



## **The Role of Constituent Assemblies in Constitution Making**

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### **Introduction**

With the increase in constitution making around the world, there is a growing interest in the role of a constituent assembly. The distinguishing characteristic of a constituent assembly is that it is established to make a constitution, or at least that this is its primary role. The constituent assembly is still the most common mode of making a constitution. Unlike past times, a constitution is no longer accepted as an imposition by a victor or dominant group over others (or a grant by a monarch or a president), or even that the military would promulgate the constitution (though both these situations happened in the last few decades—Nigeria’s democratic constitutions of 1979 and 1989 were promulgated by the military, although based to some extent on the work of constitution commissions and constituent assemblies).

Distinguishing a constituent assembly from other constitution making mechanisms might suggest that it is a distinct species (with its generally accepted characteristics). But the fact is that between constituent assemblies there can be (and have been) enormous differences in the composition, functions and modes of operation. These differences have a major impact on the manner in which the process of making a constitution is conducted as well as its orientation and outcome. The paper reviews these various possibilities, drawing on the experiences of many countries’ constitution making processes, from the American Convention and the French Assembly of the 1790s to the Kenyan National Constitutional Conference 2001-4 and the Transitional National Assembly of Iraq 2005.

The constituent assembly must be viewed in the context of the entire process of making a new constitution. In some countries it has been in charge of the entire process, but in others it has shared the task with other institutions, including giving the force of law to the constitution. Therefore when the decision to have a constituent assembly is made, it is important to focus on its relationship to other aspects of the constitution making process, even the fundamental question of how to initiate the reform process and to develop a consensus on institutions and methods. This paper therefore is not only about the mechanics of a constituent assembly, but also the context in which it operates and its connections to state, society and other processes.

### **Part I: The importance of constitution making**

In recent decades there has been considerable activity in the making or revision of constitutions<sup>2</sup>. This activity reflects a changed perception of the importance and

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purposes of constitutions. Various contemporary constitutions have marked the end of an epoch and the start of another, under the hegemony of new social forces (of which Eastern Europe provides a good example). Some reflect a commitment to, or the pressure towards, democratisation, resulting from disillusionment with a one party regime or military rule (such as Thailand, Brazil, Argentina and Mozambique). Others, of particular interest in Nepal, are the consequence of the settlement of long standing internal conflicts, centred on the re-configuration of the state, by a process of negotiation, often with external mediation, when neither side can win militarily or the cost of conflict becomes unacceptably high (such as South Africa, Northern Ireland, Afghanistan, Iraq, Bosnia-Herzegovina, and the Sudan).

Many internal conflicts revolve around the structure of the state and the distribution of its powers and resources, and in that sense, at least at one level, they are disputes about the constitution. The resolution of these disputes is often thought to have been successfully achieved when a new, consensual, constitution has been agreed and put in place (the Paris Agreements for Cambodia, for example stated the responsibilities of the UN would come to an end on the adoption of the constitution). Although the adoption of a constitution is a watershed, it is unrealistic to assume that all problems have been resolved or that the constitution would take root automatically. A constitution needs to be nurtured and consideration must be given to the many measures to fully bring it into effect.

The constitution has to deal not only with the structure of government, but also with how communities relate to the structure as well as other critical social issues. Although constitutional negotiations are seen as the method of resolving differences, the fact is that the constitution making process can itself be deeply divisive, as a great deal is at stake (the Kenyan process, 2000-05 illustrates both the unifying and the divisive aspects)<sup>3</sup>. The constitution making process is often divisive because it is profoundly political. It is political not only in the sense that it is a dialogue about political power and deliberation about societal values and institutions. It is also political, in a cruder way, because it is about individuals and groups jockeying for power. It is about tactics and strategies, which can include obstruction and sabotage. Historically, a large number of processes have failed to produce a new constitution. This does not necessarily mean that the entire process has failed. But in order to make such an evaluation, it is important to think about what constitution making is for.

#### *Objectives of the constitution making process*

These days a constitution will virtually always be a negotiated document, a pact among its diverse communities and regions<sup>4</sup>. The objectives and components of the process should recognise the negotiated nature of the constitution – using the word ‘components’ to refer to the processes involved, rather than the institutions (such as

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<sup>2</sup> Between 1990 and 2000, 17 African states, 14 Latin American, states, and nearly all the post-communist states in Eastern Europe and the former Soviet Union drastically altered or replaced their constitutions (Van Coot, 2000). Currently constitutional reviews are underway or the subject of negotiations in several countries, including Bolivia, Kenya, Bhutan, Nepal, Sri Lanka, the Maldives, Solomon Islands, Bosnia-Herzegovina, Kosovo, Iraq, and the Democratic Republic of the Congo.

<sup>3</sup> Yash Ghai and Jill Cottrell, 'Constitution making and democratization in Kenya, 2000-2005', forthcoming in 2007(1) *Democratization*.

<sup>4</sup> For further discussion on the importance of constitutions in conflict situations, see Yash Ghai, 'A Journey Around Constitutions: Reflections on Cotemporary Constitutions' 2005 *South African Law Journal*, Vol. 122 (4), pp. ...., and Vivien Hart, 'Constitution Making and the Transformation of Conflict' 2001 *Peace and Change*, vol. 26(2) pp. 153-176.

**Objectives of Constitution Building other than  
the production of a new document**

- Reconciliation among conflicting groups
- Strengthening national unity
- Empowering the people; and preparing them for participation in public affairs and the exercise and protection of their rights
- Elaborating national goals and values
- Broadening the agenda for change
- Promoting knowledge and respect for principles of constitutionalism
- Enhancing the legitimacy of the settlement and the constitution.

the constituent assembly) that carry them out. Although a constitution is a critical product of the process, the process serves several other important goals, and may have certain other functions – whether intended or not (see Box 1).

In a society in conflict (and most societies making a new constitution will be doing so because of some sort of conflict, past or on-going) the process of constitution making should serve the function of enhancing reconciliation among the groups that had been in conflict. Indeed, unless there is sensitivity to this aspect there is a risk that the constitution making process will prove divisive and therefore counter productive. The very process should be designed and carried out in a way that strengthens national unity and a sense of common, national identity. It will not achieve this unless it is an inclusive process in which all feel involved – and not just those who have been engaged in active conflict. This means that all aspects of national diversity should be acknowledged and reflected in the process, including religious and linguistic diversity. The process, and the constitution that results, should be a springboard for the future, rather than the culmination. It may therefore do more than set up a framework for government; it may be a process of elaborating national goals and values and broadening the agenda for change. These may or may not be ultimately encapsulated in the document, but the constitution making exercise itself can be an important catalyst for this wider process, especially if the constitution making is designed to involve nation-wide debates and discussions and to discover the concerns of all the people, not just those of the elites or urban populations. In fact, such a national debate may be an unofficial side effect of an official process. While it should certainly not be the objective of the official process to control, absorb or co-opt the unofficial debate, it is important that there is a mechanism for the views and concerns of the people to be reflected in the official process and the final document.

A constitution building process can have a powerful impact on society and politics by empowering the people. If inclusive it acknowledges their sovereignty. It can serve to increase their knowledge and capacity; and prepare them for participation in public affairs and the exercise and protection of their rights into the future. It thus has an important impact on the chances of success of the new constitution, which it also does by promoting knowledge and respect for principles of constitutionalism, and - assuming that the new constitutions is actually perceived as reflecting real concerns of the people – by enhancing the legitimacy of the settlement and the constitution.

Many of the objectives of the process outlined above cannot be achieved in the absence of extensive public participation. There is now a consensus that certain norms, based on the principles of self-determination and political rights, should be incorporated in the design of the process, indeed some have argued that there is a human right to participate in making the constitution under which people will live and

be governed.<sup>5</sup> However, participation is more problematic than is usually acknowledged (and has not been encouraged in many recent processes arising out of conflict). It is therefore useful to discuss briefly some aspects of participation before turning to the specific components of the process.

### *Participation*

Since an important theme of contemporary constitution making is popular participation, a few preliminary remarks on participation are worth stating at this point. It is only in recent times that popular participation in constitution-making has been accommodated. Traditionally, as typified by the Philadelphia Convention which drafted the US constitution or the German constituent assembly (called the parliamentary council) after the second world war, there has been considerable distrust of the direct engagement of the people (and doubts about their ability to understand complex issues of the purposes, forms and structure of state power)<sup>6</sup>. The response was ‘representative democracy’. Now however, more regard is paid to the sovereignty of the people; if sovereignty is indeed vested in and flows from the people (an implication also of the principle of self-determination), it is natural that they should determine how it should be delegated and exercised. The emphasis on popular sovereignty is no doubt a response to the claim to and abuse of sovereign power by numerous governments in recent decades<sup>7</sup>. But there are also more pragmatic reasons for popular participation.

Unlike perhaps older, classical constitutions, constitutions today do not necessarily reflect existing national politics or power relationships, consolidating the victory and dominance of a particular class or ethnic group. Instead, they are instruments to enhance national unity and territorial integrity, defining or sharpening a national ideology, and developing a collective agenda for social and political change—negotiated rather than imposed. Many constitutions in recent years have been made in the aftermath of civil conflicts, and an important task of the process is to promote reconciliation among the previous conflicting communities (which cannot easily be mediated by elites). If these are the contemporary functions of constitutions, then the process for making them is crucial to developing a national consensus.

A grave absence in many newly democratising countries is a populace which is able and willing to engage in the political process and to insist on its rights. People may be accustomed to older forms of rule, based on tradition, often hierarchical, sometimes arbitrary, with little possibility of challenging authority. They may not understand the concept of constitutional government or may be unable to mobilise the protective

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<sup>5</sup> Tom Franck “The Emerging Right to Democratic Governance” (1992) 86 AJIL 46 and

<sup>6</sup> Switzerland has always been an exception: it has long recognised the authority of the people to directly initiate constitutional change, by a proposal submitted by 50,000 voters—and subject to a referendum.

<sup>7</sup> This is in contrast to the attitude of constitution makers in Germany (and other European states) after the second world war where confidence in the ability and judgment of the people had been shattered. As Bogdanor writes, ‘There was, in the constitutions of the immediate post-war period—the Fourth Republic in France, the Italian and the German (as well as the Japanese)—an understandable revulsion against any philosophy which exalted the political abilities of the average citizen... Nowhere on the Continent is there to be found any genuine ‘belief in the common man’ (1988: 8). He then goes on to make a judgment, ‘Perhaps it is for this reason that the Italian, German and Japanese Constitutions have proved so much more durable than their predecessors in Central and Eastern Europe between the wars, marked by a massive positive enthusiasm for national-determination and for the fulfilment of social and economic rights. Optimism, no doubt, is rarely a good guide to constitution-making’ (pp. 8-9).

provisions of the constitution. A constitutional review process with a careful scheme for public participation can, to a considerable extent, familiarise the people with the concept and procedures of political authority, and win support for the idea of a limited government bound by rules and accountable to the people<sup>8</sup>.

In designing the procedure for public participation, it is important to bear in mind some problems with participation: manipulation of the people by interest groups, ethnicisation of opinion, spontaneity and populism, diminishing the role of experts and making consensus building harder<sup>9</sup>. The challenge for participation is to avoid these perils. The procedure must address questions of the preparedness of the people, both psychologically and intellectually, to engage in the process, the methods of soliciting views of the public and special and organised groups, the analysis, assessment, balancing and incorporation of these views. The engagement cannot be 'one off' but must be continuous, including fresh opportunities to comment on the draft and meaningful forms of participation afterwards. Transparency and integrity are essential to win and sustain people's trust and confidence, and to guard against the dangers of manipulation; otherwise constitution making can easily become just another form of politics, driven by narrow and short term interests, and generating bitterness instead of goodwill. In other words, the participation must be deliberative, not the mere aggregation of interests and demands.

Much of the discussion on popular participation focuses on the relationship between the institutions responsible for making the constitution and the people or social organisations. But equally, and in some respects even more important, may be the initiatives that civil society organisations—trade unions, women's organisations, religious or cultural communities, the disabled, minorities, think tanks—take themselves in facilitating public debate, educating the people in the intricacies and significance of the process, aggregating and mobilising public opinion, doing research, calling meetings and conferences, advocating and lobbying, disseminating ideas, not only in plush hotels and the media, often in foreign languages, but in the country side, journeying to the far corners of the country, engaging with the people rather than pontificating. In this way even if the formal process makes little provision for formal participation, the voice of the people will be heard.

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<sup>8</sup> Writing about the Kenya process, Ghai has said, 'The nature and degree of public participation had undoubtedly a profound impact on the process. It enlarged the agenda of reform and turned an elite affair into a national enterprise. It facilitated efforts to redefine politics and political process (and indeed substituted for ordinary politics). It was almost the first time since independence that the people engaged in 'rational' and discursive politics, and focused on issues other than ethnicity. It promoted not only conversations between the people and the commission, but also among the people themselves. It produced firm articulation of the interests of groups based on non-ethnic affiliations (trade unions v. employers, rural versus urban, tradition versus modernity, agriculture versus industry, the unemployed versus the employed, elderly versus the young, disabled versus the rest, women versus men, pastoral versus settled communities). The discourse among the people made them aware of the histories, contributions, anxieties, aspirations of others, deepening understandings that are so critical to developing national identity and unity, and a sense of justice. This approach facilitated the CKRC [Constitution of Kenya Review Commission] task of balancing different interests. In turn it gave very considerable legitimacy to the process (which has frustrated the efforts of the faction around President Kibaki to dilute the draft) (Ghai 2006).

<sup>9</sup> One of the foremost critics of participation is Jon Elster (op. cit). For some problematics of participation, see Ghai and Galli, *Constitution Building Processes and Democratisation* (IDEA, 2006); for two critical assessments of the manipulation of participation in Uganda, see Aili Mari Tripp 2006, and George Mugwanya, 2001. In Afghanistan the constitution commission completely ignored public submissions; indeed it tried to misrepresent them in its report (personal information).

## Part II The Process of Constitution making

Constitution making is a complex process (and has to be located within a broader context)<sup>10</sup>. At a minimum it involves the production of a legal document – perhaps one very different from anything the country has had before, or perhaps being essentially a revision of an existing document. But even this will involve various processes and stages, while participatory processes are more complex. Table 2 lists the major stages that most processes will involve.

It is possible to embark on a constitution building process with no agreed parameters and goals, but this is likely to mean that there is a variety of more or less hidden

### Components of a process

- Agreeing on a broad set of principles and goals
- Agreeing on institutions and procedures for making the constitution
- Preparing people for consultation by providing civic education on the process, country's constitutional history, and constitutional options
- Consulting people (including, where relevant, diaspora)
- Consulting experts
- Informing the process of comparative experiences
- Analysis of opinions.
- Preparing a draft constitution.
- Public discussions of the draft constitution.
- Preparing the final version
- Enactment into law of the final version
- The referendum (or any other mechanism of ratification).
- Bringing the constitution into force.
- Implementing the constitution

goals, not necessarily shared by all participants, which are likely to lead to tension, and delay as the process proceeds. It is not uncommon for certain guiding principles to be agreed before the detailed work of negotiating and drafting<sup>11</sup> the final document begins. Sometimes it has been as crude as Yakubu Gowon telling the Nigerian "Leaders of thought" in 1966 that they could recommend any system of government between - but not including - a unitary state and a confederation, or later Nigerian regimes setting limits on the scope of recommendations that can be made by the body equivalent to the constitutional commission. In South Africa the interim constitution (1993) laid down certain principles that must be reflected in the final constitution (1996), and in Kenya the principles hammered out over years between civil society and government were included in the Constitution of Kenya Review Act.

Essential is a decision – whether negotiated or prescribed - on institutions and procedures for making the constitution. This may include a series of deadlines, and a sequence of events (sometimes these days called a roadmap<sup>12</sup>); this time-line may be

<sup>10</sup> This paper deals with the formal rules and procedure. However some of the most important aspects of a constitution making process are informal—these are not dealt with here except incidentally.

<sup>11</sup> Rafiu A. Akindale, 'The Constituent Assembly and the 1989 Constitution' in Diamond, Kirk-Green and Oyediran (eds) *Transition without End: Nigerian Politics and Civil Society Under Babangida* (Lynne Rienner, 1997).

<sup>12</sup> In emulation of the supposed roadmap to a settlement between Israel and the Palestinians, of course. An example is Maldives 2005 Roadmap.

rigid or may have room for change; deciding which is a delicate issue – between the Scylla (rock) of rigidity and the Charybdis (hard place) of offering an incentive to delay. At some point it will be necessary to determine how any decision making body will reach decision if there is no consensus. And it may be – or may become – desirable to create some formal or informal mechanism for dispute or conflict resolution rather than leave everything to voting.

Assuming that the process is not to be simply an elite one, it will be necessary to set up processes and mechanisms for gathering the views of the public. These will involve preparing the people for consultation by providing civic education on the process, country's constitutional history, and constitutional options, and then consulting the people, proactively soliciting views, and offering ways for spontaneous views to be submitted. The 'people' may include usually neglected sectors, sectors still hard to reach because of conflict, or even in refugee camps in the home country or abroad, or even if exile further afield. These views must be analysed, and somehow fed into the decision making system. Almost all processes include some consideration of foreign experience; how is this to be gathered – by research, by overseas visits, by visiting foreign experts? And by what mechanism will any valuable insight be fed into the local process.

At some point a draft constitution will probably be prepared, to serve as a basis for detailed discussion. When this is done and who does it may vary.

When a full draft has been prepared, it is very common (and desirable, though not universal, practice) to make it available for public discussions. Again, there may need to be a process for feeding public comment back into the deliberations.

The 'making' of a revised or new constitution will be an article by article detailed discussion and analysis - of the draft or perhaps of the existing constitution - in the light of the comments of the public and of the wishes and views of the negotiating parties and of the members of the body charged with this process.

The document adopted must then become law - which itself may be done by Parliament, by the adopting body itself especially if that is a constituent assembly) or by some other mechanism (possibly a referendum). This process may be one that is within the existing constitution, if there is one, or somehow extra-constitutionally.

A referendum is not a universal feature of constitution making processes (and the desirability of having one is discussed later in this paper). But many countries have had one as the enacting event of the Constitution or as a pre-requisite for final enactment. Some countries resist the use of a referendum as binding, but would accept one as advisory (but advice that if clear could hardly be ignored).

Enactment does not necessarily bring the Constitution into force. This may be postponed (it is unwise to leave this to one person who might, as in Eritrea, have his or her own reasons for not taking the necessary action,<sup>13</sup> there may be a rigid timetable for coming into force by stages, or there may be some provisions contingent upon other events.

So that the document does not remain a paper constitution, however magnificent, it will require implementation – through legislation, new practices, and active involvement on the part of the people generally, civil society and institutions.

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<sup>13</sup> Bereket Habte Selassie, *The Making of the Eritrean Constitution: The Dialectic of Process and Substance* (Asmara: The Red Sea Press, Inc., 2003).

### **Part III: Deciding whether a constituent assembly should be part of the process**

The later parts of this paper assume that a decision has been made to set up a constituent assembly. It deals with what that body may do, and how it relates to other bodies. The paper therefore deals with design of a constituent assembly. But a prior question is – whether to have one at all.

A common reason for opting for a constituent assembly is tradition. A constituent assembly, often coupled with a referendum, become common in Europe, but has not been favoured in the British tradition, deeply influenced by the concept of parliamentary sovereignty (with its influence on the former empire). But there may also be objective justifications for the choice.

When a country feels in need of reform of its constitution, it most naturally turns to the existing constitution to determine the way forward. Most constitutions have provisions for their amendment. Perhaps those provisions would be sufficient to bring about the changes considered necessary. Sometimes the choice to have a constituent assembly may be inhibited by existing power holders who may want more control over the process, and the forces for change may not have sufficient support or power to insist on it. The only option may be incremental or phased change using the normal procedure for the amendment of the constitution (Chile and Indonesia are examples). Most East European countries also chose this approach, what Elster has called ‘rebuilding the ship at sea’<sup>14</sup>.

But if the need is for a radical change, those provisions may not suffice—for a legal reason and a political reason. The legal reason is that the existing constitution may envisage, or may be interpreted as permitting, only piece-meal amendments rather than a whole scale replacement. This was the position taken by a Kenya court in 2005 which brought the review process to a premature end<sup>15</sup>. Indian courts have developed the concept of ‘basic features’ which Parliament cannot change, however high the vote.<sup>16</sup>

The political reason is that those who have achieved high state office under the existing constitution or whose economic or social interests are well protected by it are likely to control the constitutional process for amendments and to vote against radical change.

A constituent assembly may be seen to provide a way out of the first of these difficulties. It is often considered to have full powers to constitute or reconstitute the state, untrammelled by the restraints of the ‘basic features’ doctrine. This is a fallacy for it is perfectly possible to set up a constituent assembly with limited powers—the most striking recent example of this is South Africa where the constituent assembly was bound by 34 constitutional principles and values that it had to incorporate in the constitution. The Constitutional Court was to determine whether the constitution it adopted was compatible with this obligation (the court did fault the constitution on the question of regional powers and the Constitution Assembly duly amended the constitution to comply with the decision of the court). In the Nigerian transitions to

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<sup>14</sup> Jon Elster, Claus Offe and Ulrich Preuss, *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea* (1998)

<sup>15</sup> *Timothy Njoya v CKRC and National Constitutional Conference* High Court Misc App. No. 82 of 2004 decided March 25 2004. The judgment can be downloaded from the website of the Law Society of Kenya: at <http://www.lsk.or.ke/lskcreview.asp>.

<sup>16</sup> The leading case is *Kesevananda Bharati v State of Kerala* (1973) 4 *Supreme Court Cases* 225. This principle was relied on, indeed abused, by the Kenyan court in *Njoya*,



democracy, the authority of the constituent assemblies has been circumscribed in two ways: the broad parameters set by the military, and a military appointed constitution commission with the responsibility to prepare a draft for consideration by the constituent assembly. However, a constituent assembly can be established without limitations and will then correspond to the popular perception of its powers.

It can also provide a way out of the straitjacket of existing power structure by means of composing its members. If provision is made for membership of groups hitherto excluded from political (or economic) power, the balance of power would be shifted and radical change may stand a better chance of adoption (as with the original French constituent assembly). A striking contemporary example was the composition of the Kenya National Constitutional Conference (which served in many respects as a constituent assembly). Its members comprised all parliamentarians (222), three representatives of each of the 74 districts elected by district councils (222), and roughly another one-third of the total comprised representatives of political parties and civil society (nominated by these sectors—religious communities, women, the disabled, trade unions, minorities, and NGOs). This is not to say that a constituent assembly cannot be composed to further conservative interests. Indirect elections often produce this result (the US Philadelphia Convention, the German constituent assembly, called ‘Parliamentary Council’, and to some extent the Indian Constituent Assembly).

Sometimes a constituent assembly is established because there may be no legitimate institutions to undertake the task of revision. Sometimes there may be no institutions at all (Cambodia, where the state had collapsed, as in Somalia now, and East Timor where a breakaway state had no institutions of its own). There may be no institutions for the purpose of making a constitution—as when two or more independent states form a union or federation. At that stage there is no common institution with authority to adopt a constitution for the new federation to be formed. It is then necessary to establish a constituent assembly or convention, which is given authority by the legislatures of the ‘merging’ states to adopt a federal constitution.

The constituent assembly is often used in revolutionary contexts where the old regime and institutions are deliberately destroyed to make room for a new system (France, Russia)<sup>17</sup>. Sometimes the search is for legal ‘revolutionary’ break from the old regime, often during de-colonisation, to ‘disconnect’ independence, rooted in local struggles, from the institutions or decisions of the imperialists (Ghana and Papua New Guinea (PNG); the Indian constitution was brought into effect by the signature of its Speaker, while ordinary legislation was approved by the Governor-General). The style of de-colonisation may also be relevant—Britain used to grant independence by Acts of the British Parliament, and so there was no obvious role for a constituent assembly. Britain resisted for a long time the demands of the Indian Congress party to establish a constituent assembly to decide India’s future. Indians had argued for a constituent assembly because that implied that negotiations would be among Indians themselves. The British Round Table model was that of negotiations

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<sup>17</sup> Two researchers have said that comparative study suggests that ‘constitutional assemblies or constitutional conventions have been most successful in two sorts of historical circumstances: in the aftermath of a significant break with the past, such as a revolution, civil war or traumatic disruption of this sort; or when new states—whether former colonies or independent states—come together to form federations or confederations’—a conclusion which applies in a general way to the adoption of change regardless of the methodology—Patrick Fafard and Darrel R. Reid, *Constituent Assemblies: A Comparative Survey* (Institute of Intergovernmental Relations, Queen’s University, Ontario: 1991).

between the British and Indians (divided among themselves and open to manipulation by the British). The constituent assembly envisaged by Congress would also have meant a major advance towards democratisation, because the delegates would have been elected by universal franchise.<sup>18</sup>

In fact the constituent assembly would not have kept the British out, as the British had laid down the broad parameters of the constitution, allowing for autonomy for Muslim majority areas, they would have to ultimately approve the document and it would have been enacted by the British Parliament. But the context changed when Britain decided soon after the elections to the Constituent Assembly to break up India into two and to leave in August 1947.

Unlike the British, Australia and New Zealand saw constitution-making as primarily the responsibility of the colonised—and facilitated the use of a constituent assembly. To some extent that is also the case now when the UN or some other international involvement takes place in war torn societies (Iraq, East Timor, Cambodia, and Afghanistan). In these cases, and in the example of federalisation, a new constitution is a pre-requisite to the coming into being of the state and the formation of the new government.

Some people advocate a constituent assembly because they imagine it not only as a representative and inclusive body but also one in which people can participate in other ways. It is seen - much more than parliament - as a gathering of the nation. They consider that an inclusive constituent assembly is more consistent with people's sovereignty than a parliament (where sectional interests may dominate). People, marginalised by the political system often agitate for a constituent assembly (in the Philippines, Kenya, Zambia, Bolivia, Ecuador, there have been frequent demands by the people for a constituent assembly). Unfortunately, not all constituent assembly driven processes are inclusive or participatory (e.g., Cambodia, where all the proceedings of the Constituent Assembly were held in secrecy, and East Timor where the majority party pushed its own draft and was not very receptive to civil society organisations). And among the most secretive of all was the Philadelphia Convention.

Although an old device, the rationale for a constituent assembly today is quite different from before: now the constituent assembly is seen as embodying people's sovereignty, as reflecting diversity, and being linked to the broad social charter character of the ultimate constitution. It is used to develop a consensus in deeply divided societies, and to define the country's identity. This emphasis reflects the nature of many contemporary constitutions—as negotiated documents, a way out of political or ethnic stalemate, an exercise in building and consolidating peace, solving internal conflicts, managing diversity and aiming at inclusiveness. Consequently, the older models of the constituent assembly may not be always useful today. The structure, powers and procedures of the constituent assembly must reflect these changed realities.

### *The ideal and the practical*

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<sup>18</sup> Gandhi, sceptical at first of a constituent assembly, became an ardent convert. He saw it as a remedy 'for our communal and other distempers, besides being a vehicle for mass political and other education'. He also saw it as an act of 'self-government' (today we would probably say 'self-determination'). He thought that a constituent assembly would bring about independence without communal strife, and recognized that the assembly would have to provide for the rights of minorities. *Harijan* 19 November 1939.

The process which would include the objectives and components outlined in the first two Parts of this paper may be said to be an ideal. A constituent assembly-driven process is perhaps the most effective method for achieving them. In practice a major influence on the process is the more immediate context (as well as the traditions and capacity of the country). If the constitution is made in settled times, there are many options, including a high degree of participation by the public (as was the case in the 1997 process in Thailand). Sometimes the change is to a specific aspect of the constitution, within a broad agreement on national values; in this case, the matter can be left to experts (as with the latest amendments to the Finnish constitution). If the country is coming out of internal or external conflict, with continuing security and law and order problems, there may be an inclination towards a more controlled process, with limited or no public consultation (as was the original intention in Afghanistan; in fact the process was quite participatory in the circumstances).

In the context of an ongoing conflict, the process is often confidential and secretive, and almost completely dominated by leaders of 'warring factions'. This is illustrated by the 2004/5 agreement between the Sudanese government and Southern Sudan, and the negotiations so far in Sri Lanka between the national government and Tamil Tigers. It is true that agreement may be easier if the parties to the process are limited and the talks are confidential. However, even when successful, the agreement and the ensuing constitution depend excessively on the goodwill of the negotiators and may fail to respond to the concerns of the people. In this way the settlement may lack firm social foundations. On the other hand, a highly participatory process may raise high expectations, empower groups and interests that lack power or status in the political and economic system, elaborate an ambitious social and economic agenda, and may make decision making hard. This to some extent happened in Kenya, where the aftermath is a continuing conflict between political and social classes<sup>19</sup>.

In order to ensure a successful conclusion to a conflict and yet achieve the benefits of a participatory process, some states have engaged in a two-stage process or its functional equivalent (first stage to build confidence and restore order, as in South Africa) or to postpone a definitive constitution until a group has established its domination (as in Uganda after the overthrow of Idi Amin). Similarly, some constitutions provide for a compulsory review after a specified period of years from the adoption of the constitution negotiated between a limited number of parties. Such a provision in Fiji ensured a wide ranging process after an initial (and unhappy) period of the imposition of a quasi-military constitution following the 1987 coups.

#### **Part IV: Pre-Constituent Assembly Period**

Often lengthy and complex negotiations are required before the mandate of the constituent assembly is agreed and decision on its formation is made (including the crucial assessment as to when the time is mature for the convening of the constituent assembly). And further decisions may need to be made after the conclusion of the work of the constituent assembly (for example, there may have to be a referendum). Both sets of these negotiations and decisions can have a major impact on the structure and workings of the constituent assembly.

##### *Pre-Constituent Assembly happenings and procedures*

Since constitution making can be a difficult, complex, expensive, and sometimes a divisive, process, rarely does a country embark upon the making of a new constitution

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<sup>19</sup> Ghai and Cottrell (op. cit).

without very good reason. Governments, political parties, ethnic or religious groups, or others are reluctant to start or engage in the process unless the goals and procedures of review suit them, and are pre-determined. Therefore considerable negotiations and compromises precede the formal establishment of the process. In Kenya these negotiations took the better part of a decade, and in South Africa and in Fiji about three years. If a process starts without a substantial degree of consensus on goals, chances of success are limited (as is illustrated by the latest attempt at adopting a new constitution in Zimbabwe).

An important stage in the process for making a constitution which is often ignored or overlooked is that which takes place before the start of the formal process: the manner in which the process is 'kick-started', the relevant groups are persuaded to have a review process, the scope and the fundamental goals of the review and the interim arrangements/constitutions leading to the process for the final constitution are agreed. This stage is often critical in determining or influencing decisions in the later stages, including the role and status of the constituent assembly. In countries, war-torn or otherwise involved in strife, there may be no way to initiate the constitution making process other than to call a 'national conference' with wide representation of all key sectors of society—this method has been used in several African countries to develop a consensus sufficient to start the process, but sometimes also to make some critical decisions on the orientation of the new constitution. In East European countries, the standard way to begin the transition from communism to markets - and to democracy - was through a series of roundtables which brought together those advocating change and the leaders of the existing regime (although the actual changes were made through Parliament, except in Poland which had a constituent assembly). Even when not part of a formal process, these procedures are integrally tied to the formal process.

#### *Interim arrangements*

As essential part of the pre-constituent assembly period (at least in any country where the very basis of the state and government is contested) is the arrangements for the governing of the country until a final constitution has been adopted and a legislature and government formed under it ('interim arrangements'). The period between the decision to start work on a new constitution and the formation of government under it can last for anything from one to 6 years (Cambodia took just over 2 years, Uganda took over 5 years, South Africa 6 years, India 3 years). Interim arrangements are important for a variety of reasons: to establish and keep level playing fields as the country embarks on a deliberate process of restructuring the state and determining rules for access to it; ensuring some stability in what could otherwise be a period of turmoil; building trust among former foes; ensuring that the constitution making process proceeds smoothly; and ensuring that there is no regression to conflict or oppression. If satisfactory interim arrangements can be made, more space and time may be established for the constitution making process allowing a participatory and deliberative process<sup>20</sup>.

The necessity for interim arrangements arises from several factors. It is often the case that one or more groups who in conflict have been excluded from the executive and the parliamentary process (or chosen to stay away). They now need to be integrated in some way into the structures of state. Or the system of government or structures of the state under the existing constitution may have lost legitimacy (at least in the eyes of

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<sup>20</sup>See Andrew Arato, 'Interim Imposition' 2004 *Ethics and International Affairs* (vol. 18, no. 3) pp.25-50).

one or more groups) and are no longer generally acceptable for governing the country (Cambodia, South Africa). Or the role of the international community is so extensive that its representatives need to be brought into the system of government for an interim period (Cambodia, East Timor, Bosnia, Namibia, Iraq).

Interim arrangements can sometimes be divided into two phases. The first phase is up to the formation of a constitution assembly, and the second between the formation and functioning of the constituent assembly and the formation of a government under the new constitution (particularly if the constituent assembly is also given the normal functions of a parliament, including law making, approving budgets and scrutinising the conduct of the government). Different interim arrangements may be needed for each phase.

Interim arrangements are generally negotiated, especially when they are part of a peace process (increasingly frequently under the engagement of the international community, as recently in the Sudan and in the negotiations in Darfur). Sometimes they are based on the existing constitution. If the sole problem with the existing arrangements is the exclusion of a faction, that can often easily be dealt with by inclusion, without changing the legal framework. While the Indian Constituent Assembly was drafting the constitution, the government of India was run on the basis of the 1935 Government of India Act (which the leading Indian political party, the Congress, had opposed, but now they acquired also the powers hitherto wielded by the colonial authorities). In Namibia, the control of and administration by the South African authorities continued, but in consultation with a UN Administrator (in order to give some reassurance to white settlers)<sup>21</sup>. Occasionally an older constitution has been 'revived'. The 2001 Bonn Agreement concerning the rehabilitation of Afghanistan restored the last (1964) constitution under the last monarch, but since neither the King nor the parliament existed, the restored constitution was a bit of fiction, with effective state power, such as it was, rested with the temporary president, Karzai<sup>22</sup>.

At other times, there is need for new institutions for the interim period, especially when the old order has collapsed (as in Cambodia, where the old government under Hun Sen nevertheless continued to have considerable power under the interim arrangements, and East Timor, where the country was run by the UN itself, with authority from Security Council resolutions). Sometimes a process can be taken part of the way on the basis of the existing constitution, but further progress may require new institutions (as South Africans found).

A difficult question is whether the interim arrangements should be compatible with the existing constitution and laws, involving both technical and political issues. The situation is more complicated if the problem relates to the legitimacy of the constitution or its institutions. A possible argument for compatibility is to emphasise the rule and continuity of law; others may think that the rule of law is better served by a shift to a fairer constitutional system and that the existing system offers too many constraints to change. Others think that negotiating and drafting new constitutional arrangements may take up valuable time which should be devoted to making the new constitution.

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<sup>21</sup> Marinus Wiechers, 'Namibia: Constitution-Making, Peace-Building and National Reconciliation' (USIP, 2001).

<sup>22</sup> For other examples of restored constitutions see Arato's article, *op. cit.*

The acceptability of interim arrangements can be enhanced if they are part of a road map to a new constitution, which may include a timeline. Indeed, in that case, even the groups which are excluded may accept that the old arrangements continue up to the new constitution and elections (the largest opposition party in Fiji, the National Federation Party rejected the government's offer of power sharing for the transition period because it did not want to be implicated in the somewhat disreputable record of the government). In Iraq the United States set up an elaborate new constitutional structure to serve as the interim authority and to provide the framework for the adoption of new, permanent constitution: the Transitional Administration Law (TAL). Although the interim instrument was meant to be negotiated among Iraqi groups, it was the US which called the shots (and as a result the TAL enjoyed very limited legitimacy).<sup>23</sup>

A timeline creates a dynamic situation in which scenarios change and the structure of interim arrangements themselves may need to be revised. The arrangements in South Africa illustrate several issues mentioned above. Although the African National Congress (ANC) had fundamental moral and political objections to the apartheid constitution, it agreed to work within it for an initial phase, for at least two reasons. The first was to reassure the white community that changes would not be abrupt and would not be imposed on them (they being in charge of the amendment procedures). The second reason was to lay the foundations for the rule of law by accepting the principle of legal continuity. The 'interim arrangements' dimension was in the agreement among the parties engaged in negotiations that the government and the legislature would in fact act in accordance with the instructions of an unofficial inter-party Executive Council (during this period the main legal pillars of the apartheid system were repealed by the apartheid legislature!). But even with this concession, the supporters of the ANC would not have accepted for long the extension of the apartheid constitutional and legal system. The initial interim period was therefore used to agree on new arrangements for the next phase. The new arrangements, in the form of an interim constitution, were fundamentally different from the apartheid constitution and were decisive in the move to a non-racial democratic system. They included elections to a constituent assembly which changed the power configuration of South Africa.

A similar sort of progression occurred in Iraq: administration by the occupying power; then a governing council of Iraqis appointed by the US in perfunctory consultation with its allies; an assembly elected under an interim constitution drafted by the US and the governing council to serve both as the legislature and the constituent assembly (with the authority to appoint the executive); the ratification of the final constitution by a referendum and fresh elections under that constitution which would come into force on the formation of the new government. The Iraqi experience illustrates the difficulty of determining exactly when transition is complete. According to the legal framework, the transition was to be complete on the adoption of the new constitution and the formation of the government under it. But when the new constitution was being adopted by the Transitional National Assembly, a decision was made to review it immediately after the referendum, so that the reservations of the Sunni factions could be addressed. That process was to commence after the formation of the new government.

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<sup>23</sup> Larry Diamond, *Squandered Victory: The American Occupation and the Bungled Effort to bring Democracy to Iraq* (New York: Henry Holt, 2005). See also Arato pp. 32-49. By its very length and the entrenchment of Kurdish autonomy, it foreclosed some options for the future.

Why were the South African interim arrangements more successful than the Iraqi? I think fundamentally because the South African process was more open, consensual and transparent—and not imposed from outside. There was also a greater preparedness to listen to the concerns of others and a strong commitment to work towards a compromise.

Interim arrangements can last for a long time, and often the final constitution bears a strong resemblance to the interim constitution, for example, in both South Africa and Iraq)<sup>24</sup>. In South Africa the interim constitution was made through consensus and enjoyed considerable legitimacy and was broadly acceptable to all groups. In the case of Iraq, it was not so much the acceptability of the interim arrangements as that the assembly ran of time that explains why it fell back on the interim constitution! Since interim arrangements can be critical to the longer term goals, parties should negotiate in good faith, rather than seek advantages for themselves or entrenching their position in structures of power, pursuing a self-centred agenda (one reason for the lack of progress in Sri Lanka was in fact a self-serving scheme presented as interim arrangements, clearly designed to become permanent, advanced by the LTTE). Interim arrangements should be approached for what they are: a device towards a final settlement, with the capacity to bring all relevant factions together and to promote consensus around a constitution that deals fairly with the concerns of many.

The interim arrangements should not be seen merely as negotiations between groups in conflict—other groups should be able to participate through consultative and other methods, and through the openness of the process. Attention should also be given to the components of interim arrangements. Power sharing in which all key groups come into the government is an important feature. For that very reason, it is important to insist on maximum transparency, mechanisms of accountability to an assembly enjoying popular approval, and a code of conduct binding the government and senior officials. Strong protection of human rights is also imperative, supported by an independent judiciary and a human rights commission.

Above all, all factions must strive to ensure, as part of the interim arrangements, a secure environment for human security, public participation, free debate and the right of assembly without molestation, supported by some monitoring mechanism and backed by sanctions—in short laying the foundations of a civil and democratic society. The parties must solemnly undertake to give up violence or intimidation, observe the ceasefire and respect human rights, and strive for peace and consensus.

The designing of the interim arrangements is also inextricably linked to the sequencing of the different stages of the constitution making process. A critical factor is what degree of representativeness of institutions must be established before the formal process can start. In a country coming out of conflict when there are no institutions enjoying general support, a special problem is: who has the right or legitimacy to make a constitution? Often this problem is solved by requiring elections

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<sup>24</sup> A somewhat different kind of permanence is represented by the German Constitution (the Basic Law). German political parties refused to have a referendum on the constitution drafted by the German Parliamentary Council (even refusing to call it a constituent assembly) because, in the absence of East Germany, they preferred to regard it as interim, until full unity (Peter Merkel, *The Origin of the West German Republic* (NY: Oxford University Press, 1963). And yet when the possibility of full union opened up with the collapse of the Berlin wall, the integration was not achieved through a constituent assembly and a referendum, but the amendment procedures of the Basic Law! (Peter Quint, *Constitution Making by Treaty in German Re-unification: A Comment on Arato, Elster, Preuss, and Richards* in 1993 *Cardozo Law Review* Vol. 14, pp. 691-704).

to a legislative or constituent assembly and give it the mandate to draft and adopt the constitution (this procedure is common when the international community becomes engaged in the process, giving perhaps exaggerated significance to elections). In Iraq, for example, elections polarised the people, and the Sunnis boycotted them, thus upsetting the communal balance and greatly complicating the task of constitution making. In East Timor the elections to the constituent assembly provided one party with a clear majority so that it had no incentive to compromise on its own proposals and others had no possibility to negotiate. Constitution making became a majoritarian exercise, whereas it should be based as much as possible on a consensus or a high vote. Before elections, no group has a reliable idea of its support in the country and therefore all groups have an incentive to reach an agreement. On the other hand, if the process goes on without elections, the interim executive can exercise a powerful influence on, or even direction of, the constitution making process (as happened in Afghanistan). Sometimes this dilemma is resolved, as previously discussed, in South Africa, where the parties agreed on a number of constitutional principles which were to govern the contents of the new constitution, before elections to the constituent assembly were held (but this is no guarantee that perceptions of advantage to be gained from a particular system of government or electoral system will not heavily influence the decisions of political parties or other members on the final constitution)<sup>25</sup>. South Africans also had an interim constitution and an interim government of national unity which helped to create an environment conducive to constructive process. Another method is to adopt a significantly high vote in the constituent assembly to build incentive for working towards consensus.

Another factor which may have an impact on the timing of the election is the need to create conditions which facilitate free and fair elections. In a situation of conflict or even post-conflict when one or more groups may be armed, there is understandably reluctance to hold elections. An armed group which wants progress on the political or constitutional front may come under pressure to give up or store away arms. But if the process has to proceed without elections, it makes it hard to gauge political and community support that groups participating in the process enjoy, and indeed as to who they represent.

In this way one can build into the interim arrangements a matrix governing demobilisation, disarmament, elections and constitution making, through a series of mechanisms and acts which trigger off the next phase, through a mixture of incentives and sanctions<sup>26</sup>.

### *Setting of Goals*

As mentioned previously, rarely does a country embark upon the making of a new constitution without very good reason. Sometimes it is difficult to start a process without an agreement on the goals of the process—if only to limit the scope of changes. A prior agreement on goals has many advantages. Identifying priorities helps to give direction to the process and assists in balancing different aims and interests. For example national unity and identity may require both effective state institutions

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<sup>25</sup> In Kenya the Constitution of Kenya Review Act set out perfectly good principles, but when constitution making proceeded after an election, the positions of parties, individuals and ethnic groups on these issues were very much influenced by what they expected to get out of them.

<sup>26</sup> For a study of how this matrix evolved and was operationalised in the conflict between Bougainville and Papua New Guinea, see Anthony Regan, 'Autonomy and conflict resolution –three autonomies in Bougainville and Papua New Guinea, 1976-2005' (unpublished)



and forms of self-government for different regions and communities, and thus the balance between individual and community rights. Increasingly, goals are defined by reference both to local traditions and culture and international norms (such as democracy, national unity, human rights, social justice, and gender equity). If the original goals are too numerous or too specific and detailed, they may clash with ideas generated in the review process itself, or they may lead to a feeling that key interest groups have already made up their mind. It is important that the process should leave room for ideas and recommendation to emerge from the consultation with the people – particularly different sectors of society, such as rural people, marginalized women, or minorities – who may have little influence on the initial choice of goals.

There is no uniform method for deciding on goals. Sometimes the vision of a dominant leader is sufficient mandate. In some cases elaborate negotiations among a host of ‘stake holders’ are necessary. In some Africa countries national conferences bringing together political groups, former ‘dissidents’, religious and civil society groups, have been the principal forces driving the process and have set out the goals of reforms. Sometimes these have been matters for the political parties, as in Fiji and South Africa. In Eastern Europe, goals were decided in round table conferences of political parties. In India and Pakistan, after independence, they were resolved by the respective constituent assemblies. In those states in which the international community has played a key role, the goals have been set by the UN Security Council as in Namibia and East Timor or by a consortium of concerned states as for Cambodia and Afghanistan. The terms on which the European Union was willing to recognise states that emerged out of the former Yugoslavia (such as democracy, rule of law, and protection of minorities) served effectively as the framework within which their constitutions were drafted.

How is one to ensure that the goals have been achieved—what is the validation process? Usually, there is no formal validation process, in which case the goals act as guidelines. But the prior establishment of goals (acting as parameters of the constitution) was so critical to the South African process that provision was made for the Constitutional Court to verify that the draft constitution conformed to the goals before it could come into force. In some cases where the international community has been involved, a determination by the Security Council has been a pre-condition—although the Security Council has made no detailed examination. In many countries, a referendum is necessary on the final product—and this can be seen as a sort of validation.

### *Deadlines*

It is useful to have deadlines for the different stages of the process (which can be a device to impose some discipline on delegates and concentrate their minds on the business at hand). But these have to be carefully considered, for too short deadlines may limit public participation and may give the impression of the process being manipulated, while long deadlines may stretch the process unduly when the need is to bring a closure to it and establish a new order. People may also get bored and tired with a long process, additional difficulties and claims may arise, expenses mount up, and the opportunity for a new settlement may be lost with the consolidation of vested interests. There comes a point in the process where little is gained by further consultations or debates; there is an element of unproductive repetitiveness. But often delays in the process are deliberately engineered. In Uganda, Museveni, who came into power by the overthrow of Obote’s regime, delayed the initiation of the process

until he had established his control over the country, and then the process itself suffered from several interruptions which suited him. In Kenya the process was dragged out well beyond the original deadline—which was one factor in its vulnerability of the draft to sabotage.

When the international community becomes engaged in a process, the likelihood is that only a short period will be provided for the constituent assembly (Cambodia, East Timor, Afghanistan and Iraq) since the conclusion of its work triggers off the exit of external engagement. In Iraq, the Transitional Administration Law (TAL) provided that the Assembly must complete the draft by 15 August 2005. A referendum must be held by 15 October. If all went well, elections for a permanent government must be held by 15 December 2005. It was always doubtful whether this breathless timetable could be met. The assumption was that the Assembly would meet and elect the Presidency Council and approve a government at the latest in the first week of January 2005, when it would also commence work on the constitution. That would have given it about 8 months to prepare and approve a draft. Even that period might have been insufficient. In the event, the Assembly had little more than two months. The result was that, when the US refused to countenance a formal extension of the deadline, some entirely illegal amendments of the TAL were made to produce a few more weeks of negotiating space, and even the document adopted in the October 2005 referendum was in fact regarded as interim, for as explained above, the major communities agreed to re-negotiate it after the referendum. A longer initial period might just have allowed the resolution of differences among the major communities, and a greater participation of the people. (But it should also be noted that it proved very difficult in Iraq to keep to the deadlines—many times they were just ignored! A member of the commission once said that the process was too political to be governed by deadlines).

#### *Institutions and Procedures for Making the Constitution: the framework*

In addition to goals, it is usual to agree on the institutions and procedures for process. This is normally the responsibility of the legislature or the executive (although usually after prior consultations that may largely determine these elements)[—this option may not be possible or acceptable in Nepal for obvious reasons]. The framework for the process can be detailed or skeletal. The advantage of detail is that it acts as a clear road map, whereas brevity gives more flexibility.

Whatever the framework, including the distribution of functions that is agreed upon, should it be given some kind of legal status? There is an advantage in a legal status (entrenched so that it cannot easily be removed) that it gives a sense of security to participants in the process, and to the people generally (who might otherwise be reluctant to give their time, emotions and energies to the process). Sometimes the legal status of process has not mattered—in Fiji the whole process was based on an executive order without any legal security; in Kenya there was a very detailed act of parliament but which was not entrenched in the existing constitution (and that proved its Achilles heel); and in some instances the process is prescribed in a previous constitutional instrument (South Africa, Iraq) or in an international instrument (Afghanistan, Cambodia). The legal form is often less important than the political will.

#### **Part IV: The Constituent Assembly: structure and composition**

When a country decides to establish a constituent assembly, it has also to make a number of specific decisions about its functions, membership and rules of decision making. It is very likely that these specific decisions will have more impact on the conduct and outcome of the process than for example, the choice between a constituent assembly and the parliament.

### *Relationship to legislature*

Although constituent assemblies have not always been democratic (the US convention which made the constitution in Philadelphia was by contemporary standards particularly undemocratic), today we regard it as *the* proper manifestation of democracy—that is one reason why there is generally a clamour for a constituent assembly as a first move towards democracy and justice. Therefore it is not surprising that the major alternative to the constituent assembly is the regular legislature (usually operating with qualified (i.e., a high) majority), as it claims to speak for and on behalf of the people. But often there is no easy way to distinguish a legislature from a constituent assembly.

In some instances the task of the constituent assembly is restricted to making the constitution (Uganda). Sometimes the constituent assembly may also double up as the legislature, or sometimes, more accurately, the legislature may double up a constituent assembly (India, Pakistan, Iraq, Papua New Guinea, South Africa, most East European states), so that the distinction between it and legislature is obliterated. Both the constituent assembly and the legislature operate with the same membership (although different procedures for their functioning and decision making may be adopted). In some instances a constituent assembly is transformed (or transforms itself) into the legislature after it has completed the task of constitution making (East Timor, Cambodia, Namibia). And indeed even when a constituent assembly is convened solely for constitution making, it may be no different from a legislature in terms of the kind of representation and the way its members get there. In both cases, the process will be dominated by political parties and the interests they represent will be carefully protected.

If the constituent assembly is a different body from Parliament, there can be a conflict between the two (Nigeria, Kenya, Uganda, Columbia). According to a member of the Nigerian constituent assembly, the hostility of Parliament ‘constrained the ability of the Constituent Assembly to do what it felt necessary’<sup>27</sup>. It was also refused funding by the legislature. In Uganda, where parliament did not control the process, it refused to allocate adequate resources for the process, with the result that this dragged on for nearly seven years, and was rescued only by a generous grant from an external donor. Tensions between the legislature and the constituent assembly have also existed elsewhere (Colombia 1991 and Ecuador)<sup>28</sup>.

Yet another variation is when both the legislature and the constituent assembly are involved in the process. In Kenya, for example, the National Constitutional Conference (a more representative body than the legislature - the National Assembly) had to adopt the draft constitution but it could not come into effect until formally approved by the National Assembly following a two thirds vote, although the National Assembly’s options were only to accept or reject, as it could not amend the

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<sup>27</sup> According to a delegate at the IDEA/INCOD/UNDP workshop on constitution making in Pretoria December 2005.

<sup>28</sup> Roberto Andolina ‘The Sovereign and its Shadow: Constituent Assembly and Indigenous Movement in Ecuador’ 2005 *Journal of Latin American Studies* (vol. 35, pp. 721-750).

draft. The National Assembly abused its role and in fact made very significant changes to the draft.<sup>29</sup> A similar kind of division happened in Ethiopia, where the constituent assembly came last—and was dominated by the supporters of the prime minister.

In some countries, the regular legislature is supplemented by additional members to become a sort of constituent assembly. The Maldives' Constitution provides for a body, called the People's Special Majlis in which is vested the 'power to make and amend the Constitution' (art. 92). It consists of all members of the legislature (People's Majlis), members of the Cabinet, specially elected members to represent regions, and 8 members appointed by the President. A similar kind of body (but with wider functions) exists in Indonesia. Afghanistan has used a traditional body, the Loya Jirga, for the approval of constitutions. The Kenyan National Constitutional Conference comprised all 222 Members of the National Assembly plus 417 others.

#### *Membership of the Constituent Assembly*

Qualifications for membership should to an extent be determined by the precise tasks given to the constituent assembly. Will its members, for example, provide civic education and undertake direct consultations with the people? Will they the technical task of undertake the task of drafting the constitution? What qualities should one look for in those who aspire to become members of the constituent assembly?

Although a constituent assembly is popularly thought of a representing the entire nation, many constituent assemblies have not been directly elected and have represented specific interests, such as regions or states (the US (1787), India (1946), Germany (1948), Australia (1891); the French Assembly of 1789 was partially elected). Two of the most well known (and widely researched) constituent assemblies, the US and the French, closely connected in time, ideology and friendships, had fundamentally different composition<sup>30</sup>. In the Philadelphia Convention representation was extremely restricted. The delegates were nominated by legislatures of the states, which themselves were composed on the basis of extremely limited franchise (women, Indians and slaves excluded, and those not owning property). The 55 delegates were selected from a very small circle of social and economic classes. They had a common background and for the most part common interests (the only really contentious issue concerned slavery—northern states supported abolition, while the southern wanted to keep it, an issue was left unresolved and was concluded only with the civil war a good part of a century later). These factors greatly facilitated an

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<sup>29</sup> See Ghai and Cottrell, op. cit. The presence of both the constitutional conference and the assembly was a (clumsy) compromise between civil society which wanted a constituent assembly and the president who wanted the National Assembly which his party controlled. The lesson from Kenya is: don't adopt this option!

<sup>30</sup> These two processes are, by far, the most well studied examples of constitution making. Of the enormous literature, the following may be mentioned. For the US, Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787* (NY: Little, Brown, 1966). A good concise account is Walter Berns, 'Writing of the Constitution of the United States' in Robert Goldwin and Art Kaufman (eds), *Constitution Makers on Constitution Making* (Washington DC: American Enterprise Institute for Public Policy Research, 1988. For France, see Eric Thompson, *Popular Sovereignty and the French Constituent Assembly 1789-91* (Manchester: Manchester University Press, 1952) and Timothy Tackett, *Becoming a Revolutionary: The Deputies of the French National Assembly and the Emergence of a Revolutionary Culture (1789-1790)* (Princeton: Princeton University Press, 1996).

agreement, despite several issues on which there were different preferences<sup>31</sup>. But the agreement was at the expense of the interests that were excluded: slaves, Indians, and women (issues of slavery and gender were eventually resolved through constitutional, legislative or administrative means, but the constitutional status of Indians remains unsatisfactory to this day). The French Assembly had over 500 members, in three categories: the nobles, the clergy and the third estate (through a combination of the principles of heredity, occupation and indirect election).

Today we regard the question of inclusiveness as crucial. If all the regions, communities and sectors of society will be represented (as was the case in Uganda and Kenya, for example), how should the representatives be chosen—through general public elections or nomination or election by the special groups or interests (the latter was the general approach in Kenya, and in Uganda there were special constituencies for the election of women, and provision was made for the appointment of other interests, like the military. Should ethnic groups have their own separate representation (as in the Indian constituent assembly)? Should women, the disabled, trade unions, professionals, commercial sector, etc. be directly represented? The alternative would be representation through general elections which means that in most cases political parties, accustomed to and organised for such elections, will dominate the process (East Timor, Ecuador). General elections are still the most common form of elections, little distinguished from parliamentary general elections, as in South Africa, Cambodia, and East Timor.

If representation is to be based on general elections, what electoral system is to be used? Proportional representation is generally preferred over other systems (like first past the post/majoritarian systems) as it produces a greater degree of convergence between the preference of the voters and the representation in the assembly. But there is less agreement on whether, in the latter case, the constituency should be districts or the whole country. Sometimes, due to lack of reliable - or any - electoral rolls, the whole country is used as one constituency. This was the case in the Iraqi elections to the Transitional National Assembly which was also to act as the constituent assembly. This produced unfortunate results as large number of Sunnis boycotted the elections (and were consequently very poorly represented in the assembly). If elections had been held on the basis of provinces, the large abstention of Sunnis would have mattered less, for in Sunni dominated provinces, even a small turn out would have ensured them most seats in those provinces<sup>32</sup>. For the second general elections, the provinces were used as electoral constituencies. In both cases political parties dominated the elections (as almost inevitably they do in proportional representation)..

Is dominance by political parties desirable or not? In multi-ethnic states, a common experience is that parties became a vehicle for ethnic representation, leaving out other social and economic interests, thus polarising society (as happened in Iraq). However, it should be recognised that the outcome would depend on the nature and organisation

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<sup>31</sup> Walter Berns writes of these delegates, 'All being of British stock and native speakers of English, they had no need of simultaneous translation of speeches or materials. Their discourse was further facilitated by their having read the same books, lived under and, in many cases, practiced the same law, and shared in a common political tradition' (op. cit. p. 133). They had worked together previously in the Congress or the army, and others they knew of through reputation.

<sup>32</sup> The absence of Sunnis from the assembly was a major setback for the constitution making process. The assembly tried to mitigate this by setting up a constitution commission to advise the assembly in which a number of Sunnis were nominated from outside the legislature, which itself caused controversy on the precise numbers and their role.

of political parties. If parties are genuinely representative and democratic, and responsive to the people, as in South Africa, the dominant role of political parties can bring about inclusion and participation. If they are dominated by ethnically inclined politicians or by individuals (as a sort of political fiefdom) as in Kenya, parties become exclusionary and narrow in their orientation. And in Nepal now, where most parliamentarians in Nepal are said to come from privileged communities, it is feared that general type elections to the constituent assembly might reproduce that pattern in the constituent assembly. Consequently some communities and groups (women, dalits, indigenous people, and the disabled) are asking for other, direct, forms of representation.

An advantage of a constituent assembly over parliament is that it can truly be the gathering of the nation. The strength and the legitimacy of the constituent assembly will lie in its inclusiveness. While parties would play a major role, membership should also be provided for other groups and interests (women, the disabled, minorities, trade unions, business, civil society and social movements). To some extent these groups and interests would be represented by parties, but there is value in their having direct representation also. It is clear that all these forms of representation have an impact on the process and its outcome. This will open prospects of reconciling communities who feel marginalised by the existing political system, as for example in Nepal now, and ensure social justice for all.

However, there is sometimes opposition to this form of representation out of a fear that it would solidify these interests and lead to the fragmentation of the political community. This fear could be met if it is recognised that a constituent assembly is different from a legislature and is no precedent for representation in the latter. In India, for example, the Constituent Assembly was based on the separate representation of Muslims, Sikhs and General (mostly Hindu), but the Assembly decided that, apart from the scheduled castes and tribes, representation in Parliament would not be communally based. Constitutional conferences leading to independence were often representative of different communities—this was seen as part of divide and rule, and in the case of India, was resented by the Congress party. But the same Congress party took very specific steps to ensure that each community was adequately represented by delegates from provincial legislatures (who constituted the membership of the Constituent Assembly).

Such forms of representation can lead to the formation of large assemblies, which can have an adverse effect on their proceedings. It has proved difficult to organise proper debates and decision making in large assemblies (this was a particular problem in Kenya where the equivalent of the constituent assembly had 629 members and even thematic committees had 70-80 members. Consensus building is also hard if the membership is large. It will be easier to determine the size once the key interests have been identified. But an upper limit of 200 may for example be optimum—and reasonable.

Should some groups be excluded (as Nazis in Germany in the 1948 assembly, senior officials of the Japanese Imperial Government also after the 2<sup>nd</sup> World War, or Baathists in Iraq (2005); the Khmer Rouge were not excluded in Cambodia). Although exclusion of such groups may be understandable in view of their past atrocities, many commentators have argued that it is best in the interests of future harmony to include them (as the continuing violence in Iraq seems to show). This

approach is preferred when one of the functions of the constitution making process is reconciliation.

As we saw earlier, some constituent assemblies have comprised all and only parliamentarians, other have involved parliamentarians plus others. Is there a case for excluding members of parliament? Some countries have adopted this rule but there does not seem a strong case for it—other than it may be hard for a person to perform in both assemblies due to pressure of time, and the result may be the delay of the work of the constituent assembly as precedence would probably be given to parliamentary business (budgets and that sort of thing). However, it cannot be denied that members of parliament, or indeed political party members, in a constituent assembly will take short term political advantages in account. As Jon Elster has said, political parties tend to favour electoral laws and institutions that favour them. ‘Parties that expect to gather a small proportion of the votes will insist on writing PR into the constitution, whereas those that expect a large share will prefer plurality voting. (... this effect of party interest is mitigated if they are uncertain about their level of electoral support.) As in Poland in 1921 and in France in 1946, parties with a strong presidential candidate will try to create a strong presidency, whereas their opponents will try to weaken the office.’<sup>33</sup>

With diverse representation, especially, the question arises how the delegates should vote, (a matter taken up later).

#### *Secretariat*

What are the modalities of providing expert and technical assistance to the constituent assembly? The constituent assembly will need a secretariat to provide logistical support. There is need for careful record-taking, registering accurately the decisions of the assembly (it is amazing how often there is controversy later about the exact decision of a committee or the assembly). The proceedings of the assembly should also be fully recorded and documented. The assembly should be provided with a specialist library. A team of constitutional lawyers and political scientists could be established as part of the secretariat or a separate unit. It would be desirable to provide each of the thematic committee with one adviser. The secretariat should organise workshops and seminars for the members to acquaint them with constitutional issues and options. As far as possible, local experts should be used, for their understanding of local context and issues.

### **Part V Powers and functions of the constituent assembly**

The functions of constituent assemblies have also varied. Some start with a blank slate and are free to make any decisions, others may be bound to incorporate certain fundamental principles (South Africa, Namibia, Cambodia). Interestingly India started with many restrictions on the constituent assembly imposed by the British Government, to protect the Muslim minority, but they were dropped as Britain decided to establish Pakistan. The constituent assembly’s role in determining goals is limited in those cases where the draft is prepared by a constitutional commission or

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<sup>33</sup> In his paper, ‘Ideal and Reality in Constitution Making’ presented at the inaugural meeting of the Club of Madrid (Madrid, October 2001). The French constituent assembly in 1791 went so far as to decree that no member would be eligible for five years after the adoption of the constitution for state office. In retrospect, this is not judged to have been a sensible decision, and in today’s circumstances it is unlikely to have much appeal to politicians and other groups (though in Kenya it would receive massive public support, where there is a deep mistrust of politicians who have been blamed for the sabotage of the constitutional process!).

some similar body. The assembly may be free to modify the draft or even to reject it but in practice its choices are limited. It is not unknown for a constituent assembly to re-define the goals of the process: both the Philadelphia and the original French assemblies, starting with modest goals, expanded their mandate to revise the entire structure of the state. The Indian constituent assembly freed itself of the limits on both the scope and orientation of the constitution after the creation of Pakistan and the departure of the British.

Some constituent assemblies cover all aspects of constitution making listed in the first section of this paper: consulting the people or special groups on the new constitution, preparing a draft of the constitution, debating and adopting it, and finally bringing it into force (as in India, Cambodia, East Timor). In some instances public consultations and the preparation of the draft are the responsibilities of other bodies (e.g., a constitutional commission, as in Uganda, Ethiopia and Kenya or a committee set up by the government as in the decolonisation processes, in India, Africa and the South Pacific). Are there advantages in giving all the functions to the constituency assembly? There might be better co-ordination if this was the case. The members of the constituency assembly will remain engaged in the process throughout if they had responsibility for all tasks. They will have a better feel for the pulse of the people if they participate in civic education and consultation with the people. On the reverse side, they may not have the expertise for all these tasks; they may not have the time to participate in all these activities, and if they do, the process may become lengthy and expensive. The division of functions (and labour) among different organisations may prevent the dominance of the process by one group of people. It is becoming fairly common to divide responsibilities (at least in Africa where a pattern seems to be emerging where there is normally a constitutional commission for civic education and consultations with the people, and the preparation of a draft constitution which is then submitted to a constituent assembly or parliament for consideration and approval).

We can look at some of the tasks in a constitution making progress identified earlier and examine how they have been discharged and how they can be best performed. The paper has already discussed modalities for determining prior constitutional principles.

#### *Civic education*

The provision of civic education in constitution making has not traditionally been a part of the process. The initiation of a process leads to considerable lobbying in support of particular positions, and indeed a process may be initiated following public discussions about specific reforms. But organised activity to engage the general public in the discussion of constitutional issues and options has recently been recognised as an important part of the process if the people are to be encouraged to participate in the process—and public participation is now seen as essential to a good process. It is not surprising that some of the most intense civic education programmes have been undertaken in Africa where political parties seldom offer people alternative policy choices and there are relatively few organisations which engage in political or policy discourses. Experience of civic education programmes is growing and it is possible to begin to draw some lessons and guidelines.

Civic education is best provided by those with expertise and experience of this type of instruction. Only a few members of the constituent assembly will be qualified for this. It is of course possible for the constituent assembly to employ staff, with relevant experience, for this purpose. But this may unnecessarily add to the managerial tasks



and costs of the constituent assembly. Civic education programmes have a tendency to become controversial and it is best to protect the constituent assembly from criticisms of partisanship. And if too many tasks are given to the constituent assembly (or any other organisation) there is a danger that if its members have a particular agenda, most stages of the process would be used to produce results that support that agenda. So there is the danger that civic education will not be imparted objectively. Of course any organisation which is given responsibility for civic education may or will have a bias. It cannot be otherwise.

The problem of bias can be handled in a variety of ways. Perhaps the most effective solution is to encourage all kinds of organisations to organise their own programmes of civic education—those belonging to or supporting religious or secular groups, women, law societies and other professional bodies, and other kinds of NGOs. To avoid extreme propaganda or provocative lobbying (which would defeat the objectives of enabling people to make up their own minds), it may be necessary to set up some basic principles of fairness and impartiality, and the avoidance of provocation or incitement. This is a task that the constituent assembly may well be given, if there is no other formal body charged with it (such as a constitutional commission) or a consortium of NGOs and community based organisations. The responsibility might include the giving of some guidance on the scope of the ‘curriculum’ for civic education, establishing codes, procedures and supervision to ensure that views are freely and honestly expressed. Whatever arrangements are made, there should be no censorship, and widest discussions and debates should be promoted.

#### *Consultations with the public and preparing a draft constitution*

Consulting the public and receiving their views and recommendations is a different matter. Here the body charged with preparing a draft constitution has to take responsibility—to encourage people to come forward with their submissions and for the drafters to get a feel of people’s grievances, hopes and expectations. Which body is responsible for drafting the constitution is itself a critical decision. There are two obvious choices, for both of which there are several examples. The first, and until recently the more usual, method is for the constituent assembly itself to take responsibility (Philadelphia, France, India, Pakistan, East Timor, Iraq, Cambodia, Namibia)—but they have not been very participatory. The other is to appoint a committee or a commission (generally a group experts or eminent persons with relevant experience) to prepare a draft (for the consideration of the constituent assembly) (Germany, Uganda, Thailand, Kenya, Ethiopia, Nepal and Afghanistan<sup>34</sup>).

It is very common today, whether the ultimate decision making body is the legislature or the assembly, to set up an expert, independent and representative commission to undertake tasks up to point of the preparation of the draft constitution. These tasks include providing or facilitating education about the process and constitutional issues to the public, promoting national debates, receiving and analysing the views of the public, and preparing and submitting a draft for consideration by the decision making body (after a suitable interval for public discussion of the draft. The advantage of such

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<sup>34</sup> Afghanistan had in fact three stages. At first an expert committee of 9 persons was established by the president to prepare a draft, which it did in great secrecy. This draft was reviewed, without the benefit of public debate (since it was kept secret) by a constitutional commission of 29 members, of which four members came from the committee, including the chair (who also chaired the commission). The third stage was the ratification by the Loya Jirga (a kind of traditional constituent assembly).

a commission is that this part of the process can to some extent be distanced from parties, tap expert knowledge, promote participation and formulate proposals oriented towards the national rather than sectarian interests and which consequently provide a fair basis for negotiations. If the entire process is left to parties, it may be very hard to reach a compromise. This was for example the Fijian experience where negotiations after the 1987 coups failed to produce a compromise, but compromise was reached when a commission, set up for the above tasks, produced a draft for negotiations among the parties. Many other countries have had similar positive experience. A slight variation on this theme were a number of constitutional commissions in East Timor whose task was to go round the country and meet with the people, to solicit their views on the constitution. These views were summarised (not in the form of a draft) and presented to the Constituent Assembly—which seems to have paid relatively little attention to them, perhaps because the majority party had already prepared its own draft proposals before the Constituent Assembly met.

Commissions of this kind lack the legitimacy to make the final decision, which is left either to the legislature using special majorities or an assembly with its own rules of procedure. With either approach it is possible to have a referendum as a final stage of the process (discussed later).

The choice of a commission or a committee for public consultation and the preparation of a draft has an impact on the role of the constituent assembly. Although the constituent assembly is free to change the draft or even reject it, in practice its choice is limited (especially if the commission can argue that its draft is based on wide consultation and reflects people's views). The basic principles and contours of the draft are made without its participation. If a commission/committee, which may be appointed by the executive or the legislature, is used for this purpose, it reduces considerably the role of the constituent assembly, which is then restricted to debating the draft and adopting it (even if with considerable changes). Experience has also shown that such committees are susceptible to pressure from the executive<sup>35</sup>. The task of the constituent assembly in developing a consensus may be harder if the process starts for the first time when the assembly is convened. There is the danger that the dissatisfaction of the constituent assembly with the draft could lead to its rejection, and leave no clear mechanism or prospects for the constituent assembly to proceed on a new draft. On the other hand, the commission's draft may reflect certain 'objectivity', professionalism, and consensus among its members, which may be easier to achieve than in a larger body, whose members are closely tied to parties and other interests. (On the other hand, there is the danger that the commission may be packed by the executive or its supporters). Such a procedure is more conducive to public participation and enables wider public debates (especially as the people can react to a complete draft before the constituent assembly begins to consider it), especially if the commission also prepares a report explaining and justifying its draft. If the commission makes a serious attempt at capturing the public mood, its draft may itself present a kind of consensus.

### *Draft or Consultation First?*

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<sup>35</sup> East Timor provided a midway position. A number of bodies were set up in advance of the meeting of the constituent assembly to obtain the views of the people in different parts of the country, and to submit them to the assembly (but without any recommendations of their own). This mechanism seems to have been adopted out of a belated recognition of the importance of participation (and perhaps to save time for the assembly which operated with a tight timeline). According to some observers, the assembly paid little attention to these views (personal information).

There is a division of opinion on whether consultation with the people should precede or follow the preparation of the draft. The latter procedure gives the public a chance to comment on concrete proposals but prior consultation provides greater scope for the expression of public views and the enhancement of people's initiatives. Iraq and Afghanistan opted for consultation on a complete draft (which left little room for the accommodation of people's views). And in the case of Iraq, unlike Afghanistan, where the constituent assembly prepared the draft through a committee, there was no opportunity to take public comments into account before the referendum. In fact it is possible to have consultations both before and after the draft is prepared, as is becoming the common practice (Uganda and Kenya followed this procedure).

Consultation on the draft constitution is easier if the task of preparing the draft is given to a commission and that of debating and adopting it to a constituent assembly. Technically it would be possible for the constituent assembly to publish a draft constitution and adjourn for a month or two while the public debates it. But the difficulty is that the assembly would have considerable commitment to its own draft and may not react favourably to public criticism—where as if the draft was prepared by a commission, the assembly could examine public comments with greater objectivity. But there is another difficulty with consultation on the draft if the constituent assembly has prepared the draft. The draft would have been prepared after negotiations and compromises, sometimes after a difficult and lengthy process. At this stage the draft is a package. It may neither sensible nor possible to re-open it.

#### *Rules for the procedure in the constituent assembly*

The rules of procedure are crucial to the working of the constituent assembly. All different interests and groups should be included in the process, and have their influence on decision making. But this ideal is seldom achieved, for even if there is wide consultation, the forums or rules for decision-making may marginalize specific interests or communities.

Sometimes these rules are made by an external body (in Kenya the constitution review commission made them) but the general rule is that they are adopted by the assembly itself (as in India and Uganda). There is considerable merit in the assembly deciding on its own procedure, but sometimes this can take up a great deal of the time of the assembly, which can be a critical factor if the time allotted to the assembly is limited (as in East Timor). In order to facilitate the fullest participation of delegates, it is important that the rules should be kept as simple as possible, with minimum 'points of order'. Even then, it would be necessary to devote some sessions to enabling delegates to understand the rules.

A great deal of thought needs to be given to these rules of procedure, which depend on whether the assembly is seen as a ratifying body or deliberating body (in Uganda, Thailand and Kenya the body was deliberative, with complex and lengthy procedures, while the Constitutional Loya Jirga in Afghanistan was largely a ratifying body, and was given very limited time to complete its task).

The rules of procedure cover matters like the responsibilities of the plenary of the assembly and the functions and structures of its committees. As a rule, it is best to use the plenary for general debates on principles and for final decisions on the adoption of the constitution, and leave the consideration of the details to committees (which should also try to reach a consensus, reducing the load on the plenary). There are normally two kinds of committees. One deals with issues relating to the constitution

(‘thematic committees’), which may include a drafting committee if there is no prior constitution commission, and a harmonisation committee to iron out differences and inconsistencies between recommendations of thematic committees. The other set of committees deal with administrative matters, and usually include a steering committee which is advisory to the chair and is responsible for the programme and day to day work of the assembly, a media liaison committee, an accreditation committee and a committee on the privileges of and disciplinary action against delegates.

The rules also determine the procedure for the conduct of the proceedings of the assembly and its committees, the introduction of motions, dealing with amendments to motions, the time limits on speeches, quorum (unless this last matter is dealt with in the primary legal instrument setting up the assembly), motions for adjournment, and the chair’s power to regulate and control the proceedings. Rules would usually deal with the right of non-delegates to observe the proceedings of the assembly and sometimes, to petition it. They might prescribe rules governing the method of voting, although the specified majorities for decision making on the constitution would probably be set out in the primary legal instrument (see below).

#### *Transparency or confidentiality?*

The emphasis on public participation suggests that the proceedings of the constituent assembly should be conducted in an open forum, with transparency. On the whole this is a good principle, as it will give the public an understanding of the process and they would be able to assess the performance and positions of the members. But it has been argued that the publicity that surrounds the proceedings tends to make members take strong positions which they consider would please their supporters, and may tend to polarise opinion within the assembly. It is sometimes said that if the assembly is to be operate by deliberation (i.e., by a serious exchange of views and careful consideration of opposing views) then confidentiality of discussions needs to be preserved. Moreover, it is claimed that it might be easier to reach compromises if negotiations take place behind closed doors and indeed the standard of the debate might be higher<sup>36</sup>. The US convention worked through the greatest possible secrecy. Madison, who chaired it and who in fact kept detailed personal notes, justified secrecy as essential to consensus-building and rational debate as it would be easier for delegates to be persuaded and to change their views if this process was not conducted in public. The French process even to this date ranks among the most open and transparent, and even participatory<sup>37</sup>.

Somewhat similar points apply to whether the voting should be by secret ballot or open. Regulations of most assemblies provide for open voting. Might there be merit in some decisions being decided by secret ballot?

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<sup>36</sup> Jon Elster (1995:388) has noted two consequences of secrecy: ‘On the one hand, it will tend to shift the center of gravity from impartial discussion to interest-based bargaining. In private there is less need to present one’s proposal as aimed at promoting public good. On the other hand, secrecy tends to improve the quality of whatever discussion does take place because it allows framers to change their mind when persuaded of an opponent’s view. Conversely, while public debate drives out any appearance of bargaining, it also encourages stubbornness, overbidding, and grandstanding in ways that are incompatible with genuine discussion. Rather than fostering transformation of preferences, the public setting encourages their misrepresentation’.

<sup>37</sup> People used to crowd Versailles where the assembly started its work, and the King was forced to transfer it to a venue in Paris so that more people could observe its proceedings and lobby members.

### *Rules for Decision Making*

This is a critical matter, which involves the questions of which body (or bodies) decides and how does it decide? In the US the draft produced by the Convention had to be approved by special conventions in the states, but in France the assembly made the final decision. Sometimes the draft has to be approved by a referendum (most recently in Iraq) and somewhat unusually, by Parliament (Kenya).

A fairly common approach is to give the power to change or adopt a constitution to either the legislature or a constituent assembly. Occasionally, the task may be divided between both the bodies (because one side does not trust parliament and the other does not trust a people based process). To divide the authority between the two institutions (as in Kenya) is unwise as it may create conflicts between the two bodies and jeopardise the success of the process<sup>38</sup>. Disagreement on the adopting body was a major cause for the conflict in Nepal, the political parties wanting parliament and the Maoists insisting on a constituent assembly—in the end considerable progress towards reform was made when both sides agreed to a constituent assembly in 2006.

Then there is the issue whether each delegate has the right to vote according to his or her conscience and judgment or is he or she to vote according to directives of the group they represent? This is especially relevant where representation in the constituent assembly is based on regional entities (as in the US Philadelphia convention where representatives of each state voted as a delegation). This would suggest that perhaps the delegations should be broadly representative, but on the other hand this may make it hard to reach a consensus on a common vote. In Philadelphia, a state whose delegates could not reach a decision was left out of the count, putting additional pressure to reach some compromise<sup>39</sup>. This form of voting is unusual today, although some constitutions provide for the support of qualified majorities of different categories of members (normally on an ethnic basis) in addition to a general qualified majority for important legislative or constitutional amendments (as in Bosnia). The Iraqi rule about voting in a constitutional referendum discussed elsewhere in this paper is also a variation on this theme.

In the French Assembly at first the voting was to be done in three separate chambers, the nobility, the clergy and the estates-general, but the revolutionary fervour of the period compelled them to vote as one chamber, to the obvious advantages of estates-general, who were the most numerous.

All the voting in the French Assembly was done in public - and so terrified were members of the displeasure of the crowds that they devised modes of voting which would make it hard for those in the public gallery to know how they had voted. Some members needed special security when the people became enraged by their views or their votes.

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<sup>38</sup> This, as I have already noted, was a major defect which enabled parliament to subvert the draft constitution as adopted by the constitutional conference. President Moi was strongly opposed to a constituent assembly, not trusting the people and an open process, and civil society was strongly opposed to parliament which was under the dominance of the president, not known as a reformer.

<sup>39</sup> Fafard and Reid say, 'As became evident in both Canada and the United States, however, any consensus reached in the hothouse convention environment rarely survived the trip back to the state or provincial legislatures', p. 21. The breakup of consensus is a serious matter if the ratification is to be made by states. In the US, the proceedings of the Philadelphia Convention were considerably more placid than the process for the ratification of its draft by state conventions. Ratification became controversial because the conventions could either say yes or no, but could not amend the draft.

A further issue is the majority needed to adopt the constitution. Sometimes a very high majority is required in order to force the parties to reach a consensus or near consensus. In some countries, the adopting body is required to strive for consensus, and the majority rule only applies if that fails. In South Africa, Kenya and Uganda, an important matter on which no consensus could be established was to be referred to a referendum (in practice in all countries a referendum was avoided, fearing uncertainty). A high majority is desirable if the country is deeply divided, especially on regional or ethnic lines. But it increases the risk that no constitution may be adopted, which means that the old, contested constitution stays in force, or worse, a national crisis is precipitated.

What should be the majority for adopting the constitution? In some countries the adopting body is required to strive for consensus, and the majority rule only applies if that fails. Sometimes a very high majority is required in order to force the parties to reach a consensus or near consensus. A large majority is preferable if the country is deeply divided, especially on regional or ethnic lines as it gives incentives for reaching consensus or broad agreement. Therefore a simple majority of all the members, much less the majority of those present and voting, should be avoided. Quite what majority should be specified depends on the distribution of regional and ethnic membership of the Assembly. A very high majority would no doubt be welcomed by minorities or under-represented groups, but this may increase the probability that the Assembly will be deadlocked, and no constitution adopted at all. It is not possible in this paper to make a firm recommendation on this point—it will in large part be a matter of negotiations.

The usual rule in the referendum is simple majority support, while the principle of qualified majority applies to the assembly. However, in Iraq the system was the reverse of this. No specific rule was provided in the interim constitution for voting in the assembly, and so the general rule of simple majority rule applied. But the voting system in the referendum was more complex (see below for detail).

A concluding observation on the systems of voting: in Iraq the rule was that should, in the constituent assembly or the referendum, the draft bill be defeated, the Assembly would be dissolved and the process would start afresh after elections to the Assembly. This would put the members of the Assembly and the leaders of political parties and religious and ethnic groups under great pressure to agree, i.e., to build a consensus. Here it is important that everyone acts with the greatest propriety and not use any blackmail. Consideration should be given to formal and informal methods of consensus building.

#### *Role of experts and expertise*

If in the past constitutional lawyers tended to dominate the constitution making process, now in a process characterised by popular participation, there is a slight (or sometimes more than slight) tendency to ignore or even denigrate the contribution of legal, political, administrative and economic experts. This contribution includes the giving of advice on the legal and economic matters as well as facilitating dialogue and suggesting ways in which controversies can be resolved (sometimes through the phraseology of an article). Experts can also bring to the attention of decision makers the experience of other countries in dealing with issues that confront the constituent assembly. The help of experts is also needed to establish the system for civic education and the analysis of public submissions and recommendations. And also for the writing of the report of the constitutional commission and the constituent

assembly to accompany the draft constitution—experience shows that the general public has difficulty understanding the text of the draft constitution unless a report explains and justifies the proposals.

If constitution making is pre-eminently a political act, the constitution is also a legal document. Decisions on broad principles, goals and institutions must be made by a body which has the political mandate. The actual drafting must be left to legal draftspersons, who should decide on the architecture of the constitution. Even if it is desirable (as it clearly is) that the text of the constitution is written in simple language accessible to the general public, it is not easy (nor advisable) to avoid well established concepts and some at least of the terms of art. We have to recognise that a constitution is first and foremost a legal instrument, the foundation of all other laws and the source of all public authority. It is constituted by various legal concepts which have specific meanings well known to lawyers. Most provisions of the constitution can be referred to courts for interpretation, which have to apply these well understood and some time not so well understood concepts. A judgment of a court on these provisions can have huge consequences, for better and worse. A single article carelessly drafted, or incautiously inserted, can have a devastating effect on the economy, or political stability, or legitimate expectations. Internal contradictions in the constitution, frequently evident only to the experienced eye of a constitutional lawyer, can cause great confusion or uncertainty. The constitution also divides responsibilities among state organs, often using terms that laypeople do not understand. For example, by loading the constitution with vague and general principles or objectives, we may pass public power to the judiciary, thus weakening the political and democratic process.

But there may be some role for a few foreign experts, so that the assembly could also benefit from foreign experiences, especially of countries with similar circumstances. There are two distinct ways of learning about foreign experiences. One is for some members of the assembly to travel to the countries concerned; the other is to invite foreign experts for visits. The former is less useful, although more attractive to members, than the latter, for if foreign experts visit, they can be exposed to a larger audience and develop some understanding of the local context and issues, which makes it easier for them to relate foreign experiences to the country. However, there may be an incidental advantage in commissioners/delegates travelling abroad—that they get to know each other better and perhaps trust each other more, an important consideration when tensions are high.

## **Part VI: After the Constituent Assembly**

### *Role of referendum*

The referendum has great symbolic value, and, if successful, adds to the legitimacy of a constitution<sup>40</sup>. It is a manifestation of the ultimate sovereignty of the people (and can act as a check on the waywardness of the constituent assembly, particularly of political parties). But the referendum as a method of people's participation is less effective than prior participation by them in the ways described above. When the referendum is the only method of people's participation, it comes too late: key decisions may have been made in small circles, and the real public debate takes place after these decisions; the debate is therefore on the merits and demerits of the draft,

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<sup>40</sup> Ironically, it is for this reason that German politicians refused to have a referendum on the draft approved by the parliamentary council (which refused to call a constituent assembly)—they preferred to regard the constitution as temporary, both because it was negotiated under the auspices of occupying forces, and excluded what became East Germany. See Merkel, *op. cit.*

not of alternatives and the only choice is rejection and approval (as is the case with the European Union draft constitution). But of course the knowledge that the draft will be ratified through a referendum may serve to influence negotiators to seek the common or moderate ground.

The difficulty of reaching agreement in a multi-ethnic state cannot be underestimated. A consensus on the constitution put together patiently and carefully can be upset in a referendum. Depending on the majority required, it gives the largest community the means to impose its will on others. The problem can be met if the majority is higher overall or has to be expressed in a specified number of regions, though this gives a minority a veto, which may be deeply resented by the majority.

The referendum is generally thought of as a form of ratification of the constitution, following the end of a long process. But sometimes a referendum can be the basis of the initiation of the process. In East Timor the constitution making process started when the East Timor rejected in a referendum the autonomy law negotiated between the UN, Portugal and Indonesia, thus opting for independence. In the former Yugoslavia, Slovenia and Croatia held a referendum to decide on separation from the Yugoslav state<sup>41</sup>. A referendum can also be used to resolve a critical before starting on constitution making. In Nepal some have proposed that even before the constituent assembly meets, a referendum should be held on the future of the monarchy<sup>42</sup>. There may be some advantage in such pre-determinations, but they can also create controversy and polarisation at the very start, and render irrelevant attempts to find some negotiated settlement of the issue.

If there is to be a referendum, then the rules for referendum, particularly the system of voting, become part of the decision making process (there was no referendum in the US, Japan, or India or Germany, and in the US the ratification was by state conventions called specially for this purpose<sup>43</sup> and in Germany by the state legislatures). Referendum is fairly common (it is standard practice in Switzerland, Australia, and France, although not in the 18<sup>th</sup> century, and was adopted in Spain, Portugal and Iraq). In South Africa, Uganda and Kenya a referendum was to be held only if, on an important matter, there was no two-thirds support in the constituent assembly. This gives delegates an incentive to reach consensus—unless it is a majority which may consider that its chances of getting what it wants are stronger in a referendum than in the constituent assembly. To some extent this was the situation in

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<sup>41</sup> In its famous decision on the right of Quebec to unilateral secession, the Canadian Supreme Court ‘modified’ the constitution to say that if a referendum in that province clearly supported secession, the federal government would have to negotiate with the provincial authorities on the terms of the secession—thus triggering off the formation of the constitution of an independent Quebec.

<sup>42</sup> This is not unlike the situation in Kashmir as the Constituent Assembly was to start its work, and some suggested that the question of the future status of the monarchy should be decided in a prior referendum. In this case the proponents of the referendum were supporters of the monarchy who considered that a referendum would endorse the monarchy and thus foreclose the option of abolition favoured by the premier, Sheikh Abdullah. The Indian government opposed the proposal, for reasons to do with the international complexity of the Kashmir problem. See the interesting discussion in Karan Singh, *Autobiography* (Oxford University Press, New Delhi, 2006) pp. 137-138. Karan Singh was then Regent (and heir-apparent) and the constituent assembly could be convened only with his approval—however, he gave in to the entreaties of Nehru—and one of the first acts of the Constituent Assembly was to abolish the monarchy.

<sup>43</sup> Madison argued that if the ratification was by state legislatures, they would say no, since the draft transferred some of their powers to the national government. So he suggested that each state should have special convention for this purpose. But no referendum was proposed, perhaps because they did not trust the populace.



South Africa where the elections to the constituent assembly had demonstrated a huge majority for the ANC. The result was that the minority parties were more willing to compromise in the assembly where they were more likely to negotiate a better deal than in the yes or no polarity in the referendum.

In Iraq, there had to be a majority overall in the referendum, but the draft could be vetoed by three or more provinces (out of 18) if each of them rejected it by a negative vote of two-thirds. The rule was inserted for the benefit of Kurds, but clearly demography would have made it possible for the Shias to veto the draft, and perhaps also the Sunnis. It was unclear that the members of the constituent assembly paid much attention to the need for consensus in order to surmount the referendum challenge, except towards the end. The Sunnis support in the referendum was solicited by others, with the promise of a review of the constitution. Even then the Sunnis nearly managed to torpedo the draft (which was accepted by a minority in all three Sunni dominated provinces and rejected by two-thirds in one of them).

### *Implementation Mechanisms*

Constitutions which are the product of long negotiations in which different interests are carefully balanced, or which seek to make fundamental changes in the organization of the state and society, or are agreed under external pressure are not easy to implement. Many provisions of the constitution are inevitably in the form of general principles which need legislation setting out the rules and institutions to give to effect to them. In some, non-common law systems, even if specific, constitutional provisions are not binding without legislation, for example China and France. In Cambodia both the government and the judiciary take the position that constitutional provisions are not directly binding. Even in the common law, many provisions cannot really become effective without legislation. The reformist agenda of the 1990 constitution of Nepal, including decentralisation, was not implemented by the parliament or the executive—and this is one cause of the disenchantment with the constitution.

If the constitution is made by a constituent assembly and the necessary legislative administrative measures for its implementation are left to parliament and the executive, there is the danger that only those provisions which find favour with the parliament or the executive will be given effect to. Even if the constituent assembly is transformed into the parliament (and its members therefore committed to principles that they have adopted in another capacity), there is no guarantee that the new government would show a similar commitment.

Therefore special attention needs to be paid to the mechanism for its implementation and enforcement. One possibility is to set up an independent commission for a reasonable period which is necessary to ensure the implementation of the constitution by preparing or causing to be prepared legislation on the principles and provisions that require legislation, and to require the executive to take the necessary administrative steps to fulfil the constitutional obligations of the executive. Such a commission was proposed in the Kenya draft constitution; it is included in the Afghanistan constitution.

Ancillary provisions include providing a schedule attached to the constitution containing a list of legislative and other steps necessary for implementation and the deadlines for action. In order to avoid the risk of inaction, it is possible to have a

constitutional provision that principles should be implemented by executive authorities so far as possible even if no legislation has been passed, and that courts to be able to make orders within the same framework. It may be possible to empower civil society to participate in the implementation and mobilisation of the constitution, for example by giving them a role in taking cases to court to compel implementation. As a final example, it may be possible to make implementation of certain principles as a kind of conditionality, e.g. for the assumption of specified powers by the executive or the legislature.

But this is “supply side”. The implementation and mobilisation of the constitution also depends demand – on the initiatives of the people, individually and through their organisations to seize the opportunities presented by the new constitution, and insist on their rights being enforced, and on performing their own duties. Whether this happens depends on the people’s understanding of the constitutional provisions/mechanisms.

All these provisions also place a great burden on the courts, which they may be better able to discharge in some traditions than others. It may also depend on whether there is a court specially charged with a role in the enforcement of the Constitution, whether it is termed a constitutional court or not.

Does the constituent assembly have any role in this post-constitution stage? Individual members may well play a part, whether in official positions or in civil society. Interestingly, no member of the French Assembly of 1789 was permitted to hold public office for 10 years; in the event this was something of a disaster for it barred some of the best qualified.

## **Part VII: Conclusion**

It is clear from this account that there are numerous choices to be made in the design of the constitution making process. These decisions will have major impacts on the process and the outcome. I have tried to suggest some of the critical factors in decision making.

However, there is one factor which I have not discussed and which may be said to be the most important of all. It is the willingness and ability of the political and social leaders to provide guidance, encouragement and support for the process. The need for leadership is the greater the more participatory the process. A participatory process will bring many interests, often competing, to the fore. There will be many ‘spoilers’: groups or individuals who have no interest in change, as they perceive that their current or future prospects are better served under the existing constitutional arrangements. The decision making rules will be complex. Constitution making processes are more likely to result in a constitution if there is one major political group or individual in charge: the colonial elite in the US, the rising middle classes in France, the Congress Party in India, the military in various ‘democratising’ constitutions in Nigeria,<sup>44</sup> Fretilin in East Timor, the African National Congress in South Africa, Sihanouk and the royalist party in Cambodia, Museveni and his so-

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<sup>44</sup> Rafiu A. Akindale, ‘The Constituent Assembly and the 1989 Constitution’ in Diamond, Kirk-Green and Oyediran (eds) *Transition without End: Nigerian Politics and Civil Society Under Babangida* (Lynne Rienner, 1997)

called ‘no party’ movement in Uganda, and the Ethiopian People’s Democratic and Revolutionary Front in Ethiopia<sup>45</sup>.

But such dominated processes may not reflect the general will and the constitution may remain contested. Therefore when a country is deeply in the midst of a crisis, unsure of its identity, lacking in national integration, sections of its population suffering from a sharp sense of discrimination or marginalisation, where competing values and visions contest, it is critical that participation should be encouraged and managed. The need for deliberation and listening to others, and the willingness to make concessions, is paramount. In these circumstances the success of the progress depends on the presence and participation of women and men of vision, courage and imagination (the likes of Madison, Nehru, Adenauer or Mandela). This will particularly be the case when there is a fragile balance between different social and political groups and consensus building becomes an act of statesmanship.

A final word on the impact of a constituent assembly (and of a constitution making process). Because the primary task of a constituent assembly is to adopt a constitution, its success is judged by whether a constitution is produced and brought into force. This paper has suggested that there are other ways in which to assess the results of a process in general and the constituent assembly in particular. In some conflictual situations, the very demand for a constituent assembly becomes central to politics. The great triumph of the bourgeoisie in 18<sup>th</sup> century France was to convert the Estates-General, convened for the purpose of assuring increased funds to the government, into a constituent assembly. That assembly was partly a witness to, partly oversaw and partly stimulated the most momentous political and social developments in that country. For many delegates the process itself was profoundly moving and formative, turning many into critics of the regime, challenging their class affiliations and sympathies, and developing racial reform agendas. And although the text of the constitution was short lived, the impact of social changes it ushered in and the substance of the text had lasting effect<sup>46</sup>. Thus depending on the circumstances of a country, the work of the constituent assembly can have a transformative effect on social and political structure and as well as ideology. It can give voice to and empower the disadvantaged. It can have a significant impact on political culture. It can help to redefine national values and identity. For these reasons it is welcomed by some and feared by others. What this paper has tried to show is the diversity of

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<sup>45</sup> For an excellent discussion of this issue in a number of African countries, see Goran Hyden and Denis Venter (eds), *Constitution Making and Democratisation in Africa* (Pretoria: Africa Institute of South Africa, 2001).

<sup>46</sup> Something similar can be said about the Indian Constituent Assembly. It was agreed upon and established to bring about Indian independence, with a prior agreement on how to accommodate India’s diversity, which involved a series of autonomies, but principally the separation of Muslim and Hindu dominated provinces into two major constellations held together loosely as a sort of confederation, and a special status for ‘princely’ states. With it also came other principles of communal representation and recognition of corporate (ethnic) identities. The context changed when separate independence was granted to Muslim dominated provinces as the state of Pakistan. This opened up the possibility of a vision that the dominant Indian party, the Congress, had long espoused, of a secular, modern democracy, based on equal citizenship. The whole drama of the unfolding and re-definition of India was happening as the Constituent Assembly met. It was both influenced by these events and influenced them, particularly in firming up the new consensus on the Indian state, and putting it in fine print, in the form of provisions about citizenship, secularism, democracy, federation and integration, human rights and social justice—a vision that has been variously challenged as well as reaffirmed. The crystallisation of it in the constitution (and the growing ideology about the constituent assembly as the ‘founding fathers’) gave it a resilience that has survived many attacks on it.

national experiences, the range of choices open to reformers, and the many ways of defining the mandate of a constituent assembly and structuring its composition and procedures. On these matters depend to a considerable degree the consequences of a constituent assembly.