment process. These defects can be perhaps be cured if an assembly has been elected democratically for the express purpose of amending fundamental features or of bringing in a new constitution. A referendum, it follows, would put the attempt beyond doubt.

Prevalence of referendum

Professor Markku Suksi, a foremost authority on the referendum, notes that more than half of the constitution-making processes from 1998 through 2007 used the referendum to decide on new constitutional text. But at the level of states (ignoring subnational entities), new constitutions, or constitutions that seem to be the result of a more specific constitution-making process rather than a regular amendment process, have been decided by means of the referendum only in some fourteen cases (Albania [1998], Sudan [1998], Venezuela [1999], Qatar [2003], Rwanda [2003], Cyprus [2004], Burundi [2005], Iraq [2005], Kenya [2005; 2010], Democratic Republic of the Congo [2006], Serbia [2006], Kyrgyzstan [2007], and Thailand [2007]). Suksi also estimates that at least half of the world's constitutions require a referendum for constitutional change (Suksi 2008).

Status of referendum

Apart from the subject matter, referendums can be categorized by their status. A referendum may be mandatory, required by the constitution or some other law. In these cases the results of the referendum are usually binding. A referendum may be advisory, to enable the government or parliament to gauge public opinion. In countries such as Britain in which referendums are neither mandatory nor binding, there may nonetheless exist an unwritten convention that certain important constitutional changes will be put to a referendum and that the result will be respected. The Kenyan referendum [2005] was probably advisory (if positive, the actual change to the constitution would have required parliamentary approval), but the rejection effectively killed the constitution-making process.

Some countries have elaborate rules on who may call a referendum, and when; a referendum can have a constructive or a disruptive influence on politics, and can certainly be used in a partisan way to undermine regular political institutions and processes. Sometimes it is necessary to get the permission of the courts to hold a referendum (as in Hungary). A court in Zimbabwe has held that the president can call a referendum at any time (and submit any draft constitution). Since only the legislature has any constitutional amendment power, the referendum can only be advisory. (As it happens, the Zimbabwe draft was rejected and the president made no attempt to take it or an amended version to the legislature.) For the purposes of constitutional amendment or replacement, the rules are normally relatively straightforward, and compulsory.

Rules regarding voting

How are the results of the referendum computed? On this critical matter, there is no single answer. In most systems a simple majority of those voting suffices (but in the Republic of the Congo, an absolute majority of those voting is required, and in Lithuania some provisions, touching on the character of the state, require a three-quarters majority). Some laws prescribe that a minimum percentage of registered voters must have voted, and many referendums have

been lost even though the majority of those who voted said “Yes,” because of low turnout. (Ireland and Italy are among the countries that require a minimum turnout.) A few, particularly federations, require that apart from an overall majority, there must be a significant spread of support throughout the country. This rule was applied in the referendum in Kenya [2010], requiring an overall majority of those voting and 25 percent support in five out of eight provinces. (Kenyan provinces have ethnic dimensions.) In the Iraqi referendum of 2005, the requirement was both a majority of “Yes” votes nationwide and that not more than two governorates (out of eighteen) have a “No” vote by two-thirds or more of the registered voters. (This figure was chosen rather than the original and less onerous requirement of two-thirds of the actual voters, the change giving a veto to small, but compact, groups—a rule originally meant to help Kurds in their negotiations for autonomy, but which nearly enabled the Sunnis to torpedo the constitution.)

Debating referendums

With the above framework for referendums, the question is what role should there be for the referendum? We need to ask questions about such issues as: how important is it to give the final word on constitutional issues to the people; about the place of the referendum in what is often a long and complex process covering a variety of issues, some controversial; the nature and fairness of the referendum campaign and process; the fairness of the referendum; and its impact on politics and nation-building. Is the referendum about the constitution, or is it really about other issues? Are there particular circumstances when a referendum might be particularly valuable—and others when it is unnecessary, even counterproductive? In order to answer these and other pertinent questions, we look at the advantages and disadvantages that are commonly advanced about referendums.

Arguments in favor of referendum

People’s sovereignty and democracy; conformity with international norms—self-determination

The preamble of most constitutions says, “We the People give ourselves this constitution,” or something to that effect. Modern democratic theory and emerging international norms, such as self-determination, proclaim that the sovereignty of a nation is vested in the people. Since the constitution is the supreme law, a manifestation of national sovereignty, it is appropriate that the final word should rest with people.

People’s participation

Closely connected with the above point is the right of the people to participate in the constitution-making process. (See part 2.2.1.) Traditionally, the entire scope of people’s participation was the referendum, generally after the constitution was made in considerable secrecy, by a few men drawn from the upper classes. Today, as we know, people participate in many ways, but often they play a small role in decision-making—except when there is a referendum.

Check on constitution-makers

The final word is often a commentary on, or an assessment of, the results of preceding efforts. If the process has been participatory, people have a chance during the referendum to decide whether their views have been sufficiently taken into account. There are several examples of people rejecting the constitution: Albania [1998], Zimbabwe [2000], Kenya [2005]. Sometimes the rejection kills efforts at reform, but more often it leads to a better process, as in Albania and Kenya (although after a lapse of some years).

Accountability of constitution-makers

The referendum can be a mechanism of accountability. It provides an opportunity for wide-ranging debate, and if the sponsors of the draft, usually members of the government, lose, they are expected to resign. In practice this has not happened. In Kenya [2005] the president dismissed the “No” faction of the cabinet; in Zimbabwe the president intensified his oppression of the people; in Albania the government stayed on and rigged the next election. But it is likely that the regime loses some moral and political authority.

Incentives for compromise to ensure general support of all ethnic and other communities

It is possible that if the process includes a referendum, this leads to caution on part of constitution-makers involved in earlier stages of the process, making them more sensitive to views of the people and more inclined to resolve differences among themselves. It is possible that in South Africa [1996] the provision for a referendum if the constituent assembly was not able to agree (by a two-thirds vote) might have persuaded the National Party to make more concessions to the African National Congress than it might have done otherwise, and equally that the African National Congress might not have wanted the agreement with the National Party, negotiated over a long period of time, to collapse through extremist influence on the referendum. However, it does not seem that the Kenyan politicians, acting through the parliamentary select committee, were particularly concerned about the reaction of the people (even shortly before the 2010 referendum was due), but the committee of experts, realizing that the last word lay with the people, felt emboldened to restore some people-oriented provisions that had been removed by the committee.

Change after careful consideration

Insofar as the referendum provides another opportunity to reflect on the draft constitution, and involves people who might not previously have been engaged in the process, it may prevent hasty, ill-considered, or opportunistic alterations to the constitution.

People’s knowledge of constitutional matters

The referendum campaign is an intense period of concentration on political and constitutional issues, explanations of the draft constitution, and arguments about its pros and cons. This

provides an incentive as well as a wonderful opportunity for the people to learn about constitutional values and institutions, and perhaps their own responsibilities as citizens.

Nation-building

Professor Suksi remarks that several recent referendums have taken place in countries in, or coming out of, conflict. For various reasons, he says, political or military leaders in these countries use referendums to secure the broadest possible legitimacy for a new constitutional arrangement and the greatest possible visibility for the constitutional solution. The referendum may, under such circumstances, be the final resort, either due to opportunism on the part of the leaders of the state to legitimize their position or because of an honest attempt to re-create public authority by a reference to the root of legitimacy, the people (Suksi 2008).

Legitimacy—people’s aspirations: Putting the matter beyond doubt

Underlying many of the above arguments is the legitimacy that is supposed to flow from people’s endorsement of the constitution. Words such as “ownership” and phrases such as “the commitment to defend the constitution” are used frequently. There is no doubt that people who have been given, and have taken, the opportunity to vote on the constitution will feel a greater stake than they would in one bestowed on them. The sponsors and supporters of the constitution often point to the enthusiasm of the people, emphasizing the significant majority for it, while its opponents feel hesitant to criticize it.

However, there is little empirical evidence that the euphoria or the hesitation lasts for long—unless the constitution delivers—or that people would take to the streets to defend the constitution. Thailand’s 1997 constitution resulting from a highly participatory process was overthrown easily enough. Even more striking was the lack of any popular resistance to the refusal of the Eritrean president to bring the 1995 constitution, which had been crafted with full public participation, into force. On the contrary, there is the risk that if the high expectations are not met soon, the support for the constitution will disappear. The next section discusses arguments against the referendum.

Arguments against referendum

A constitution is not a one-issue matter, but a complex set of values and institutions

A common worry about the referendum is that the voters will not understand the constitution or appreciate the significance of contentious issues. They may, indeed, reject the constitution on the basis of one or two issues that are peripheral to it. It is safe to say that in few cases have the vast majority of the people understood the real significance of the constitution, or the compromises that have gone into creating it.

Danger of misleading campaigns

Most referendum campaigns are dominated, if not hijacked, by politicians. Experience shows

that many of them do not understand the constitution, and in many cases have not even read it. Ignoring the central objectives and themes of the constitution, they blow a minor provision out of all proportion, particularly if it appeals to the emotions, and they make the referendum a one-issue matter. They are not above deliberately misleading the people; the campaign becomes a tissue of lies—the antithesis of deliberative democracy. If the politicians are divided about the constitution, their supporters will follow them and make little effort to understand the true issues.

Voting for the wrong reasons

The party politicization of the campaign can infect the people, so that the motives for their votes have little to do with the content of the constitution (or even misunderstandings about it). There are, as it were, purely political party considerations that can delegitimize the sponsors, usually the government. In countries where parties are unstable and fluid, the considerations are ethnic. The 2005 and 2010 referendums in Kenya were marked by extreme appeals to ethnicity; their effectiveness was reflected in the voting patterns. The general feeling was that the campaigns were really about the 2007 and 2012 general elections. The referendums became politics by another name.

Dangers of manipulation and intimidation, and seeking spurious legitimacy

In many countries, especially in developing areas, the referendum campaigns and voting have many of the hallmarks of elections—use of official resources for campaigns; intimidation and the use of the militia; bribery and other forms of electoral corruption, including the stuffing of ballot boxes. In Rwanda the voters were deliberately given only two weeks for debate, attempts at independent assessment were suppressed, and the fear of another genocide was evoked by the government if the constitution were rejected. The situation was worse in Sudan, where the draft, as presented by the commission, was altered by the president and then submitted to a highly manipulated and controlled referendum. Recently a similar charade was enacted by the military authorities in Myanmar (formerly Burma). In none of these states was the process open or participatory; instead it was marked by censorship and coercion.

Deeply divisive or polarizing effect of referendum in multiethnic states

The points above suggest that, far from the referendum bringing people around a constitution and promoting national unity, it can be deeply divisive. The situation after the referendum can become worse than before. (This is illustrated by the experiences in Cyprus, Iraq, and Kenya.) These experiences also showed the majoritarian bias of the referendum.

A better form of public participation is at earlier stages of the process: People as decision-makers

If an objective is the participation of the people, it is more effective to bring the people into the process at earlier stages, when there are discussions about the reform agenda and preliminary decisions on the constitution are being made. This will engage them more deeply and make them the real decision-makers.

Referendum can be used to defeat the results of a fair and participatory process

The referendum is sometimes used to defeat the results of a fair and participatory process. In Sudan [1998], Zimbabwe [2000], and Kenya [2005], key government officials not in agreement with the drafts produced through predetermined procedures put to a referendum their own versions of the draft. Although in some cases the doctored drafts were rejected, the original drafts were not enacted. In Kenya it took several years, and another lengthy process, to install the original draft, and even then it was not promulgated in its entirety.

In multiethnic states, the better solution is to negotiate in good faith

In multiethnic states, the strongest argument against a referendum is that a laboriously and carefully negotiated settlement between different communities can come unstuck. These settlements are almost always controversial, yet they are the only basis on which agreement is possible. But disgruntled members of a community, particularly of the majority community, can use the referendum campaign to mobilize opposition with the use of racist propaganda. In a country with a troubled ethnic history, such appeals are likely to succeed. The result is deep resentment in one or more communities and the general worsening of ethnic relations. Equally likely is that some leaders would not even agree to a settlement, fearing that they would be accused by their communities of selling out during the referendum campaigns. The danger of referendum politics sharpening ethnic divisions is real. The recent Canadian experience in getting a new constitutional order shows the incompatibility of a negotiated compromise with the outcome of referendum.

Legitimacy comes from the fairness and effectiveness of the constitution

Some of the most successful constitutions have not had the benefit of a referendum, such as those of Canada, Germany, Hungary, India, Japan, Mauritius, and South Africa, while many constitutions endorsed by referendum have performed poorly or been replaced (e.g., those in Eritrea, Sudan, and Thailand). Fairness depends on the context; in the case of a multiethnic state it means that there is respect for all communities, and individual as well as community rights are protected within an overarching national identity. Effectiveness means that the status of the constitution as supreme law is honored and therefore the rule of law prevails.

Importance of the question

It is well understood that, deliberately or by carelessness, how the question is put can affect the result. When Australians were asked about the abolition of the monarchy, it is probable that a majority favored this step, but the question as framed faced them with a choice about how to replace the British monarch as head of state. This issue divided the republican vote. In Kenya [2010] the question “Do you approve of the proposed constitution?” was arguably less clear than one showing that the choice was between the existing constitution and the proposed one.

The United Kingdom electoral commission criticized a referendum on powers for the Welsh assembly for being ambiguous and using phrases (such as “devolved powers”) that people did not understand.

Comment on the debate

The arguments for and against the referendum show that while in theory it is democratic and basic to the sovereignty of the people, it poses serious practical problems. It may well be necessary in some contexts and unwise in others. It would be useful to make a careful analysis of the desired or expected objectives of the referendum before embarking on it, and to structure it accordingly. Meanwhile there are some obvious procedural improvements that should be instituted, particularly to make it fairer, more effective, and more educational.

Referendum reforms

- One complaint about the referendum is that it gives limited choice, expressed as “Yes” or “No.” Is it possible to offer more choices? Options that may be considered are:
 - choices on a series of contentious issues (for example on abortion or on the electoral system) before the draft is finalized; or
 - choices between two drafts (for example, one based on the parliamentary cabinet system and the other on the presidential).
- The draft constitution should be published well before the referendum date so that there is sufficient time for proper dissemination and discussion.
- The question on which the voters have to decide should be clearly stated, and announced well in advance; testing questions ahead of time to see whether they are understood would be wise.
- To avoid the hijacking of the campaign by politicians, an independent commission of eminent and respected citizens should be established to assist with dissemination of the draft, and the organization and funding of campaign activities, including:
 - promoting understanding of the purposes and procedures of the referendum, in cooperation with the electoral commission and other relevant bodies;
 - establishing or accrediting national “Yes” and “No” teams, drawn from academics and intellectuals, retired civil servants, professionals, and civil society, with appropriate gender, ethnic, and regional balance;
 - facilitating town hall-type meetings and media programs jointly with “Yes” and “No” teams to promote fair and open debate;
 - preparation, publication, and dissemination of materials to facilitate understanding of the draft, including for people with reading impairments, and in different languages where appropriate; and
 - engaging with monitors overseeing the campaigns and the voting.

- A regulatory system for campaigns and for the conduct of voting, with a code binding on all political parties and other groups active in the campaign, should be established to ensure a fair campaign, including:
 - no hate speech;
 - no bribery of voters;
 - no deliberate misleading of voters and others about the draft;
 - no intimidation or use of force against those with opposing views or voters; and
 - no use of government resources other than through the referendum commission.

- To make the referendum meaningful, the design of the constitution-making process should provide for the participation of the people in earlier stages of the process so that they become aware of the issues and the debates and are able to make an informed choice at the referendum.