



Constitution Brief

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Constitutional Negotiations Dynamics, Deadlocks and Solutions

Sumit Bisarya and Thibaut Noel

1. Introduction

Countries often amend their constitutions or enact new ones following major political events, such as the founding of newly independent states, the fall of an authoritarian regime or the end of violent conflict. Significant constitutional reform at a pivotal moment is often a high-stakes process because a constitution regulates access to public power and resources among different groups, is usually difficult to change and thus often constitutes a key turning point for a country.

This Constitution Brief focuses on strategies and mechanisms for breaking a deadlock in constitutional negotiations conducted in an environment of competitive democratic politics. In democratic constitutional reform processes, a diversity of stakeholders with divergent views and conflicting interests may participate in high-stakes negotiations over long-term arrangements for access to public power and resources. In addition, a supermajority is often required in order to encourage broad consensus and support for the new constitutional order. More than solely a technical exercise, the making of a new constitution through an inclusive democratic process is thus first and foremost a political process that requires substantial bargaining, trade-offs and creativity from the parties involved.

While disagreements over divisive topics are likely and even inherent to constitution-making, they may also result in a serious deadlock when stakeholders are unable to reach agreement. A prolonged deadlock can delay or even derail the whole reform process. In this context, it may be advisable to create incentives that can help parties to the negotiations overcome divergence and resolve deadlocks should they occur.

The brief begins by outlining the circumstances in which constitutions are made or substantially changed, and the stakes involved (Section 2). The next section identifies the drivers and the dynamics that shape constitutional negotiations and influence their outcome (Section 3). The final section considers procedural measures and constitutional design techniques that can be used to prevent protracted deadlock and to overcome serious disagreements when they occur (Section 4).

2. About constitutions and constitution-making

Comparative experiences illustrate how specific political contexts influence and shape processes of constitutional reform and their outcomes. The root causes driving the demands for constitutional change and the existing power balance between different stakeholders in a given country are some of the contextual factors that greatly influence the negotiation of the constitution and its outcome. Constitution-making processes therefore vary considerably, depending on the context.

In spite of their differences, in general constitution-making processes share the following features:

- **Constitution-making is higher law-making.** The process of making a constitution and the context in which it unfolds differ from those of ordinary law-making. Constitutional change often follows exceptional political events such as internal armed conflict, the end of authoritarian rule or independence. In these moments, there is often a greater political awareness among all elements of society, leading to widespread demands for the refoundation of the political system. Additionally, as a constitution is a country's fundamental and supreme law, the constitution-making process is often designed in a way that confers it legitimacy and authority over ordinary laws and all legal norms. Constitutions are typically negotiated through processes that require the participation and consent of more stakeholders than is required for enacting an ordinary law. While laws are made by transient parliamentary majorities to regulate specific policy matters and may be revised or even replaced after a few years, constitutions are—in theory—made 'by the people' to bring long-term fundamental changes to the organization of the state and society. As such, constitution-making can be described as higher law-making.
- **Constitution-making involves high stakes and takes place in divided political settings.** Making a new constitution is a high-stakes process: it redefines access to public power and resources, it often seeks to address demands for autonomy and recognition of identity, and it provides a long-term blueprint for societal change. Also, by design constitutions are difficult to change. Constitution-making processes often take place in a polarized political environment characterized by a low level of trust among the stakeholders involved. This is the case especially in constitutional reform processes following armed conflict, or where an outgoing authoritarian regime is part of the negotiations.
- **Inclusive processes foster enduring constitutions.** Constitutions tend to last longer when a diversity of stakeholders reflecting the pluralism of society has been involved in making them (Elkins, Ginsburg and Melton 2009). Constitutions whose provisions are negotiated and accommodate a variety of interests can foster far-reaching acceptance and ownership, and can reduce demands for renegotiation. The Brazilian Constitutional Convention of 1987–1988, for example, was characterized by wide-ranging inclusivity and public participation, and resulted in a constitution that has endured longer than most other Latin American constitutions. Therefore, it is generally recommended that the reform process be designed in a way that ensures the involvement of different factions of society in producing and approving the constitution. While inclusivity can prevent enactment of one-sided constitutions, it can also make the constitutional negotiations more difficult. In Nepal, for instance, the Constituent Assembly elected in 2008 was the most inclusive elected body in the country's history. Eight years of protracted negotiations, which included the election of a second Constituent Assembly, were necessary for the numerous groups involved to reach compromise, and even then there were important groups who rejected the final constitutional settlement. The difficulty of reaching agreement was a product of both how divisive the issues were and the size and diversity of the Constituent Assembly.
- **Constitution-making is a multidimensional phenomenon.** Constitution-making is simultaneously a legal, social and political process. A constitution is a legal document that creates institutions, empowers them, imposes limits on their authority and is enforceable in court. Therefore, drafting a constitution requires an attention to technical detail to ensure coherence across the different parts of the charter and a workable system of government. Constitution-making can also be described as a social process during which parties to the negotiations define commonly held values and a foundational vision for the society that

will guide government actions. But above all, constitution-making is a political process. When developed in a setting of competitive democratic politics, a new constitution is the outcome of intense negotiations where stakeholders with conflicting interests discuss, bargain and make trade-offs to develop a text that at least most of them would eventually support.

3. Drivers and dynamics of constitutional negotiations

Generally speaking, constitutional reform processes involve making choices under different types of constraints (3.1) and engaging in various bargaining strategies (3.2).

3.1. Upstream and downstream constraints (Elster 1995)

Contrary to the notions of constituent power according to which constitution-makers have absolute freedom in deciding on the content of a new constitution (Burdeau 1983), comparative analyses have shown that two types of constraints may be present on a constitution-making body which influence the scope of choices of the constitution-making body and/or its members (Elster 1995).

On one hand, the decision to initiate a constitutional reform process may impose specific requirements on the procedure or on the content of the reform. These **upstream constraints** are imposed on the constitution-making body, or its members, before it starts to deliberate. A recent example of upstream political constraints can be found in Sri Lanka, where parties competing in elections to the constitution-making body in 2015 committed to incompatible constitutional arrangements. The Tamil National Alliance ran for election promising to deliver a federal constitution, whereas the Sri Lanka Freedom Party vouched to maintain a unitary state (Bisarya 2016).

Peace agreements are increasingly exerting upstream constraints on constitution-making bodies. This is the case in South Sudan, for example, where the 2018 peace agreement provides a commitment to establish a federal state structure through the drafting of a new constitution. In this case, the constitution-making body will have no choice but to set up a federal system when considering the future state structure.

In cases where the reform process aims to amend the existing constitution rather than draft a new one, the existing text is itself an upstream legal constraint, as it lays out the procedure to be followed, and may also provide limitations with regard to the content of the amendments. In Germany, for instance, the Constitution provides that amendments require approval of two-thirds of both houses of the legislature, and further prohibits changes to certain constitutional principles such as the democratic form of government and the federal state structure. In the Philippines, the amendment procedure laid out by the 1987 Constitution greatly complicated the peace process involving insurgent groups seeking special autonomy in the Bangsamoro region. The peace agreement signed in 2008 by the government and the Moro Islamic Liberation Front was ruled unconstitutional by the Supreme Court because its terms promised to adopt any constitutional amendments that were necessary for its implementation, whereas the power of constitutional amendment rested exclusively with the national legislature (Anderson and Choudhry 2019). In 2014 a new peace accord was brokered which opted to grant a special autonomy status to the Bangsamoro region through an organic law to avoid the difficulty of getting a constitutional amendment approved. The Bangsamoro Organic Law, which defines the autonomy status and the basic government structure of the Bangsamoro region, was adopted by the national legislature in 2018 and ratified by the people in Bangsamoro through a referendum in 2019.

On the other hand, **downstream constraints** may arise where the draft produced by the constitution-making body needs to be ratified by another body or through a referendum. In such a process, the constitution-making body needs to satisfy the preferences of the ratifying authorities, which might act as a constraint on what the constitution-making body can propose. In Kenya, the 2010 Constitution was negotiated between political parties but had to be approved by the people in a referendum. In order to secure the support of the teachers' union and its members, political parties agreed to include a Teachers Service Commission in the draft submitted to referendum.

Even without a referendum, representatives may feel constrained in their scope for negotiation by the need to retain the future political support of their constituents.

As these examples reveal, both upstream and downstream constraints can have an important influence on the outcome of the constitutional reform process.

3.2. Structure of interaction and types of bargaining

While constitutional reform processes vary considerably in their structure and dynamics, the following framework, proposed by Gabriel Negretto, is useful to understand the process of constitutional negotiations (Negretto 2013). The overall setting is as follows. First, the initiation of negotiations implies a number of actors who are interested in creating new constitutional rules. Second, these actors have different and conflicting views and interests regarding what these new rules should be. Third, since the new constitutional rules require a broad consensus to be adopted, the different actors will have to engage in intense negotiations to broker a compromise that can be supported by a sufficiently broad number.

Within this setting, the question then becomes, What factors can encourage, or hinder, successful negotiations?

One factor is whether actors have some shared principles or overlapping interests which could provide overarching incentives to reach agreement. This could range from basic constitutional principles, either explicitly or implicitly agreed to by all parties, to contextual circumstances such as the presence or threat of a major crisis. For example, in Nepal it was agreed early in the negotiations as an overarching principle that Nepal would be a federal republic, and the crisis caused by a major earthquake in 2015 provided an incentive to finish the long-delayed constitution-making process, contributing to a consensus among most major parties to finalize the constitution.

A second factor is whether the disagreements among the parties over the content of the constitutional reform are overlapping or cross-cutting. Where actors have cross-cutting preferences across multiple constitutional issues, compromise by means of mutual concessions will be easier to reach. In such cases, negotiating parties can engage in trade-offs across issues: one party can concede to a demand made by its counterparts on a particular issue in exchange for support on another issue more critical to them. The 1978 constitution-making process in Spain is an example where differences existed among negotiating parties with respect to various issues, including the system of government, territorial organization and socio-economic issues. However, as the disagreements were cross-cutting, bargaining and vote-trading enabled a consensual overall solution (Negretto 1998; Colomer 1995).

The constitutional reform process that took place in Argentina in 1994 provides another example. Incumbent President Carlos Menem initiated a constitutional amendment process with the aim of removing the constitutional proscription on re-election to consecutive presidential terms that was preventing him from seeking a second term. However, his party was unable to amend the Constitution without the support of the main opposition party. The opposition seized this opportunity to bargain with the majority party, agreeing to consider the possibility of consecutive presidential re-election in exchange for the limitation of presidential powers. In the end, the parties agreed to a compromise that permitted immediate re-election for one term in exchange for attenuating the powers of the president. While the reform process was initially limited to the re-election of the president, the need to negotiate with the main opposition party led to a more comprehensive revision (Negretto 1998 and 2017).

A third factor is the distribution of power among parties. In some cases, one side has enough power (e.g. seats in the legislature, coercive power through control of the security sector) to force a unilateral change without engaging in negotiations. In the cases considered in this brief, and in the vast majority of democratic constitutional reform processes, no one party can force its own solution and must engage in bargaining with other groups.

Lastly, there is the issue of electoral uncertainty. Where parties have a high degree of electoral uncertainty, they are more likely to engage in cooperative bargaining, as they want to minimize

the potential costs of losing elections. In such a case, all parties will have an interest in establishing a constitutional framework that provides certain guarantees of access to power as well as effective checks and balances. By contrast, if parties are certain they can win elections, they are less likely to seek consensual solutions and will seek to maximize the reward of winning elections (Negretto 2013: 61).

4. Preventing and resolving deadlocks

While disagreement over divisive topics will inevitably arise in the course of constitutional negotiations, there is a danger that they may result in a prolonged deadlock that can significantly delay or even trigger the collapse of the reform process. In this context, mechanisms that can help negotiating parties to overcome these divisive issues are of crucial importance. These mechanisms can be grouped into two types: procedural measures that can help to prevent a protracted deadlock (4.1) and constitutional design techniques to resolve serious disagreements when they occur (4.2).

4.1. Preventing deadlock through process design

To minimize the chance of a protracted deadlock, constitution-makers can specify certain procedures, before substantive negotiations begin, that will foster constructive discussions and incentivize compromises throughout the constitutional reform process. Some examples are listed in Table 1.

Table 1. Procedural measures that can help prevent deadlock

1. Organizing the agenda	<ul style="list-style-type: none"> • constitutional principles • scheduling contentious issues • cross-issue negotiations
2. One-text rule	
3. Structuring the constitution-making body	<ul style="list-style-type: none"> • committee of the whole • harmonization committees
4. Third-party involvement	<ul style="list-style-type: none"> • reference groups • referendums and elections

4.1.1. Organizing the agenda

Constitutional negotiations must start somewhere. How the agenda is structured will be determined by the context and the positions and interests of the parties. Some recurring strategies to encourage consensus include the following:

Constitutional principles. The constitution-building processes of Kosovo, Namibia, Nepal and South Africa are examples of negotiations which started with overarching principles to guide subsequent discussion on the details of the constitution. Agreement on principles can be used to build trust and provide some guarantees in terms of broad parameters for the ensuing constitutional negotiations and the resulting text, while being abstract enough to appeal to a broad set of parties and leave scope for negotiations. In Nepal, following the signature of a peace agreement between the government and the Communist Party of Nepal-Maoist in 2006, the main negotiating parties first agreed that the future constitution would have to establish a multiparty democratic system and a federal state structure, but without specifying institutional details. In South Africa, the constitutional reform process began with a series of round tables during which stakeholders not only established a road map for constitutional reform but also determined 34 binding constitutional principles to guide the content of the final constitution.

Scheduling contentious issues. In some cases, it may be advantageous to begin negotiations with non-contentious issues to build both a level of trust and a sense of momentum. In other cases—in particular where there has been a recent history of constitutional reform debates—it may be prudent not to reopen debates where consensus has previously been reached, but instead to focus

directly on the more contentious issues. For example, in the relaunch of the Kenyan constitutional review process in 2009, the Committee of Experts was directed to first compare the various drafts which had been produced by recent failed attempts at constitution-making to produce a ‘harmonized draft’ built around the areas where previous drafts converged. The areas where there was divergence among the previous drafts, on the other hand, were identified as ‘contentious issues’ and prioritized for consultations with the public.

Negotiating issues and not provisions. Sometimes constitution-building bodies seek to use the existing text as a foundation and negotiate article by article and chapter by chapter for changes. While this can seem a logical way to review a text, it can also lead to a deadlock. Constitutions fit together holistically, and changing one part can lead to consequences in another part of the constitutional framework. Tackling issues, rather than provisions, allows negotiators to engage in trade-offs and bargains concerning different provisions of the constitution, increasing the chances of progress towards a consensual and holistic final text. For example, parties may agree that one problem to address through reform is a winner-takes-all electoral system to choose an overly powerful president, through which the president’s ethnic group is favoured until the next election. This issue could be addressed through a variety of reform options including: change in the system of government, changes in the electoral system for electing the president, better checks and balances at the national level, greater devolution of power or other mechanisms. Debating the issue as a whole, rather than individual provisions, can expand the horizons of negotiations and resolve deadlocks through cross-issue agreements.

4.1.2. One-text rule

Comparative experiences have also shown that allowing negotiations to take place only over a **single text** has often been useful. Constitutional negotiations usually start with an initial phase where all parties present and discuss their respective proposals. Consolidating proposals into a single text after some initial negotiations can foster a sense of collective ownership of the initial text. Perhaps most importantly, the single-text rule also ensures that parties focus on the same proposals while engaging in more-in-depth negotiations and cross-issue bargaining. In contrast, where parties are allowed to develop their own drafts, and use those as a basis for negotiation, stakeholders tend to argue for their positions based on their own text and the provisions they originally proposed. In such cases, parties are more likely to discuss only the points made in their own proposals rather than address interests and explore various alternative options for compromise. Spain (1978) and South Africa (1996) are both examples where negotiations took place over a single draft.

Tunisia presents an interesting, if atypical, variation on this approach. Two blocs within the National Constituent Assembly strongly disagreed over the critical issue of the system of government, but they arrived at an early consensus on many other issues. Consequently, the Assembly published a first draft which included three columns in the chapters on the system of government,¹ including the differing opinions of the major groups. In this way, the Assembly was able to garner public feedback on the differing views, while also keeping the process moving forward within a single text.

4.1.3. Structuring the constitution-making body

The choice of constitution-making body tasked with conducting the constitutional negotiations is often a crucial question, and various options exist (Bisarya and Zulueta-Fulscher 2018).

Where the constitution-making body is inclusive and relatively large, a procedural device that can help prevent a protracted deadlock is the possibility to discuss a contentious issue in a **committee of the whole**. Such a committee consists of all the members of the constitution-making body, and it uses the flexible rules of committee procedure instead of the more rigid rules normally used in a plenary session. In instances where members of a thematic committee are unable to reach a compromise on a particular issue, they can refer contentious proposals to the committee of the whole, which can deliberate and negotiate on those issues. Most importantly, the committee

1. For an English translation of the draft, see <https://constitutionnet.org/sites/default/files/draft_constitution-english.pdf>.

of the whole can also vote on these proposals, but the results would not be binding on the constitution-making body, as they are made at the committee stage. Moreover, votes are usually by majority rather than supermajority. The committee of the whole allows parties to test ideas—for example, by examining what kinds of majorities or opposition they would generate. During the US Constitutional Convention of 1787, the structure and powers of the federal legislature quickly became a contentious issue (Collier and Collier 1986). While members of the thematic committee tasked with designing the future legislative branch were unable to reach a compromise, they submitted the contested proposals to the committee of the whole to see the level of support or opposition they would generate from among the delegates. The discussions and the results of the non-binding votes in the committee of the whole enabled the delegates to better understand the positions of the different states' delegations on those issues, and helped them to identify alternative options for compromise and potential allies.

Larger assemblies will often use thematic committees to negotiate particular issue areas, but they will also have an executive committee (sometimes called a **consensus, constitutional or harmonization committee**) composed of political leaders to integrate the outputs of thematic committees, as well as to come to an agreement on unresolved issues. This allows lower-level party members to thrash out details, and prevents leaders from becoming entrenched in starting positions, enabling them to avoid losing face by making concessions. Instead, they can sit on a 'high' committee and resolve differences directly with their counterparts from other parties.

Outside of formal constitution-making bodies, who actually conducts constitutional negotiations is an important question. Having top-level leaders participate directly in the negotiations throughout the duration of the constitutional reform process can make compromise more difficult to broker because of the leaders' fear of losing face. But if the people sitting at the negotiating table are only messengers with no authority to deviate from the instructions they receive from their party hierarchy, this does not allow adequate room for compromise. Ideally, negotiations should take place between people with direct lines of communication to their top-level leaders, and with the authority to make decisions within certain parameters. This way, negotiators are able to bargain, while top-level leaders can intervene in the negotiations to resolve a deadlock on particularly contentious issues. Such a scenario happened during the negotiations for the Sudan Comprehensive Peace Agreement in 2005. While the negotiations were conducted between representatives of the government and the Sudan People's Liberation Movement (SPLM), Vice President Ali Taha and the SPLM leader, John Garang, came together and intervened directly to resolve a protracted deadlock that had arisen over certain technical issues (Choudhry and Haysom 2010).

4.1.4. *Third-party involvement*

In some cases, constitution-makers faced with substantial disagreements have referred the contentious topics to a third party. A third party could consist of a group of thematic experts or of representatives of civil society organizations that would act as an advisory body by providing alternative views and proposals to the constitution-making body on the divisive issues plaguing the negotiations. Consultation with third parties can change the dynamic of the negotiations and depoliticize a particular issue. In Kenya, the Committee of Experts tasked with preparing a draft text had a duty to consult with a reference group—consisting of 30 members selected by key interest groups—on pending contentious issues, and did so for three main divisive topics: the system of government, devolution of powers and transitional provisions that would regulate the entry into force of the future constitution (*Daily Nation* 2009). These consultations aimed to gather the views of different stakeholders on these matters and to broaden the scope of options that the committee could consider.

In some cases, third-party involvement has also contributed to maintaining momentum in constitutional negotiations, even when the involvement of such a party was not formally foreseen from the outset. During the constitution-making process in Tunisia, four civil society organizations formed a consortium—the National Dialogue Quartet—to act as mediator amid growing popular protests and heightened tensions between the Ennahda government and opposition parties. Through a series of dialogues, the quartet helped political parties to find a way out of the crisis by

reaching an agreement on the formation of a new government, and to get the constitution-making process back on track.

Finally, the people at large can resolve deadlocks through two mechanisms—elections and referendums. In Nepal, the Supreme Court dissolved the deadlocked Constituent Assembly, which could not meet the two-thirds majority threshold, after a constitutionally imposed deadline had been extended four times. New elections changed the party composition of the Constituent Assembly, which was able to reach agreement after 18 months of negotiations and amid a crisis caused by a major earthquake. In South Africa and Tunisia, the respective constituent assemblies adopted a text by a two-thirds vote of all their members. There were provisions, however, so that if such a supermajority could not be reached, a text supported by a simple majority of all members of the constituent assembly could have been sent for adoption through a national referendum. Although such a two-pronged decision-making formula would usually benefit the majoritarian party, in both South Africa and Tunisia the formula encouraged all negotiating parties to make concessions, as in both cases all groups wanted to avoid the risk of being seen to have failed in their mandate, and of seeing the constitution rejected by the people in a referendum.

4.2. Overcoming a deadlock on divisive topics through constitutional design

When a deadlock emerges due to disagreements over a specific topic, parties involved in constitutional negotiations have used a number of constitutional design devices to overcome this stalemate. These include (1) substantive trade-offs, (2) incremental reform strategies and (3) various forms of deferral and temporary arrangements.

4.2.1. Substantive trade-offs

A common strategy used by constitution-drafters to overcome disagreements on a particular topic is to make trades-offs through creative constitutional design. A good example is found in the US Constitutional Convention of 1787, where one of the sharpest disagreements related to the representation of states in the federal legislature. Delegates from the smaller states were ordered by their respective state legislature to vote for equal representation of the 13 states in Congress, whereas delegates from the most populated units were strongly in favour of a system of representation based on population. This controversy threatened to sink the Constitutional Convention, as delegates from the small states considered quitting the convention if proportional representation were adopted. A compromise was eventually reached through a creative trade-off. Delegates agreed on a bicameral parliament, with the House of Representatives formed through representation based on population, and the Senate based on equal representation of each state (Collier and Collier 1986).

Similarly, in South Africa, the federal state structure designed in the 1996 Constitution was the result of a trade-off between leaders of the former ruling National Party and the African National Congress (ANC), led by Nelson Mandela. Building on its strong popular support, the ANC wanted to establish a pure majoritarian democracy to enable the party to implement its socialist programme in order to build an egalitarian society following the end of the discriminatory apartheid regime. Leaders of the National Party, however, worried that the ANC would reduce the wealth of the white elite through redistributive policies. The compromise was to design a federal system featuring elements of majoritarian democracy at the federal level but guaranteeing some level of autonomy to provinces over certain policy matters. The negotiated federal arrangement has enabled the ANC to win large majorities in every national election since the transition to democracy in the 1990s and the opposition Democratic Alliance to enjoy power and control over some key policy matters, such as healthcare, housing and welfare, in the Western Cape, the country's richest province.

In some cases, negotiating parties brokered a compromise on a particular issue by including the controversial provision in question in a different place in the constitutional text. In India, the constitution-making process was plagued by a deep cleavage over the prohibition of cow slaughter. Conservative Hindus requested a strict constitutional ban on cow slaughter, but secularists strongly objected, arguing that such a ban would go against the secular nature of the Constitution. The drafting technique used to reach a compromise was to introduce a prohibition of cow slaughter in

a separate section of the Constitution, namely ‘Directive Principles of State Policy’. This section comprises non-legally binding policy objectives aimed at guiding the actions of future legislators. The compromise was to make the ban on cow slaughter a policy recommendation rather than a legally enforceable provision (Khaitan 2018).

4.2.2. Incremental reform strategies

In cases of paced transitions, where the incumbent regime was involved in the constitutional negotiations and still held a significant degree of power, it has sometimes been useful for parties to alter the existing constitution through a gradual series of amendments as a way to accommodate stakeholders favouring the status quo. Incremental reform strategies were used, for instance, in Chile and Indonesia to progressively reduce the role of the military in politics and advance democratic rules (Barany et al. 2019).

Following the collapse of President Suharto’s authoritarian regime in May 1998, the various factions in Indonesia’s parliament agreed to modify the existing Constitution through a series of amendments rather than produce a new charter. Due to the long-standing involvement of the military in politics, this step-by-step process was agreed as a pragmatic way to limit the risk that the military bureaucracy might resist and block reform from the outset. Adopted in October 1999, the first amendment aimed to limit the risk of a return to authoritarian rule by reducing presidential powers and strengthening those of the legislature. In August 2000 the People’s Consultative Assembly (PCA), which was in charge of the review process, discussed a second amendment bill that was much broader in scope. While the second amendment bill sought to make significant changes to 16 chapters of the Constitution, factions within the PCA reached an agreement on seven of the chapters. In order to avoid a prolonged deadlock and secure the agreed changes, negotiating parties decided to adopt the provisions on which there was agreement and to postpone negotiations on the remaining contentious issues for future amendments. The second amendment introduced a bill of rights drawn from international human rights law, strengthened decentralization and established representative councils in the regions, and granted further powers to parliament. In September 2000 PCA members, with the assistance of an expert team, reopened negotiations over the remaining contentious issues. Throughout this third amendment process, the parties involved agreed to move to a presidential system, to create a second chamber of parliament, to strengthen judicial independence and to establish a constitutional court. The fourth constitutional amendment, adopted in August 2002, specified the modalities for a second round of presidential elections and provided for a fully elected legislature, thus addressing the last two divisive issues. Through four consecutive amendments between 1999 and 2002, Indonesia succeeded in establishing a new democratic governance framework by significantly transforming the existing Constitution. The number of words in the charter increased from 1,393 to 4,559, and 89 per cent of the articles of the amended Constitution are either new or amendments of the original provisions (Indrayana 2008). Most importantly, this step-by-step reform process facilitated the gradual retreat of the military from politics. The negotiating parties first agreed to reduce the share of military appointees in the legislature from 20 per cent (100 seats) to 15 per cent (75 seats) in 1995, and to 7.5 per cent (38 seats) in 1998. As part of the second amendment adopted in August 2000, stakeholders agreed that, as of 2009, the legislature would be composed solely of elected representatives. Finally, during the negotiations over the fourth amendment, the military agreed to exit politics as of the 2004 elections.

A similar incremental reform strategy was used in Chile, although over a longer period of time. Constitutional reform in Chile unfolded from the 1988 referendum, when the people refused to extend the term of the incumbent President, General Augusto Pinochet, beyond an eight-year transitional period. Pinochet’s regime and opposition parties initiated the first constitutional amendment process before the next general elections, scheduled for late 1989. The negotiating parties compromised on an amendment proposal that prepared for a transfer of power to a civilian government in exchange for maintaining a reduced but privileged role for the military in politics. Opposition parties agreed to keep the military-appointed senators, including Pinochet as senator for life, in exchange for an increase in the number of elected senators. Similarly, opposition leaders agreed to retain the National Security Council (NSC) in exchange for introducing a new civilian

seat to balance the number of civilian and military members. Some of the NSC's powers were also transferred to the elected president. In addition, the military was able to protect its significant institutional autonomy, since a four-sevenths majority was required in both houses of parliament to amend laws affecting the military profession. These constitutional amendments were adopted by referendum in July 1989; they also lifted the prohibition on Marxist parties and introduced a more flexible constitutional amendment procedure. Between 1989 and 2005 some of the vestiges of authoritarianism were removed through a series of constitutional amendments and legislative reforms. For example, these reforms ended film censorship, strengthened judicial independence, allowed the direct election of municipal councillors and enshrined gender equality. After several attempts, political parties succeeded in ending the involvement of the military in politics through constitutional amendments in 2005 that eliminated military-appointed senatorial seats, transformed the NSC into an advisory body to the president and granted the president the power to dismiss the commanders-in-chief of the armed forces.

4.2.3. Deferral and temporary arrangements

An alternative solution to overcome a substantive deadlock consists in deferring final decision-making on particularly controversial constitutional issues to the future. Negotiating parties can do this through a variety of constitutional devices and drafting techniques, namely sunset clauses, sunrise clauses, mandatory periods of constitutional review, by-law clauses and constructive ambiguity.

A **sunset clause** is a temporary constitutional provision that expires automatically after a specified period of time. Such constitutional provisions with a built-in expiration date can potentially satisfy the conflicting interests of all the parties involved. The demand of the party insisting on the provision is satisfied in the short term, while opponents are ensured that the provision is only temporary. In Portugal, a sunset clause was used in the 1976 Constitution to grant a temporary role to the military to ensure a smooth transition from an authoritarian regime to a democratic system. Following the military coup that overthrew the authoritarian Estado Novo regime in 1974, a Constituent Assembly was elected to draft a new democratic constitution. The drafters established the Council of the Revolution, composed of a majority of military members, to oversee the transition process and to serve as the 'guarantor of the proper working of democratic institutions, of fulfilment of the constitution, and faithfulness to the spirit of the Portuguese revolution of 1974' (art. 142 of the Constitution). The Constitution empowered the Council of the Revolution to advise the president and to judge the constitutionality of all laws enacted by the legislature. The Council of the Revolution could also order parliament to pass any law necessary to implement the Constitution. Most importantly, the Council of the Revolution had veto power over any constitutional amendment but only during the first four years of the first legislature. This sunset clause ensured that the constitutional prerogatives of the military would only be temporary. In fact, the Council was abolished through a constitutional amendment in 1982 and replaced by a constitutional court and a civilian advisory body (Varol 2012).

A closely related constitutional design device is a **sunrise clause**. A sunrise clause defers the effective date for a constitutional provision until a date in the future. India provides an example (Choudhry 2016). The official language of the Union government was one of the most divisive issues in the Constituent Assembly. At independence, the official language of the British colonial administration was English, spoken by less than 1 per cent of the population. Hindi was spoken by approximately 40 per cent of the population. Very few speakers of other languages spoken in India spoke Hindi. In the Assembly, the main question was whether to replace English with an indigenous language as the Union government's official language. One camp called for Hindi to be the sole official language of the government and legal system, and another argued for both English and Hindi to be the official languages of the Union government and the legal system. The result was a compromise. Article 343(1) of the Constitution of India declares Hindi to be the official language of the Union, but article 343(2) delays the implementation of article 343(1) for 15 years, during which the status quo with respect to the use of English remained in place. Article 343(3) provides that the delay could be extended indefinitely through ordinary legislation. This shifted the burden of legislative inertia onto those who wished to keep English in place, without requiring

the two-thirds majority needed for a constitutional amendment to article 343. These mechanisms kept open the possibility that the transitional arrangements could be continued indefinitely. They also channelled these questions into the legislative process and ordinary politics.

This is in fact what happened. Article 344 directed the creation of a commission to develop a plan for the transition from English to Hindi, which was struck in 1955. The commission rejected extending the transition any further. But dissenting members of the commission disagreed intensely, especially with respect to the language of the exam of the All India Services, which staffed the senior-most ranks of the central and state bureaucracies—arguing that adopting Hindi would be neocolonial in non-Hindi states. In Tamil Nadu, there were anti-Hindi protests which led to 66 deaths. The resulting compromise preserved the status of English indefinitely by granting a statutory veto on the continued use of English to each non-Hindi-speaking state in the Official Languages Act 1967.

Another constitutional design device that constitution-makers have used to overcome a substantive deadlock is to include a **mandatory review** for particularly contentious constitutional provisions. For negotiating parties, this strategy consists in adopting a specific constitutional design option but agreeing to reopen negotiations on the matter after a specified period of time. Opponents may agree to a particular provision if they are guaranteed that this choice will be renegotiated at some point after its adoption. To illustrate, a mandatory review requirement was adopted by the drafters of Brazil's 1988 Constitution to resolve a protracted dispute over the system of government. Incumbent President José Sarney and the conservative coalition within the Constituent Assembly advocated a presidential system of government while opposition parties wanted a shift towards a parliamentary system. The conservatives succeeded in convincing the opposition to adopt presidentialism in exchange for a clause to allow for a referendum on this issue five years after its adoption. The promise of future review facilitated compromise during constitutional negotiations by reducing the cost for the opposition to concede to presidentialism (Dixon and Ginsburg 2012).

While sunset clauses, sunrise clauses and mandatory periods of constitutional review enable negotiating parties to agree on temporary arrangements, another more common option is to leave the divisive issue undecided and to defer it to the future parliament through a **by-law clause** (Dixon and Ginsburg 2012). This consists in a constitutional provision that explicitly delegates decision-making authority on a divisive constitutional issue to the legislature. Leaving a polarizing issue unsettled and postponing it to future legislative negotiations can be a valuable design mechanism to avoid having it impair the whole constitutional reform process. From a comparative perspective, two types of by-law clause have been used by constitution-drafters: those that expressly require the legislature to regulate a given constitutional issue in the future, and those that simply grant the legislature the possibility to decide on it (Dixon and Ginsburg 2012). By-law clauses are used more often by constitution-drafters on controversial issues which are not at the core of their demands. Negotiating parties may be willing to spend time to reach a compromise on divisive issues that are critical to the reform process, and defer secondary disagreements to the legislature to avoid having protracted disputes on lower-stakes issues that could impair a bargain on priority matters. If the parties involved choose to defer high-stakes constitutional issues, it may be necessary to specify a time period within which legislation must be passed, or to include an interim arrangement in the constitution to regulate the topic in question until a law is enacted. The 1997 Gambian Constitution, for example, provided a period of 10 years for the legislature to decide on the abolition of the death penalty.

The Constituent Assembly of India also used deferral through a by-law clause to overcome a dispute over a uniform civil code (Lerner 2011). Some members wanted the Constitution to provide for a uniform civil code applicable to all citizens to regulate issues such as marriage, divorce and inheritance. Other members, however, advocated keeping the existing system of separate personal law regimes to allow religious minority groups to use their respective traditional laws on these matters. Negotiating parties chose to defer this disagreement by including in article 44 of the Constitution a provision stating that 'The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India'. This article was incorporated as a directive principle, and was thus intended to be a policy recommendation for future legislators rather than a legally binding provision. Similarly, the drafters of Kenya's 2010 Constitution adopted a by-law clause to overcome a controversy on the right to abortion. Christian groups pressed for an

absolute ban on abortion, whereas other segments of society wanted the Constitution to guarantee access to abortion. A compromise option was found between these opposing demands through a constitutional provision declaring that abortion was not permitted unless for therapeutic reasons to prevent maternal mortality or ‘if permitted by any other written law’ (article 26.4). The constitution-drafters thus made it possible for parliament to reopen negotiations and to expand the grounds for abortion in the future.

A related drafting technique consists in deliberately using vague constitutional language in the drafting of divisive constitutional provisions. Often called **constructive ambiguity**, this drafting technique helps parties reach a compromise by agreeing on an ambiguous text that allows negotiating parties to read their different understandings into the text, thus allowing all parties to claim to their constituents that their demands have been met. Constructive ambiguity can be particularly helpful to reach a compromise on issues such as commonly held values, identity or societal goals. Vagueness, however, should be avoided for constitutional provisions that require clarity, including those regulating the structure and responsibilities of the executive, legislative and judicial branches of government.

A good example of the use of constitutional ambiguity involves the way in which the negotiators of the 2014 Tunisian Constitution managed to reach a compromise on the status of religion (Böckenforde 2016). Constitutional negotiations within the National Constituent Assembly (NCA) were marked by severe disagreements between parties that wanted the constitution to establish an Islamic republic and those that wanted to declare it a secular republic. Ennahda, the biggest party in the NCA with 41 per cent of the seats, advocated Islam as the state religion, while some secular parties wanted the constitution to establish a state that was neutral with regard to religion. The parties overcame this controversy by developing ambiguous constitutional provisions to address the status of religion. The Tunisian Constitution states: ‘Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican’ (article 1, maintained from the previous constitutional text). The Constitution further provides that ‘Tunisia is a civil state based on citizenship, the will of the people, and the supremacy of law’ (article 2). The vagueness of the text allows for two potential interpretations. The wording ‘its religion is Islam’ in article 1 may be interpreted as acknowledging the fact that Islam is the most practised religion in the country, while the expression ‘civil state’ in article 2 is sufficiently vague to guarantee that there is no official state religion, even without referring expressly to secularism. This constructive ambiguity enabled both Ennahda and secular parties to claim victory vis-à-vis their respective supporters.

5. Conclusion

Making a new constitution, or amending an existing one, is not an easy task. More than a mere technical exercise, reforming a constitutional framework is first and foremost a political process that requires—in an environment of competitive democratic politics—intense negotiations between a wide range of stakeholders with divergent views and conflicting interests. While disagreements over divisive topics will inevitably occur during constitutional negotiations, there is no standard formula that can be applied in each and every constitutional reform process to resolve these divisive issues. However, as we have seen, there are a number of procedural measures that can be agreed from the outset by the negotiating parties to incentivize compromises throughout the constitutional reform process and minimize chances of a protracted deadlock. In addition, when a deadlock occurs due to disagreement over a specific issue, stakeholders can use various constitutional design devices to overcome the stalemate.

As a general recommendation, constitution-makers, mediators and advisors should foresee the need for flexibility to respond to the various ups and downs that will occur throughout the process. When facing a divisive issue, constitution-makers should try to resolve it in a manner tailored to the issue in question and to the overall context surrounding the negotiations. Perhaps most importantly, constitutional negotiations require all stakeholders to be willing to make some concessions and to be creative to find compromise solutions that a sufficiently broad number of actors can agree upon.

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Colophon

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