

# PART VII

## CONCLUSION



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# Designing Constitution- Making Processes

Lessons from the Past, Questions for the Future

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This volume aims to inform the decisions of future constitution makers and experts advising them by offering an array of practical ideas, suggestions, and warnings about how to shape constitution-making processes. The volume uses a case study approach in order to draw lessons from the real-world experiences of past constitution makers. The case studies contain a wealth of information and analysis concerning the diverse procedural choices made by domestic and international actors responsible for organizing constitution-making processes—and the consequences of those choices—in a wide variety of circumstances.<sup>1</sup> As discussed below, the case studies also demonstrate the critical influence of context on process design choices, and on how well or poorly particular approaches to constitution making worked. Consequently, future constitution makers can benefit by using this volume to evaluate whether the circumstances in which they find themselves are more or less similar to those surrounding

particular past cases, and, thus, whether they would be well or ill advised to adopt similar approaches.<sup>2</sup>

The premise of this study is that the nature of a constitution-making process matters. The overarching objective of this concluding chapter is to explore what the nineteen case studies and two thematic chapters show about the ways in which process matters. To meet that objective, this chapter derives practical advice from comparisons among the case studies. Above all, these comparisons reveal that one-size-fits-all generalizations about good practice are hard to come by, and that attempting to synthesize the case studies into a model constitution-making process would be unrealistic. But they also reveal many insights into the procedural options available to constitution makers and into patterns of constitution-making practice. This chapter discusses both lessons concerning the key elements of constitution-making processes that surface in various groups of cases as well as themes

that emerge from the study as a whole. In addition to the conclusions discussed here, the individual case studies stand on their own as sources of lessons, tied to the particular contexts of the constitution-making exercises they examine.

As the introduction to this volume indicates, recognition is growing that constitution-making processes merit attention just as the outcomes of those processes do.<sup>3</sup> The two thematic chapters in this volume provide legal and intellectual support for this view through an examination of international conventions and an expanding body of law. Though the case studies do not address the relative significance of constitutional substance and constitution-making process, work conducted under the auspices of the United States Institute of Peace's (USIP) Project on Constitution-Making, Peace Building, and National Reconciliation (described in the introduction)—including the material in this volume—demonstrates the importance of process and the increasing regard for process in the public and academic discourses on constitution making.<sup>4</sup> Indeed, one theme evident throughout this volume is that very many people involved in these constitution-making exercises—from citizens participating in public consultations to technical managers to autocrats resisting genuine democracy—behaved in a manner indicating that they believed the nature of the process mattered. That reality should be kept firmly in mind, even while grappling with the intellectual difficulties of determining precisely how process choices matter, and especially how they affect both lasting public sentiments and concrete outcomes. As one example of those difficulties, the thematic chapters and many of the case studies in this volume convey that public participation is a valuable means of democratizing the process of constitution making and legitimating the results, even as they raise complex questions concerning how to ensure the genuineness of

participation mechanisms and measure their effects.<sup>5</sup>

A particular challenge in producing procedural recommendations for future constitution makers is identifying which process choices in the past have led to successful results, against some specified set of criteria for success. The case studies demonstrate that this challenge is not easily met.<sup>6</sup> But among the contributions they make in the search for good practice, the case studies help to define a set of questions concerning assessment of concrete and perceptual outcomes, and the connections between process and outcomes, that merits further exploration. For instance, what are the appropriate criteria for judging success or failure in constitution making? Should such labels be applied on the basis of what the resulting constitutional text looks like (e.g., how well it protects human rights or meets some other widely accepted norms or qualitative standards), or whether the document and the process that produced it are well regarded among the citizenry, or how stable the political situation is sometime after the constitution making, or how prosperous the society becomes, or whether the process contributed to developing a culture of constitutionalism or to encouraging citizen involvement in public life? What if some of these or other possible criteria are met, but not others? And how proximate to the constitution making, as well as how long-lasting, must the relevant outcomes be in order to attribute them to specific process choices?

Moreover, how should we assess a constitution-making exercise in which there was broad representation, thorough deliberation, and popular participation—that is, a process that met plausible criteria for democraticness—and which produced a substantively respectable document, but after which the constitution was not implemented and opportunities for political competition were denied?<sup>7</sup> In such a situation, the influence of extra-constitutional factors—the power

of an autocrat, civil conflict, or aggressive neighbors, for example—may especially complicate an analysis of the impact of a constitution-making process. Considering this dilemma from the opposite angle, how should we judge a process that was elite-driven and often secretive—in other words, not especially democratic or participatory—but which resulted in a durable constitution implemented by a largely peaceful and democratic society?<sup>8</sup>

To simplify, can a process be considered *good*, and therefore commended to future constitution makers, if the ultimate outcome experienced by the citizenry was *bad*, and vice versa? In addition, in trying to measure the contribution of a constitution-making process to whatever outcomes might be considered desirable, how can its effects be isolated from those of other variables, such as the broader state-building process and other contemporaneous political developments?<sup>9</sup> Comprehensive answers to these questions lie outside the scope of this volume, which offers neither a theoretical nor a social-science framework for analysis, but the case studies and the effort here to draw conclusions from them demonstrate the need to pursue such inquiries.

Others have suggested some criteria for success.<sup>10</sup> For example, Jennifer Widner uses three “‘outcome’ measures” in her analysis of data from an ongoing study of constitution writing in nearly 200 cases: the difference in violence between the five years prior to and the five years after ratification; the rate of suspension or replacement of the new constitution; and the degree of rights protection provided by the constitution’s text.<sup>11</sup> She attempts to analyze empirically the claim that certain process choices produce more or less successful results, but cautions that it is very difficult to identify causal relationships between process and outcomes. She makes clear that a “number of very serious challenges bedevil the ability to give a social science answer” to questions concerning whether and how

certain process choices produce better and worse results; these include the difficulty of making comparisons, given that constitution making “embraces a bundle of procedures” that can be combined in many ways, and the complexity of distinguishing the impact of procedural choices from other influences.<sup>12</sup> One example of this empirical challenge concerns public consultation, an element of constitution-making processes on which this volume focuses. Indicating the difficulty of connecting even what many practitioners and academics regard as a desirable process choice to desirable outcomes, Widner finds no correlation between public consultation and stronger rights protection.<sup>13</sup> Similarly, among deeply divided societies, she finds that “the anticipated correlation of success with more representative features does not emerge.”<sup>14</sup>

Unlike Widner’s study, the present one is anecdotal, covering only a fraction of the constitution-making experiences relevant to its subject matter. This study therefore does not claim to establish a basis for determining whether certain process choices will predictably yield certain results. Moreover, given the themes on which the case study authors were asked to concentrate,<sup>15</sup> the material in this volume does not permit a comprehensive analysis of the outcomes of all the constitution-making processes covered. Even if it did, clear-cut judgments about the success or failure of a particular constitution-making exercise would likely remain elusive; in many cases, the picture is mixed.<sup>16</sup>

Aside from the uncertainty that surrounds measuring constitution-making success and the difficulty of reliably pinpointing causal links between process and results, drawing generalized prescriptive lessons from the case studies is problematic because process choices that seem to serve well in some circumstances do not in others. In certain respects, different cases seem to point to opposite lessons: For example, in looking at whether a deadline should be set for

constitution making, the Hungary case study identifies the lack of one as a key process failure, while the Poland case study illustrates the value of not having one.<sup>17</sup>

The overarching conclusion that emerges most clearly from the case studies is that context is of paramount importance. The design of a constitution-making process must be matched to a country's particular political, economic, social, and other circumstances, and differences in circumstances at particular historical moments will require differences in approach. Context shapes constitution making in several ways: It determines the procedural options realistically available,<sup>18</sup> influences the process design choices leaders make, and affects whether those choices serve the desired objectives. This is not a groundbreaking observation, though this volume adds considerable texture to it; over a decade ago, Andrew Arato (coauthor of the Hungary case study) pointed out that "concrete models have a way of turning into something quite different when adopted under dramatically different circumstances. Thus, in a given situation, the circumstances must take priority in the analysis."<sup>19</sup> Drawing guidance from the case studies, therefore, entails identifying which contextual variables are relevant to understanding why certain process choices were made in a particular case, and with what results. Returning to an earlier example, determining what the case studies reveal about constitution-making timelines requires singling out the factors that made a deadline inappropriate for Poland but sorely missed in Hungary. The necessity of recognizing the high degree of particularity in constitution-making experiences, as well as the empirical challenges noted above, confirms the usefulness of a case study approach to examine constitution-making processes. By considering which procedures have worked well, or poorly, within the contexts of the various case studies, lessons can be drawn that will no doubt resonate for future constitution mak-

ers. Comparisons among the cases further illuminate the relevant contextual factors and their significance for procedural choices.

To facilitate comparing the cases, this chapter disaggregates the constitution-making processes into the components that surfaced as most important in the study. It examines how each of those components played out in various cases, referring wherever possible to outcomes that were shown to be relevant in those cases, such as whether the constitution was implemented, whether it is regarded as legitimate, and whether the constitution-making process seemed to affect political stability. In addition to presenting and analyzing procedural options, this conclusion addresses key issues with which future constitution makers will likely have to wrestle.

The chapter begins with an overview of the cases, followed by an examination of the main structural elements of the constitution-making processes. It then discusses a series of thematic topics: inclusiveness and representation; direct public participation; timelines and deadlines; external assistance and intervention; incorporation of constitution making in peacemaking processes; the impact of constitution making on conflict resolution; the relevance of international law and norms; and the question whether constitution making should adhere to existing law. The chapter ends by considering what the cases indicate about the importance of process, compiling common process pitfalls, and offering practical suggestions for assessing the contextual factors that should influence process design.

### Overview of the Case Studies<sup>20</sup>

The nineteen cases examined in this volume concern selected constitution-making exercises carried out in diverse circumstances over a twenty-seven year period.<sup>21</sup> Table 22.1 lists the cases chronologically.

**Table 22.1 Chronology of Case Studies**

Year of Conclusion of Constitution-Making Process Discussed in Study	Country
1978	Spain
1987	Nicaragua
1988	Brazil
1989	Hungary
1990	Namibia
1991	Colombia
1993	Cambodia
1995	Bosnia and Herzegovina
1995	Uganda
1996 (signed)/1997 (effective date)	South Africa
1997	Eritrea
1997	Fiji
1997	Poland
1998	Albania
1980 (independence) and 1999	Zimbabwe
1999	Venezuela
2002	East Timor
2004	Afghanistan
2005	Iraq

While these cases vary greatly in terms of the events that led to the constitution-making exercise and the political and social environment in which the exercise was carried out, in all the cases, the making of a new constitution took place at an important moment in the country's state-building process.

The USIP project of which this volume is a product focuses especially on countries transitioning from conflict, and on the potential for constitution-making processes to contribute to building peaceful conditions and political stability in such countries. The material in this volume addresses the concerns of the project, but also explores constitution making in a wider variety of situations than those often labeled *post-conflict*.<sup>22</sup> This volume therefore provides ideas and lessons for countries pursuing constitution making in the context of many types of political and social turmoil, and the analysis in this con-

clusion applies to the full range of circumstances that the case studies cover.

Table 22.2 categorizes the case studies based on the general contexts in which the constitution-making exercises took place. Almost half of the cases involved circumstances in which the country was either emerging from conflict or still experiencing conflict. These two types of contexts are merged here, as often they are not clearly distinguishable. In Colombia and Iraq, violent conflicts persisted at the time of constitution making; in the other countries in this category, varying degrees of more limited open conflict or underlying tensions remained. In the other roughly half of the cases, the countries are evenly split between those that were undergoing a transition from nondemocratic forms of rule during the constitution-making period and those that were in the midst of some other period of institutional crisis or major reform of state structures. The particular circumstances in this latter category are spelled out briefly in the notes.

The categories in Table 22.2 are generalizations; each case study concerns a unique set of circumstances, and some of the cases are not amenable to precise and simple classification. Moreover, some cases exhibit characteristics of more than one category. For example, South Africa at the time of its constitution-making experience was emerging from both conflict and rule by a regime that oppressed a majority of the population. While violent conflict was a central feature of the conditions that led to the constitution making, and political violence in fact increased during the constitution-making process, the lengthy, multistage, negotiated transition with which that process was entwined was more similar to the circumstances of the cases in the second category than those in the first. Similarly, several countries in the first category have faced the double challenge of simultaneously managing a transition from conflict to peace and

**Table 22.2** Categorization of Case Study Contexts

During conflict or transition from conflict, or at independence	Transition from nondemocratic regime	Other period of institutional crisis or major reform
Afghanistan	Albania	Brazil <sup>1</sup>
Bosnia and Herzegovina	Hungary	Fiji <sup>2</sup>
Cambodia	Poland	Uganda <sup>3</sup>
Colombia	South Africa	Venezuela <sup>4</sup>
East Timor	Spain	Zimbabwe <sup>5</sup>
Eritrea		
Iraq		
Namibia		
Nicaragua		

*Notes:* 1. The Brazilian constitution-making process was part of a long period of redemocratization initiated by the military in 1974. 2. A constitutional review provision in Fiji's 1990 constitution prompted the constitution-making process addressed in this volume. 3. The National Resistance Movement, led by President Yoweri Museveni, initiated the constitution-making process to signal a break with past regimes and to constitutionally implant the idea of "no-party democracy." 4. The Venezuelan process nominally was intended to restructure and improve the system of governance in a context of political crisis, but, in fact, was used to facilitate the consolidation of state power in the hands of President Hugo Chavez. 5. The 1980 process in Zimbabwe produced that country's independence constitution and would fit in the first category, but the 1999 process, which fits in the third category, is the major focus of the case study in this volume. Civil-society agitation for a new constitution to right the inequities of the 1980 constitution and displace subsequent amendments that eroded democracy prompted the 1999 process. The government responded to that agitation by launching a process that it controlled.

a transition from some form of authoritarian rule to democracy. Both transitions have deeply marked their experiences with constitution making and implementation. Bosnia and Herzegovina, for example, fits squarely in the first category, but the legacy of that country's communist period had a distinct impact on the shape of the 1995 constitution and has hampered the effort to establish a constitutional democracy there. Thus, the cases are sorted in Table 22.2 according to the category in which they fit best, but not necessarily exclusively.

Table 22.3 lays out the main structural elements of the constitution-making processes examined in this volume, showing which countries used each element.<sup>23</sup> It thus depicts the constitution-making process from a technical and functional perspective.<sup>24</sup> Across the cases, there are many variations in the combination of elements used, as well as significant variations in the details of how each element was designed and actually implemented. For instance, in some cases, an elected body (of one of the types indi-

cated in the first column) managed the entire constitution-making process and genuinely deliberated on the substance of the constitutional text, while in others an elected body essentially rubber-stamped a text produced under executive or international control. As the chapters in this volume demonstrate, the structural fine details of the processes are extremely diverse, and those details matter greatly in assessing what happened in each country and with what results.

### **Structuring a Constitution-Making Process**

The case studies contain a great quantity of descriptive information regarding the structures of the constitution-making processes examined. These descriptions will be useful to readers seeking a detailed understanding of the process choices made in those countries. This chapter offers some conclusions about the benefits and drawbacks of particular procedural choices in various circumstances. To that end, the discussion in this section is

**Table 22.3 Structural Elements of Constitution-Making Processes Used in the Case Studies<sup>1</sup>**

	Parliamentary process, constituent assembly, convention <sup>2</sup>	Appointed commission	Roundtable	Public participation process	Referendum (for ratification, unless noted otherwise)	Interim arrangement <sup>3</sup>	Judicial review
<b>Afghanistan</b>	X (Constitutional Loya Jirga, comparable to a constitutional convention, considered and amended draft)	X (35-member commission prepared draft modified by the executive)		X (weak/limited process)		X (transitional provisions in Bonn Agreement)	
<b>Albania</b>	X (parliamentary constitutional commission drafted text)			X	X (set of transitional laws termed Major Constitutional Provisions)		
<b>Bosnia and Herzegovina</b>	X (subnational parliamentary approval of negotiated document)						
<b>Brazil</b>	X (Congress acted as constituent assembly) <sup>4</sup>			X	X (plebiscite after five years to revisit form of government)		
<b>Cambodia</b>	X (constituent assembly, converted into National Assembly after adopting constitution)					X (transitional provisions in Paris Peace Agreements)	

*continued*

**Table 22.3 Structural Elements of Constitution-Making Processes Used in the Case Studies<sup>1</sup>** *continued*

	Parliamentary process, constituent assembly, convention <sup>2</sup>	Appointed commission	Roundtable	Public participation process	Referendum (for ratification, unless noted otherwise)	Interim arrangement <sup>3</sup>	Judicial review
<b>Colombia</b>	X (constitutional assembly prepared and adopted text)			X	X (on question whether to establish a constitutional assembly)		X
<b>East Timor</b>	X (constituent assembly, converted to National Assembly after adoption)			X (weak/limited process)			
<b>Eritrea</b>	X (National Assembly approved and constituent assembly ratified product of commission)	X (independent 50-member commission)		X		X (self-appointed provisional government and appointed transitional parliament)	
<b>Fiji</b>	X (changes to commission draft negotiated by parliamentary select committee, and adopted by parliament as amendment) <sup>5</sup>	X (3-person review commission)		X (weak/limited process)			
<b>Hungary</b>	X (parliamentary amendment process)		X		X (referendum on four substantive constitutional questions)		X

<b>Iraq</b>	X (National Assembly, with constitution committee responsible for drafting text)	X (weak/limited process)	X (Transitional Administrative Law promulgated by occupation authority)
<b>Namibia</b>	X (constituent assembly, converted to National Assembly after adoption)		X (UN Security Council Resolution)
<b>Nicaragua</b>	X (National Constituent Assembly, with special constitutional commission composed of political party representatives holding seats in the assembly responsible for preparing draft)	X	X (Fundamental Statute and Statute of Rights and Guarantees provided temporary framework after 1974 constitution abolished)
<b>Poland</b>	X (National Assembly—the parliament of the outgoing regime; a transitional, partly democratic parliament; and a new, democratic parliament played roles at different stages)	X	X (several constitutional amendments including 1992 Small Constitution)
<b>South Africa</b>	X (constitutional assembly, double-hatted as ordinary parliament; drafted and adopted final constitution)	X	X (political parties negotiated Interim Constitution)

*continued*

**Table 22.3 Structural Elements of Constitution-Making Processes Used in the Case Studies<sup>1</sup>** *continued*

	Parliamentary process, constituent assembly, convention <sup>2</sup>	Appointed commission	Roundtable	Public participation process	Referendum (for ratification, unless noted otherwise)	Interim arrangement <sup>3</sup>	Judicial review
<b>Spain</b>	X (parliament)				X (for approval of transitional reform law and final constitution)	X (Eighth Fundamental Law, approved by referendum 1976, and "pre-autonomy laws")	
<b>Uganda</b>	X (constituent assembly, with elected and appointed members)	X (government- controlled commission)		X (extensive public engagement, but focus on civic education rather than consultation)			
<b>Venezuela</b>	X (constituent assembly)				X (on question whether to establish constituent assembly, and for ratification)		
<b>Zimbabwe</b>	X (parliamentary approval)	X (500-member government-controlled commission produced nonbinding draft)		X (1999: extensive process, but little impact)	X		

*Notes:* 1. With respect to the first three columns, the overlap is explained by the fact that use of an appointed commission independent of the legislature (for drafting and, in some cases, public consultation purposes) or roundtable (for negotiation and drafting) was accompanied in all the relevant cases by an elected body's control over other elements of the process. 2. This category includes parliamentary commissions or committees responsible for drafting or other aspects of constitution making where such a body was composed of members of the ordinary legislature or constituent assembly, and where the commission or committee therefore did not operate independently of the parliamentary process. The constitutional commission in Albania is one example of such a body. 3. Hungary is not included here, even though its substantially amended constitution technically remains interim. The 1996–97 effort there to create a wholly new constitution failed, and, as discussed in the Hungary chapter of this volume, momentum toward such an end has been lost. 4. The president of Brazil appointed a blue-ribbon committee to prepare a draft constitution for submission to the constituent assembly, but then refused to submit the draft because he disagreed with many of its provisions. Consequently, the constituent assembly drafted the 1988 constitution from scratch. 5. While technically an amendment of the 1990 constitution, the adopted changes, in fact, formed a new constitution of the Fiji Islands.

organized according to the structural elements identified in Table 22.3 (except for public participation, which will be addressed separately)—in other words, by the types of bodies and mechanisms used. Another useful way to consider structural questions is to identify the relevant functions undertaken, such as drafting, deliberation, and approval and ratification; thus, the discussion here highlights distinctions among the functions performed by the various types of mechanisms.<sup>25</sup>

The three tables above together reveal an absence of clear trends over the time period covered by the cases regarding the employment of particular elements of constitution making. For example, serious public consultation programs have been implemented intermittently; Nicaragua carried out a robust program in 1987, as did South Africa in the mid-1990s, but none of the countries that made new constitutions in the present decade—East Timor, Afghanistan, and Iraq—did so in a way that meaningfully brought public input into the process.<sup>26</sup> Similarly, independent commissions, used for drafting and other purposes, have been employed sporadically, while interim constitutional arrangements, used for transitional purposes during the creation of a final constitution, have been put in place fairly regularly.

#### *Parliamentary Constitution-Making Processes and Constituent Assemblies*

In all nineteen cases, an elected, partly elected, or indirectly elected body played some role in the constitution-making process, but the nature of both the body and its role varied widely.<sup>27</sup> In Brazil, the congress doubled as a constituent assembly, drafting the constitution from scratch and approving it with no further ratification procedure. In Bosnia and Herzegovina, the legislatures of the two sub-national Entities rubber-stamped a constitution included in a peace treaty and already

legally in effect. In some cases, an elected body was the lead actor in the process, responsible for drafting as well as deliberating on the text, as in South Africa, where the constitutional assembly drafted, debated, and adopted the final constitution, and Albania, where a parliamentary commission drafted the text. In others, an elected body's role was confined to ratifying the product of an independent commission, as occurred with the constituent assembly in Eritrea.

The case studies explore many, often idiosyncratic issues surrounding why certain types of elected bodies were used in a constitution-making process, how they were used, and how well they acquitted themselves. Elected bodies are political, and the political dynamics vary in the cases; overall, it is clear that the impact of those dynamics on the results often trumped the impact of the technical niceties of how the processes were structured.<sup>28</sup> Nevertheless, the case studies illustrate a useful variety of structural options. Some of the issues that transcend individual cases and merit consideration by future constitution makers are addressed below.

#### *Use of Ordinary Legislature versus Extraordinary Constituent Assembly*

Afghanistan is the only case considered here in which the main deliberative and decision-making body was neither a regular legislature nor an elected or mostly elected constituent assembly, but rather a *loya jirga*, a traditional Afghan grand national assembly composed of indirectly selected representatives of the various regions of Afghanistan, as well as some presidentially appointed delegates. The use of a traditional mechanism in Afghanistan may have enhanced the popular legitimacy of the outcome. Though the particular form of the *loya jirga* is not likely to be replicated in other contexts, the availability of local traditional procedures could usefully be explored elsewhere. All the other cases are split evenly

between process choices more amenable to replication in their general forms: use of an ordinary legislature and use of a constituent assembly, for purposes of some combination of drafting, debating, and deciding on a constitutional text.<sup>29</sup>

The question of whether to employ an ordinary legislature or an extraordinary constituent assembly can be contentious, with conflicting positions generally centering on which option will serve whose interests. In Spain, it remained unclear in the period leading up to the 1977 elections which type of body those elections would produce because of a left versus right political dispute on the issue; in the end, the position of the center-right and right-leaning parties, which favored a regular parliament, prevailed. In Uganda, disagreement over what type of body would drive the constitution-making process was part of the broader struggle over the ruling National Resistance Movement's control of the process. The Movement originally intended to have the National Assembly serve as the relevant body, because of the large number of its followers holding seats there, but pressure from political parties to establish a constituent assembly, with delegates freely elected, successfully produced a different result. Other Movement efforts to keep the playing field uneven succeeded, however.

Use of a constituent assembly can have several advantages over the parliamentary approach. A constituent assembly may have greater popular legitimacy as a constitution maker, as its members are elected specifically to develop and adopt the new national charter. In addition, a constituent assembly—unless double-hatted as a parliament, as in South Africa—can devote itself full-time to constitution making without the distraction of day-to-day parliamentary business. As a consequence, it may be better able to focus on the broader questions of constitutional vision.

Brazil's experience illustrates a set of problems that can arise from using an ordinary legislature for the extraordinary task of constitution making. There, the congress served as the constituent assembly due to a condition secretly imposed by military authorities, which thought the congress would be more responsive to military demands than would a specially elected constituent assembly. Congress adopted, on President Sarney's proposal, a constitutional amendment empowering itself to double as the constituent assembly, even though the alternative had substantial popular support. Using the congress undermined the democratic character and legitimacy of the constitution-making process: Malapportionment badly underrepresented the most populous states, the 1986 congress that drafted the constitution included senators indirectly elected under the prior authoritarian electoral law, voters knew nothing about their representatives' views on the constitutional issues, and the congress had a "ravenous appetite for pork barrel benefits."<sup>30</sup> In addition, the approach forced the congress to divide its time between constitution making and regular legislative business.

A key consequence of the Brazilian approach was that the constitutional framers, as members of a highly politicized body elected primarily to represent state and local interests, operated with a short-term perspective. They injected numerous details that more appropriately belonged in legislation or regulations, while deferring for later a variety of questions of broad constitutional vision and governmental framework. Moreover, the congress had a clear conflict of interest; unsurprisingly, the final constitutional text aggrandized congressional power.<sup>31</sup> Though the Brazilian process was very open and public, the nature of the decision-making body made it vulnerable to active lobbying by special interest groups, which distorted the outcome. Moreover, military influence on the deliberations—in the form of a threat of a

possible coup hanging over the delegates—was highly constraining. With complicated voting rules, multiple rounds, thousands of offered amendments to the draft, and protracted negotiations, ultimately the process was so unwieldy that it produced a very cumbersome text, which has been an obstacle to effective governance. The process was textbook in some formal respects, but the hodgepodge document that was its result has no coherent vision and is overly complex.<sup>32</sup> In recent years, key features of the 1988 constitution have been dismantled through a series of amendments.

Fiji, too, provides an example of problems that can arise when using a regular parliament instead of a constituent assembly. Parliament members there had vested personal and ethnic group interests in the constitutional status quo. A popular referendum might have helped to mitigate this problem, but the last word on the constitution was left entirely with the politicians in parliament, who in some ways undid the constructive work performed by an independent commission. In the end, though some tried to use the constitution-making process to improve ethnic relations, others used it to reinforce Fiji's ethnic divide.

Opposition elements in Hungary blocked use of a constituent assembly and promoted a roundtable approach (discussed below), as they feared that early elections for such a body organized by the government were likely to result in a communist majority, which could then enact a regime-conservative yet formally legitimate result.<sup>33</sup> Consequently, ordinary parliaments were significant in the process in Hungary, an approach inherited from the communist past, and, in the view of the case study authors, lacking the heightened legitimacy needed for democratic constitution making, in which voters should know that the delegates they elect will actually make a constitution. Ultimately, the parliaments failed to develop a final new constitution.

In Albania, a parliament-led constitution-making process succeeded for several reasons that stand in significant contrast to the above cases. The parliamentary mandate to undertake the drafting of a new constitution had been established a few years prior, foreclosing any legitimacy concerns of the sort noted in Hungary. Rather than assigning the task to the entire parliament, as in Brazil, the parliament established a small constitutional commission and ensured that it was broadly representative and inclusive of all parties, including minorities. And rather than starting from scratch, the Albanian parliament had a set of guiding constitutional principles as its starting point.

Of the cases in this volume, South Africa appears to have best combined the roles of an ordinary legislature and a constituent assembly in a single body. From a practical perspective, the roles were not always compatible because of conflicting time demands, but the procedure did not suffer from the legitimacy deficit noted above; at the time of the elections, voters were well aware of the dual function their representatives would perform. In addition, because the elected body was a new one, formed during the transition, the potential for vested interests to distort the process was minimized. Though the South African experience does not suggest that this is the best approach when other alternatives are available, it does show that some of the more serious problems can be avoided when, for practical or other reasons, there is no good alternative—in South Africa's case, because a wholly new parliament, operating under a new interim constitution, had to be created at the very same time as a democratically chosen constitution-making body.

In choosing between the parliamentary and constituent assembly options, sensitivity to the history and constitutional tradition of the country in question may be required, as these may be crucial to the popular legitimacy of the process. In Poland, there was

no realistic alternative to using an ordinary legislature for constitution making, even though the procedure had practical downsides. Because the regular national assembly was responsible for drafting and deliberation, the process was repeatedly interrupted and delayed by parliamentary elections and various political crises that absorbed delegates' attention. These events lengthened the constitution-making process, which consumed almost eight years. Nevertheless, no alternate approach was seriously considered. Bypassing parliament would have contradicted Polish constitutional tradition; the case study authors observe that "because all Polish constitutions in the past had been drafted within the legislative branch, another way could hardly be regarded as legitimate." Moreover, another approach, such as establishing a constitutional convention, "would not have been practicable in the specific conditions of Polish political developments." It would have been premature at the outset of the process in 1989.<sup>34</sup> Later, once a new, democratically elected parliament was formed in 1991, "it had full legitimacy and competence to take care of the constitution writing." Furthermore, the lack of any major ethnic, religious, or regional divisions in Poland meant that it was reasonable to "link the constitution drafting process almost exclusively to the political preferences of Polish voters." Similarly, the Constitutional Loya Jirga, an approach similar to a constituent assembly, was viewed as the only acceptable option in Afghanistan, not only because the country lacked a functioning parliament at the time, but because the *loya jirga* had long been the default model to address major issues in the country, including the drafting of the well-respected 1964 constitution.

In several cases, constituent assemblies were converted into regular legislatures when their constitution-making work ended. This procedure poses a potential conflict of interest similar to that seen in using regular

legislatures for constitution making. In East Timor, the regulation that laid out the legal basis for the constituent assembly gave it the option to transform itself into the nation's first parliament, which, as expected, it did. Consequently, the constituent assembly decided on the parameters of its own future powers. In Cambodia and Namibia, too, constituent assemblies were converted into regular national assemblies after adopting the constitutions. In Namibia, this was regarded as a practical necessity, to ensure that the major institutions would be in place on the day of independence. It was also considered harmless, because fresh elections would have yielded the same results as the very recent constituent assembly elections.

Namibia shows that despite the disadvantages in principle of using or converting to an ordinary legislature, actual harm depends on the political dynamics in the country. Similarly, South Africa and Poland show that even where some practical problems result, the benefits of using (or dual-hatting) an ordinary legislature can outweigh the drawbacks. Moreover, Colombia's experience illustrates that in certain circumstances, trying to avoid a conflict of interest can have unintended consequences: There, members of the constituent assembly were disqualified from running in the new congressional elections, but as a result, practically all the old political class was reelected, rather than the new and independent political formations that emerged in the constituent assembly under modernized electoral rules.

Overall, the cases suggest that using an ordinary legislature for constitution making can be a problematic choice when the legislature is not a broadly representative body in political, geographic, or other relevant terms; when giving the legislature a central role would likely undermine the legitimacy of the process (including when members have a vested interest in avoiding reforms); or where there may be reasons to suspect that legisla-

tive representatives are not those who would likely be chosen for a constitutional drafting job. But certain cases also suggest that under particular conditions, using an ordinary or convertible legislature can be regarded as fully legitimate, as in Poland and South Africa, or at least harmless, as in Namibia. Factors such as lack of resources or time to elect both an ordinary legislature and a constituent assembly—and, where still respected, a country's constitution-making tradition—must be considered in determining a suitable procedure.

#### *Organization and Professional Support*

Under either main approach discussed above, a variety of technical options are available for shaping the precise role and organizing the work of the elected body. Given the difficulty of having an entire elected body draft a constitution, some constituent assemblies and parliaments have created smaller drafting bodies from among their members, as discussed further below. Alternatively, or subsequent to this, both legislatures and constituent assemblies have created committee and subcommittee structures, generally arranged thematically to focus on different aspects of the constitution, for purposes of drafting and deliberation. Harmonization and editing or other technical committees also have been used to consolidate the work of thematic committees and finalize texts, as in the systemization and editing committees used in Brazil, or the systemization and harmonization committee in East Timor. Many of the chapters in this volume describe the specific committee structures used in the cases.

A process in which members of a parliament or constituent assembly may be offering and receiving potentially thousands of ideas, proposals, and amendments concerning, in some cases, hundreds of articles as they debate and draft a new constitution is an enormous challenge. To manage this

challenge, the constitution-making body can benefit from the technical and administrative support of a professional, neutral, and well-resourced secretariat. Several variations appear in this volume. Depending on the particular case, the functions of such a professional staff unit may include conducting research for the constitution-making body and its committees, and providing information and analysis, for example, on how constitutions in different countries address particular issues; organizing, summarizing, and digesting suggestions and information received through public consultation; undertaking the technical drafting needed to form the substantive decisions made by the elected constitution makers into constitutional text; harmonizing the texts and decisions of various committees and identifying conflicts among them; developing reports for the assembly on the work of the various committees; and providing information on the assembly's work to the public. In Brazil, the Senate's informatics and data processing center filled many of these functions, in addition to its regular supporting role for the legislature. Albania employed a different model; it created a so-called quasi-non-governmental organization, with local and foreign staff, to perform several functions, including indexing and organizing all public comments for the parliamentary constitutional commission and its technical staff and coordinating foreign assistance to the commission. In Colombia, a UN-funded presidential agency provided technical support to the constituent assembly, organized some public promotion of the new constitution, and also prepared legislative bills needed for the constitution's implementation. A national academic institute also provided technical drafting assistance. Staff support for the constitution-making enterprise may involve more than a centralized secretariat, as in Eritrea, where the constitutional commission established and managed seven provincial offices to facilitate outreach.

### *Responsibility for Drafting*

The case studies display a wide variety of choices regarding the assignment of drafting duties, including the use of neutral experts, drafting committees of constituent assemblies and legislatures, and appointed commissions (discussed later in this chapter).<sup>35</sup> The cases raise two key, interrelated questions about drafting procedures: first, whether to designate experts, as opposed to parliamentarians or delegates, to draft text; and, second, whether to commence constitutional negotiations with a provisional draft. Positive and negative experiences in several cases indicate the general utility of employing experts in the drafting process. Experiences with respect to the timing for introducing a draft are more idiosyncratic.

Namibia illustrates the effective use of experts in the drafting process; there, the constituent assembly appointed a three-member drafting panel of South African lawyers, charged with presenting a draft to the assembly. The choice of South Africans, two of whom were Afrikaners, lends insight into the conditions that the constituent assembly perceived to be relevant to its procedural choices. Though the assembly was offered an abundance of constitutional expertise from all parts of the globe, members were strongly suspicious of outside interference and felt that their constitution “should not be the product of some foreign experiment.” On a practical level, the constitutional law and traditions of South Africa and Namibia were similar, their common law was the same, and assembly members knew that the future Namibian constitution would maintain its roots in the South African legal system. Assembly members also realized that appointing South African experts would help dispel mistrust in the constitution-making process, especially among the white population.

In Poland, the national assembly’s drafting process initially was unworkable. In fall 1989, both chambers of parliament appointed their

own constitutional committees, which produced two different drafts. These appeared irreconcilable, and no procedure was in place to mediate the differences. The drafting procedure was rectified when a joint committee was established in 1991. In addition to parliamentarians from both houses, the committee included nonvoting representatives of the president, cabinet, and constitutional court. The right to submit drafts to the committee was given to the committee itself, the president, and any group of at least fifty-six parliament members; at a later stage, provision was made for popular drafts, signed by at least 500,000 voters, to be submitted as well (one popular draft, sponsored by the Solidarity trade union, was submitted). Once the drafting process began in earnest, the joint committee appointed five law professors—all leading scholars in constitutional law, with no direct political involvement—as permanent experts who participated actively in the committee and its subcommittees, including assisting with writing the text.<sup>36</sup> A separate group of experts was engaged at the end to technically edit the text. Even among the committee members themselves, some were regarded as “‘expert’ politicians” (with the others regarded as “‘pure’ politicians”).

In South Africa, domestic experts helped to draft text within the confines of the constitutional assembly’s clear overall responsibility for preparing and approving the final constitution. After negotiations were already under way, and following a first stage of public outreach and consultation, the assembly’s management committee appointed a team of experts, including law advisers, language experts, and members of a previously appointed panel of constitutional experts, to prepare the first working draft of the constitution as well as later versions of the draft as negotiations progressed. Aside from the experts, the constitutional assembly benefited from being able to draw on a deep well of talent among its own members. The timing of

producing a draft roughly midway through the assembly's work allowed for a relatively open-ended phase of debate and public consultation during a period when, in any event, the parties were not yet prepared to make the necessary substantive compromises. This was followed by more focused negotiation and consultation once a first draft was produced. Delaying the use of drafting experts in this way perhaps reflected the strong sentiment in South Africa that elected representatives should lead the constitution-making process, and that any role for appointed experts should be minimized. In both Poland and South Africa, the timing for introducing expert assistance precluded any sense that outside experts were supplanting the role of the designated constitution makers and confirmed that the experts were in a supporting role, assisting and refining the drafting choices of those elected to create the constitution.

The manner in which experts and an appointed commission were used to support the drafting process in Fiji presents a more mixed picture. Some of the world's leading constitutional experts advised the appointed commission charged with launching the constitution-making process, and the commission, supported by a technical staff, prepared a very extensive report. However, that report provided drafting instructions for the new constitution, which, while framed in precise terms, were not, for the most part, actual textual formulations crafted to achieve the recommended result. This approach limited the utility of the commission's work.

In some countries, the constituent assembly members themselves assumed responsibility for drafting. In Venezuela, the constituent assembly organized twenty subject-specific committees to draft different parts of the constitution. Technically, this procedure was not problematic, though—as discussed elsewhere in this chapter—political manipulation distorted the constitution-making process overall. In Brazil, the drafting story is a

distinctly unhappy one. The assembly considered whether to start the process with a draft prepared by constitutional scholars, but opted not to do so “on the theory that this would make the process as open and democratic as possible.” The assembly “emphatically rejected the idea of commissioning a draft as a ‘dangerous instrument of control’” over its work. As a result, the 1988 constitution was drafted “from scratch” by the entire 559-member assembly, divided into twenty-four thematic committees, though the drafters drew from previous Brazilian constitutions and proposals, and participated in seminars on constitution writing with foreign experts. This approach made it “virtually impossible to produce a coherent document, particularly with a weak party system and a weak president.” In the case study author's view, had the assembly started its work with an experts' draft, it “probably would not have produced a document with such serious conceptual and organizational flaws.”

As with other aspects of constitution-making processes, analysis of the drafting procedure requires distinguishing between the formal technique and the political reality of how a constitutional text is produced. In Cambodia, for instance, a twelve-member committee of the constituent assembly was charged with preparing a draft, and worked in secret for two and half months to do so; however, the two main political parties prepared their own competing drafts, one of which the constituent assembly adopted after only five days of debate. Somewhat similarly in Iraq, an elected constituent assembly was legally mandated to draft the text, a task it delegated to a committee of assembly members. But political party leaders pushed aside the assembly and its committee (which had been provided with foreign technical expertise), negotiated certain fundamental decisions, and completed the text behind closed doors.

As already noted, the cases suggest that in many instances future constitution makers

would be well advised to employ constitutional experts in the drafting process and to bring them in from outside the country if domestic constitutional expertise is lacking. At least two cases demonstrate that expert advice is particularly helpful where it is neutral and not provided through political parties. In addition, these experiences illuminate the utility of a professional, well-organized structure to support the drafters and negotiators by facilitating expert input to the process and ensuring accurate revising of the text. Such a structure could take the form, for example, of a secretariat attached to the deliberative body, or a committee staff structure. As for timing, some cases indicate that preparing an experts' draft at the outset of the constitution-making process would be helpful to developing a coherent text, though South Africa in particular demonstrates the potential advantages of employing drafting experts after the decision-makers' and public's preferences have begun to take shape. Arguably, delaying the introduction of drafting experts, as was done in South Africa, could help to subordinate the experts' role to that of the democratically mandated constitution makers.<sup>37</sup>

#### *Tabling of Drafts by Powerful Parties*

In several cases, politically powerful parties strongly influenced the drafting process by tabling their own complete constitutional drafts. The positive and negative effects of powerful parties playing such a role are rather idiosyncratic. But it is clear that the issue merits close attention from those designing drafting procedures, and that past experiences will prove instructive.

East Timor offers a particularly negative example of this phenomenon. There, Fretilin's proposed text became the starting point of the drafting process in the constituent assembly because of the party's dominance in that body. Fretilin had created its draft at a 1998 conference of exiled party leaders in Sydney, Australia, but did not put the draft

before voters at the time of the constituent assembly elections in 2001.<sup>38</sup> Fretilin's dominance in the assembly precluded any real compromise or negotiation over the main issues addressed in the proposed text. Moreover, as the case study authors point out, by "taking the Fretilin draft as their point of departure, the committees [of the constituent assembly] failed to develop the constitution from the ground up, examining and discussing which options would be most suitable for East Timor." In the end, the constitution established a political system that capitalized on Fretilin's strengths.

Cambodia's experience is more ambiguous. Because of Prince Norodom Sihanouk's paramount influence on the constitution-making process, the draft constitution he favored—which, not incidentally, restored him to the throne—became the basis for the final constitution, rather than the work of the constituent assembly's drafting committee. This approach, which effectively precluded the possibility of an open-ended exploration of the constitutional options, was certainly undemocratic. In the case study author's view, however, it probably was unavoidable, given Sihanouk's central role in the transition, popular respect for his authority, and the cultural reluctance of assembly delegates to demonstrate significant independence. A more assertive UN mission in Cambodia may, perhaps, have been able to mitigate Sihanouk's dominance by laying down a clearer road map for the constitutional process.

On the positive side of the ledger, Namibia's experience shows the potential benefits of proceeding on the basis of a particular party's draft, if the decision to do so is based on a consensus view of the need to cement that party's support. The Namibian constituent assembly invited all parties that gained seats to submit constitutional proposals; all proffered more or less complete drafts. Once faced with the "seemingly insurmountable task of drawing up a constitution from a multitude of proposals," however, assembly members

unanimously agreed to accept SWAPO's<sup>39</sup> proposal as a working document that would serve as the basis for drafting. Awareness of this move "produced a perception of credibility and legitimacy" for the work of the assembly among supporters of SWAPO, which had garnered 60 percent of the vote in the assembly elections. The panel of experts then produced a draft of the complete constitution (filling a number of lacunae) based on the SWAPO document. An important factor that helps explain Namibia's positive experience in starting with a political party draft is that political developments had caused SWAPO to abandon many of its own original ideas. The draft it tabled consolidated elements of most of the other parties' proposals, making it a sound basis on which to build consensus.

#### *Appointed Constitutional Commissions*

Five of the cases in this study involved the use of appointed commissions outside of the elected decision-making body to develop a draft constitution, and in some instances, to organize and conduct public consultation. In each of these cases, the commission's final product was submitted to an elected body for consideration. In theory, the commission approach enables the selection of a broadly representative group of citizens—perhaps even broader than a group of elected representatives, ideally with constitutional expertise, to prepare a draft.

Some experts see the constitutional commission approach as a possible way to circumvent the obstacles presented by domineering political forces in a more political elected forum. In East Timor, for example, Fretilin's political dominance undermined the extent to which the constituent assembly membership truly represented the variety of voices present in the country. The case study authors suggest that appointing a broad-based constitutional commission could have mitigated the problem and reduced the ef-

fect of Fretilin's dominance in the assembly, which was charged with deliberating on and approving the text. The arrangement for selecting the commissioners is key, however, to ensuring a commission's balance and inclusiveness. Where possible, appointment procedures that constrain the ability of domineering political forces to control the appointments are advisable. Uganda's experience illustrates the appointment dilemma: In that case, the president and the minister for constitutional affairs appointed a constitutional commission with a membership that was regionally balanced, but entirely made up of strong supporters of the Movement system that President Museveni used the constitution-making process to embed.

Where there is some commitment to an inclusive process, a commission can be useful for developing a draft constitution, though the cases in this study on the whole do not show that this approach produces a better result than using a constituent assembly or parliamentary drafting committees with expert assistance.<sup>40</sup> In Eritrea, an appointed commission was used to good effect, technically speaking (the outcome of the process as a whole has been an unhappy one, as the constitution has not been implemented). The national assembly appointed a fifty-member commission with a ten-member executive committee, and, in accordance with the provisional government's proclamation establishing the mandate for the commission, ensured full representation of a cross-section of Eritrean society. The commissioners included twenty-one women, members of each of the country's nine ethnic groups, and representatives of business and professional communities. Over a three-year period, the commission carried out a very extensive program of public education and consultation, and at the end presented the national assembly with a draft constitution for its approval and further public debate, after which the draft was submitted to a constituent assembly for ratification. Selassie highlights the importance of

the commission's independence to its effectiveness: "The independence of a commission ensures the integrity of the process and consequent public confidence in the process and its outcomes, that is, the constitution itself."

Zimbabwe's experience runs counter to the ideal constitutional commission model, as President Mugabe appointed a 500-member constitutional commission filled with ruling party supporters. The commission undertook an "impressive and wide-ranging" public consultation exercise throughout the country, and formulated a draft that contained major substantive improvements over the 1980 independence constitution.<sup>41</sup> But in the end, given the legal procedure the president used to establish the commission, he was under no obligation to accept its recommendations; he rejected a number of them, including one prohibiting land seizures without compensation. In this way, the government used the commission ostensibly to consult with the public, while actually ensuring its own control over the process—at least up to the point of referendum, as discussed below. Control had been the government's objective from the start. It created the commission to thwart the ambitions of the NGO community in Zimbabwe, which began agitating for a new, more democratic constitution during the 1990s.

In Afghanistan, the question of the constitutional commission's independence was highly pertinent. The thirty-five commissioners, appointed by President Karzai, reflected a broad political and ethnic spectrum, including a mix of experts and politicians. However, after the commission produced a draft constitution, the presidential palace took control of the draft, prevented its anticipated publication, and undertook an executive review: "Anxious to secure greater power for President Karzai and limit the possibility of alternative power centers, members of President Karzai's cabinet and National Security Council redrafted key aspects of the constitution" before presenting it to the Constitutional Loya Jirga for debate and

approval. This maneuver undermined the value of vesting drafting responsibility in a commission.

Fiji's experience offers further cautionary lessons on how to structure and operate commissions. First, the small size of the three-person review commission appointed by parliament negated the possibility of wide representation. Although a constitutional commission's typically manageable size is a potential advantage, it should ideally be large enough to be broadly inclusive. Second, the composition of the commission—two local members, representing parties of competing ethnic groups, and one foreigner as chairman—was "not propitious to defining national goals and identity." Though the commissioners confounded critics by reaching consensus on many constructive recommendations, the case study authors still see the example as problematic. Third, at over 700 pages, the commission's final report was too long to be accessible to the public; due to its length, it was not even translated into local languages. Finally, the commission's report provided "drafting instructions" for the new constitution, but not an actual draft text of the new national charter, leaving that task to the legislature and reducing the utility of the commission's work.

Considering these five experiences, an appointed commission can potentially contribute positively to democratic constitution making; the commissioners can be appointed in a balanced way; an appropriate size and diversity of membership can be ensured; the commission has the necessary expertise; it can operate independently; and given its mandate and membership, the commission is adept enough to produce a draft that will be acceptable within the political context.

### *Roundtables*

Negotiating forums referred to as *roundtables* were used most prominently in several East and Central European countries during their

transitions from communism, as a means of bringing together elements of the outgoing regime and new democratic formations. This mechanism, which proved useful in the conditions of those negotiated transitions, is illustrated by two of the European case studies in this volume.

In Poland, the roundtable comprised the so-called semi-illegal opposition and representatives of the official regime. They spent six months secretly negotiating the organizational aspects of the roundtable, then reached a compromise agreement on Poland's transition path. The agreement became the basis for an amendment to the communist-era constitution that transformed the structure of both political branches of government and began a process of piecemeal amendment that continued until an entirely new constitution was written. The roundtable functioned for a relatively short time, but it played a crucial role in the first months of the transition process; it filled the legitimacy gap opened up by the discrediting of the existing parliament of the ancien regime. The case study authors point out that ultimately, however, "enacting the 1997 constitution was detached, in time and political context, from concluding the 'peace agreement' at the 1989 Round Table."

In Hungary's fully negotiated transition process, a national roundtable undertook the first of two main rounds of constitution making. The second round took the shape of a pact between the two largest parties in parliament that specified a set of amendments to the existing (1949) constitution. In both stages, the nature of the process excluded public participation (except through a referendum, discussed below). The main substantive negotiations in the first round took place in thematic committees of the roundtable that were not open to the media or the public. The pact-making process was even more opaque, involving secret talks among top political leaders.

The case study authors elucidate a number of benefits and detriments to the roundtable method Hungary employed. The approach had the "great strategic advantage of avoiding violence and civil strife" and prevented both the forces of the old regime and new revolutionary actors from imposing a constitutional solution. In addition, it solved the problem of how to begin the process democratically when there was no prior democracy, substituting "pluralist" legitimacy in the initial stage for democratic legitimacy "by including as many relevant actors as possible and having them come to agreement through consensus or fair compromise." The roundtable approach contributed significantly to maintaining legal continuity in the Hungarian transition and facilitated consensual decision-making, thus helping to keep the transition on a stable and nonviolent path. On the other hand, the roundtable's consensus was an elite one, and the lack of popular involvement in the process and the consequent absence of genuine political legitimacy "carried over from the Round Table to all its successors" during the twelve years of fragmented constitution making.

Though not generally characterized as a roundtable approach, the first stage of constitution making in South Africa was carried out using a forum named the Multi-Party Negotiating Process that in many respects resembled the roundtable negotiating forums described above. A broad spectrum of parties from both sides of the racial divide participated in the process, which formulated the interim constitution of 1993 (approved by the last white parliament), set a date for the country's first democratic elections, and defined the outlines of the final constitution-making process. This first stage was largely closed, involving both formal multiparty negotiations and informal bilateral and multilateral talks among political party leaders. But by producing consensus on a way forward for the transition to democracy and the creation

of a new constitution, it formed the basis for the much more transparent and open final constitution-making process that followed. The first-stage process was a bridge between the structures of the apartheid regime and those of the new democratic system.

The Hungarian, Polish, and South African cases illustrate for future constitution makers the potential contributions of a negotiated transition with a two-stage constitution-making process—first elite, then more democratic—to building stability, consensus, and legitimacy.<sup>42</sup> The roundtable approach to constitution making makes particular sense in the context of a pacted transition in which the outgoing regime retains enough support or power to remain a relevant player, legal continuity is valued, and elite consensus-building is more important or more realistic, at least initially, than democratic decision-making on constitutional issues. Even if not precisely in the form of a roundtable, a mechanism that enables elite-level negotiation of key issues, as well as a more public constitution-making process, is warranted in a variety of transitional settings.

### *Referendums and Plebiscites*

Almost half the constitution-making exercises examined here used referendums or plebiscites at various stages.<sup>43</sup> A variety of motivations prompted use of these procedures, and they were carried out with highly varying degrees of the type of civic education necessary to enable voters to make meaningful judgments. Vivien Hart, in her chapter in this volume, observes that a referendum “may seem as close as the process can come to direct democracy . . . but rather than the voicing of complex desires and criticisms, the voter is faced with an up or down vote.” She also notes that partisan pressure may be exerted on voters, a dynamic evident in some of the case studies. Across the board, however, the case studies in this volume suggest that

referendums can be valuable in constitution making, conferring a degree of legitimacy on the process and its outcome.

Some of a referendum’s benefits and limitations as a device for democratizing the constitution-making process were evident in the Polish experience. Turnout for the ratification vote was only 42.86 percent,<sup>44</sup> and votes were influenced more by political sympathies than any careful study of the text. However, the prospect of the referendum appeared to have a salutary effect on the drafting process, as the constitution writers had to anticipate public acceptability of their work. In this sense, public opinion had an important passive impact on the formulation of the text.<sup>45</sup> Moreover, the referendum, in the case study authors’ view, “legitimized the document and contributed to the public’s accepting it.”

While referendums have been used usually to ratify a final constitution, as in Poland, Widner’s study finds that in rare instances, referendums are held at an interim stage to seek popular approval of decisions made during negotiations preceding the actual constitution-making process.<sup>46</sup> All three of the instances she cites are included among the case studies here. In Spain, voters were asked to approve a transitional reform law adopted by parliament. In South Africa, the apartheid government called a referendum of white voters to test acceptance of its efforts to negotiate with the African National Congress. And in Venezuela, a referendum was held to decide whether to create a constituent assembly. The chapter here on Colombia provides a fourth example: A referendum was held on the question whether to establish a constituent assembly. In each of these cases, the referendum served a context-specific purpose, though on a general level, it was used—as with any referendum—to provide some degree of democratic authorization for particular political choices.

The Iraq case presents an altogether different type of referendum, called for the purpose of crafting a bargaining chip in constitutional deliberations (a separate nationwide ratification referendum also was held, as discussed below). Elites in Iraqi Kurdistan realized that the argument for preserving their autonomy needed to be made with reference to popular support, “hence the spontaneous poll organized by the Kurdistan Referendum Movement at the time of the January 2005 election, intended to demonstrate support for Kurdish independence.” The unsurprising result, which overwhelmingly favored Kurdistan’s independence, became a useful instrument for Kurdish negotiators during the drafting negotiations the following summer, as they pressed for greater regional powers.

When referendums are used for their more common purpose, ratification, they occasionally have proven to be a valuable corrective measure, even at the end of an inferior constitution-making process. Zimbabwe is an outstanding example. The legitimacy of the 1999 constitution-making process was openly disputed, given tight government control over it. In the referendum, voters rejected the constitution by 54 percent, despite a vigorous government campaign in favor of the document. The rejection “sparked a furious reaction from the government,” including large-scale invasions of white-owned farms by Mugabe loyalists. Ironically, though the electorate accurately perceived that the constitution-making process was seriously flawed, the text it rejected would have been a substantive improvement over the existing constitution. Similarly, in Albania, voters rejected a 1994 constitutional draft when it arguably was developed in violation of the interim constitutional arrangements; some voters saw it as favoring the governing coalition. In Venezuela, voters in December 2007 narrowly defeated constitutional amendments sought by the government of Hugo Chavez, despite the incentive of prom-

ises of a shorter workweek and even though President Chavez by then controlled all the major levers of power.

A crucial question for determining the utility of referendums is whether and to what extent they confer legitimacy on the constitution-making process and its outcome. In general, the case study authors take the view that they do bolster popular legitimacy. Vivien Hart is somewhat more skeptical, particularly where a referendum on a final text is the only opportunity for public participation in the constitution-making process: “The oft-cited function of legitimation of the text, essential if a culture of constitutionalism is to support its implementation, may not be achieved merely by casting a vote.” Providing a simple up or down vote after all the key decisions have been made, she notes, “is not adequate participation in democratic governance, and the public knows this.” Instead, Hart argues that a referendum can be a meaningful way of “holding representatives to account and creating legitimacy for the constitution, but only when it is embedded in a process of continuous and sustained participation.” Some cases demonstrate that referendums, notwithstanding their potential value, are just one item on the menu of options for ensuring legitimacy. In South Africa and Eritrea, the constitution makers considered ratification referendums unnecessary given that the overall open and democratic nature of the constitution-making processes served the legitimation function.

In Hungary, however, a referendum held on four substantive questions provided the main source of the amended constitution’s legitimacy, in Arato and Miklosi’s view, as it was the *only* “popular moment” in the entire constitution-making process. But overall, they see the degree of legitimacy enjoyed by the Hungarian constitution as low—as a result of the failure to replace entirely the communist-era constitution, and the use of a gradualist amendment approach instead. This

example raises the thorny question of how and why, precisely, legitimacy matters. The harm to the quality of Hungarian democracy may be real, but the practical manifestations of that harm are difficult to discern. Hungary is a stable country that since its constitution-making process concluded has been accepted into both the European Union and NATO. Hungary is thus one of those cases in which the question whether the constitution-making process was successful or not must be given a mixed response; the process unfortunately failed to generate democratic legitimacy for the new constitution, and yet, despite that, the country has become a stable constitutional democracy.

Regardless of the extent to which a referendum generates democratic legitimacy, its results, so long as the voting is basically free and fair, can serve as a useful means of gauging public regard for a new constitution at the moment of its adoption and public perception of the fairness of the constitution-making process. Such results can be an imperfect gauge, however, as propaganda, partisan pressure, and other factors may influence voting. Albania in 1998 illustrates such imperfections: A high percentage of cast votes (90 percent) approved the new constitution after a polarizing referendum campaign, but the opposition boycotted and turnout was low, disturbing the reliability of the referendum as a means of measuring public perceptions. But other cases permit some clearer observations. With respect to Iraq, for example, it may be reasonable to conclude that the constitution enjoys high regard among Shia and Kurds, who approved it in large numbers, but not among Sunnis, who saw the constitution-making process as ultimately unfair; they overwhelmingly voted against it, though not in great enough numbers to block adoption of the constitution.

Overall, the case studies suggest that referendums can be useful in many instances.<sup>47</sup> They may serve to validate, or repudiate, a constitution and the process of its develop-

ment. And if they are carried out under free and fair conditions—and preceded by opportunities for public input as well as public education to enable a vote on the constitution to be an informed one—they can help build a sense of public ownership and engagement with the new charter that is essential to healthy constitutionalism.

### *Interim Arrangements*

Among the 194 constitution-writing exercises from 1975 to 2003 in Widner's study, one-third involved the preparation of an interim constitution, or a set of immutable principles or essential features intended to serve as required elements of the permanent constitution. These interim arrangements sometimes reinstated and selectively amended an earlier constitution.<sup>48</sup> Of the cases in this volume, more than half involved some type of interim arrangement (see Table 22.3 above).<sup>49</sup> The disproportionate representation of interim arrangements in this volume compared to Widner's data likely reflects their necessity in situations of regime change, conflict resolution, or other ruptures, where preexisting governance structures have either disintegrated or been discredited. Tables 22.2 and 22.3 above, considered together, show that all the cases in which interim arrangements were put in place were those involving periods of conflict, or transitions from conflict or authoritarian rule. None of the countries in the institutional crisis or reform category used interim arrangements; no regime rupture had occurred proximate to the constitution-making exercise.

Interim arrangements often are negotiated among political elites, generally in a closed or even secret manner—including through the use of a roundtable structure, as discussed above—though the case studies here also include arrangements specified in peace agreements or imposed by an occupation authority. Such arrangements may take a variety of forms, including a fully elabo-

rated but explicitly temporary constitution, a statute that serves in place of a constitution, or a political agreement among conflicting parties who intend to engage in constitution making.<sup>50</sup> Whatever the form, two main aspects of such arrangements relevant to constitution-making processes are, first, the provision of operative transitional measures intended to serve as a constitutional placeholder, and second, the specification of fundamental principles to guide the future development of the state, including in some (but not all) instances to guide the development of a new constitution.

#### *Operative Transitional Arrangements*

To give just a few examples of the types of operative transitional arrangements adopted in the cases in this volume, in Spain, the 1976 “fundamental law” was effectively a transitional constitution sponsored by the king and the prime minister appointed by him, and approved by popular referendum.<sup>51</sup> In Nicaragua’s revolutionary context, the 1974 constitution—discredited beyond repair—was promptly abolished and a “fundamental statute” as well as a “statute of rights and guarantees” were put in place to provide a temporary constitutional framework. Some transitional arrangements lay out requirements for the course of a constitution-making process, as in Eritrea. By contrast, the author of the Cambodia case study laments that the transitional provisions in the Paris Peace Agreement missed the opportunity to guide the constitution-making process, though the agreement did require certain substantive constitutional features.<sup>52</sup>

South Africa’s experience provides an excellent example of a two-stage constitution-making process utilizing interim arrangements. There, in relatively closed and hard-fought negotiations, elites agreed upon a transitional constitution, followed by a two-year process of more open and participatory constitution making by an

elected constitutional assembly that resulted in the adoption of a permanent constitution. The 1993 interim constitution, adopted in the first phase, put in place a power-sharing system that was used as a transitional device to achieve the objectives of immediate conflict resolution and peaceful coexistence. The national unity government formed at that stage, as well as other mechanisms intended to level the electoral playing field,<sup>53</sup> created political space for forming a new, integrative social contract and a majoritarian system (with protections for minorities) in the second stage. The interim constitution also outlined the procedures for making the final constitution, incorporating a set of principles with which the final text would have to comply. In effect, the interim constitution was a peace treaty, and while the need for it to serve that function resulted in some imperfections as a constitutional document, it created new facts on the ground that enabled the final constitution to be written in a more propitious atmosphere.<sup>54</sup>

The South African case illustrates the potential benefits of making intermediate reforms for a transitional period where there is a need for immediate compromises not suited for a constitution that is meant to endure, and where it is not feasible to craft those compromises in a democratic and transparent forum. (Similarly, the Bosnia case illustrates the harm of setting out in a permanent constitution the same sort of compromises agreed in closed negotiations, as discussed below.) The South African example also, however, raises a cautionary point for future cases: Once the interim constitution was agreed, it became a template for the final constitution. This may not have been problematic in South Africa, but it suggests the difficulty of revisiting the substance of interim agreements.<sup>55</sup> The Spanish experience also illustrates this phenomenon. A regionalization and devolution program put in place during the transition period was not supposed to prejudice the final constitutional dispensation on the key

issue of regional autonomy, but, in the event, it became irreversible.<sup>56</sup>

### *Preconstitutional Principles*

The extent to which the principles specified in some interim arrangements are consecrated in the permanent constitution varies. In South Africa, as discussed in the next section, judicial review by a constitutional court ensured that the final constitution was consistent with the thirty-two essential principles agreed by the parties that negotiated the interim constitution. In Cambodia, where there was no such enforcement mechanism and the UN Transitional Authority, in the case study author's view, was not as assertive on these points as it might have been, the constituent assembly did not hew closely to the principles in the 1991 peace agreement that were intended to be embodied in the constitution. Instead, the Cambodian assembly drew on two prior constitutions as the main substantive sources for the new constitution.

In Namibia, the constituent assembly effectively adopted the preconstitutional principles as its own, minimizing the need for judicial or other enforcement. The UN Security Council resolution that set the framework for the constitution-making process had failed to speak to the nature and content of the constitution to be created. The Namibian political parties regarded this as a serious shortcoming and consequently agreed to the so-called 1982 Constitutional Principles, brokered by international negotiators. The assembly formally adopted the principles as the basis for its work at its first meeting. Taken together, these examples suggest that the need for a mechanism to enforce compliance with preconstitutional principles depends entirely on the strength of the parties' will to adhere to them, or the need (as in South Africa) to back the principles with a guarantee as a means of securing agreement to proceed with constitution making.

With respect to both operative transitional arrangements and preconstitutional principles, the South Africa case in particular suggests that, in deeply divided societies, measures that safeguard the interests of all relevant groups appear to help in completing a transition without violence or process breakdown. However, the Iraq experience—in which the “transitional administrative law” served as an interim constitution and established basic requirements for the final constitution-making process—suggests that such measures may be insufficient in this regard. Perhaps the fact that an occupation authority imposed the law, following compressed negotiations among some of the parties rather than genuine negotiations among all key stakeholders, contributed to its inadequacy in ensuring a peaceful transition.

### *Judicial Roles*

In a handful of cases, a constitutional or other court played a role in the constitution-making process. These cases illustrate a variety of ways in which the judiciary can provide legal interpretations that become part of the process or enforce political agreements in the unsettled conditions that usually accompany constitution making.

In South Africa—the most significant example—the interim constitution of 1993 both created a new Constitutional Court, and required it to review whether the final draft of the permanent constitution complied with thirty-two core principles laid out in the interim document. The court returned one draft to the constitutional assembly to revise eight points judged to be inconsistent with the principles; the assembly then modified the relevant provisions accordingly, and the court certified the amended document in a second decision. By assigning this task to the court, the political party leaders who crafted the interim constitution effectively substituted judicial affirmation of compliance with their

political agreement for a more purely democratic validation of the final constitution.<sup>57</sup> In other words, the unelected court was given the authority to override the decisions of the democratically elected assembly on the basis of a comparatively undemocratically created constitutional pact.<sup>58</sup> The unprecedented role accorded to the court at least partly reflected South Africa's strong legal tradition, and lingering respect for the law as a means of dealing with conflict, both among those who were the oppressors and those who were oppressed during the apartheid period.<sup>59</sup>

The South African Constitutional Court exercised great care in formulating its certification decisions, its decisions were widely accepted, and, importantly, the invention of its certifying role broke a deadlock in the transition negotiations. But it would be difficult to recommend such an approach to other new or fragile democracies, which rarely have a supply of well-qualified, astute, independent judges comparable to South Africa and rarely enjoy the same level of respect for judicial institutions.<sup>60</sup> Where conditions similar to those in South Africa are found, however, judicial review may be useful in ensuring adherence to agreed-upon fundamental principles.

Among the case studies, other examples can be found of more limited, and more commonplace, roles for the judiciary in constitution-making processes. In Colombia, the Supreme Court ruled on a challenge to the presidential decree establishing the constituent assembly. Despite existing constitutional provisions authorizing only the congress to effect constitutional reforms, the court relied on the notion of popular sovereignty to uphold the decree, which was based on the results of a referendum that overwhelmingly supported the creation of a constituent assembly. Similarly, in Poland, the Supreme Court played a part in the process by examining 433 challenges to the validity of the refer-

endum approving the constitution (it decided that the procedure had been valid).

Looking more broadly at constitutional formation during transition periods, Poland and Hungary provide additional examples of important judicial actions. Polish courts—in particular, the constitutional court—played a role during the long stretch of piecemeal amendment of the 1952 constitution that preceded the enactment of a new constitution. During that time, the courts declined to enforce some of the old constitutional provisions, relying on the newly introduced constitutional principles instead. Courts also rewrote some old constitutional provisions on the basis of both the new principles and provisions of the European Convention on Human Rights. The case study authors note that “in this way, the judicial branch civilized and modernized the old constitution and prepared a relatively smooth transition into the post-1997 constitutional order.” In Hungary, the “air of temporariness” surrounding the constitution—the patchwork nature of the amendments to it, its shaky legitimacy, and the circumstances of the negotiated transition—enhanced the significance of the constitutional court's role as the constitution's guardian. In those unsettled conditions, the court, through its interpretations, effectively helped to make the constitution. As the consolidation of the new regime progressed and major interpretive rulings were made, the court's judicial activism diminished. These two examples demonstrate how capable judiciaries can strengthen constitutional democracy when performing their ordinary interpretive functions during extraordinary times.

### **Inclusiveness and Representation**

The case studies indicate that the democratic representativeness of and degree of inclusiveness among constitution makers affect the perceived legitimacy of a constitution-

making process, as well as the degree to which its outcome reflects a true social contract among all relevant groups.<sup>61</sup> A lack of inclusiveness may create a need for measures to avoid the disproportionate influence of a dominant political force. Moreover, the breadth of representation among decision makers of relevant groups and factions will likely determine whether the parties necessary to reach a durable constitutional bargain are at the table. The question of who needs to be included or represented depends entirely on the specific circumstances of the case, but generally, the cases show that consideration should be given, *inter alia*, to elite groups and other power holders; ethnic and minority groups; sectarian groups; civil-society organizations, especially those that are organized and active; and women. Particularly in deeply divided societies and those emerging from conflict, an inclusive approach can be vital to enabling conflicting parties to debate and negotiate the terms of the new national order and resolve important differences peacefully.

The most basic procedure for ensuring that the constitution makers are representative of the citizenry and include leaders of societal groups with varying interests is to elect the principal constitution-making body democratically, particularly through proportional representation.<sup>62</sup> An elected or partly elected body was a part of the process in all the case studies in this volume.<sup>63</sup> In Colombia, for example, the elections for the constituent assembly were based on new electoral rules that opened up the political process as never before to those outside traditional power structures, even though turnout was very low. Those traditional forces fought back later, but the constitution embodies very significant democratic reforms, no doubt affected by the assembly's composition.

Additional procedural techniques to ensure inclusiveness among constitution makers and enhance representativeness include appointing a broad-based constitutional com-

mission to play a key role in the process, as in Eritrea. Another technique involves supplementing an elected constituent assembly membership with some appointed members representing relevant groups in society, to ensure that a broad range of voices are present at the negotiating table. In Afghanistan, quotas for certain groups were established for the selection of members of the Constitutional Loya Jirga, and 10 percent of the seats were set aside for presidential appointment, "to ensure that certain groups or individuals important to the process (in the government's eyes) were represented." As with other aspects of constitution-making processes, the particular circumstances shape the particular procedural choices made to ensure representation: In Eritrea, for example, citizens living abroad were considered to have been crucial to the armed struggle in providing intellectual, diplomatic, and financial resources. Consequently, provision was made for their representation in the constituent assembly. In South Africa, although no seats were guaranteed for particular groups, inclusion and protection of the interests of minority groups were assured by constraining the substantive choices available to the constitutional assembly through prior negotiation of a set of binding constitutional principles.

In some cases, the formal promise of representation and inclusion is unfulfilled in reality. Overall, the cases demonstrate that fairly run elections are a valuable means of democratizing the constitution-making process. Several cases, however, illustrate that problematic elections can fail to fulfill their democratizing potential. For example, the constituent assembly in Venezuela was elected, but President Chavez manipulated the election to ensure that his followers controlled the assembly.

In the same vein, an appointment mechanism that is ostensibly established to broaden inclusion can be misused. In Uganda, both the electoral and appointment procedures were distorted, and the constituent assembly elec-

tion process had a markedly negative impact on democratic representation even beyond constitution making. The election process gave every advantage to the National Resistance Movement and suppressed any other political party activity; consequently, the elections “became a turning point at which the Movement emerged as a *de facto* single ruling party.” In addition, one-quarter of the seats in the constituent assembly were set aside supposedly to provide representation of various sectors. But the ruling National Resistance Movement’s supporters filled nearly all the appointed slots, demonstrating that the nature and motivation of the appointing authority determine the extent to which an appointment procedure accomplishes its nominal objective.<sup>64</sup> As a result of all these maneuvers, the constitution-making process failed to achieve a genuine popular consensus on Uganda’s political system.

Some cases also illustrate the problem of excluding key stakeholders, a dynamic that in some instances involved shutting the opposition out of constitution making,<sup>65</sup> and in others involved self-exclusion by boycotters.<sup>66</sup> In either situation, the depth and durability of any consensus achieved in the process can be harmed. In Nicaragua, for example, some opposition elements boycotted the process, thus limiting the consensus reached. As a result, though the constitution-making process was an important aspect of the transition, it cannot be said to have facilitated reconciliation.

In Iraq, too, electing the constitution drafters did not translate into real representation. This was due to the Sunni Arab boycott of the election and electoral rules that made Iraq a single district. Also, in the endgame where the real negotiating occurred, political party leaders excluded assembly members from the process, leaving them in the dark even as to the contents of the text. Iraq perhaps more than any other case dramatizes the need to have all key groups fully involved. The

constitution-making process had the potential to play a crucial role in preventing the country’s slide into civil war, but the exclusion of Sunni representatives and Sunni interests from the process precluded this possibility.

Some cases demonstrate the paramount importance, in certain circumstances, of elite participation in the constitution-making process, so long as credible representatives of all key groups are included. In Spain, elite buy-in was regarded as essential, the negotiation process involved closed (at times secret) political party negotiations, and there was no public participation. Yet the outcome there, on the whole, can surely be considered a success.<sup>67</sup> In Namibia, too, strong elite ownership of the process provided excellent conditions for success. Based on that particular experience, the case study author comments that the “process of constitution making must be driven by elites . . . sustained by popular support.” In South Africa, the success of the first stage of constitution making, which produced the negotiated interim constitution, hinged on the participation by and consensus reached among elites on both sides of the racial divide.

It is clear that regardless of the inclusiveness of a process, the support of the dominant political forces—sometimes certain political parties, sometimes individuals—is required for implementation of the constitution ultimately to occur. Spain, where the king and other political elites backed the constitution, is a positive example in this regard; Eritrea, where President Afwerki thwarted effectuation of the constitution, is a negative one.

### **Direct Public Participation**

The manner and significance of providing opportunities for public participation in constitution-making processes emerged as a central topic in this study. The spectrum of citizen involvement in constitution mak-

ing evident in the case studies runs from no involvement at all to direct consultation and substantive input, with tremendous variation among the cases in how participation was structured and whether and how public views influenced the result.<sup>68</sup> Where the constitution-making process featured public participation, the timing of this element varied as well: In most cases, it occurred during the drafting or approval phases, though in Colombia, public action fueled the start of the constitution-making process.

Election of representatives who will draft or deliberate on the content of a constitution—a form of indirect participation—was the most commonly utilized procedure in the cases for involving the public, and is discussed above. The use of referendums, a direct but limited form of participation, is addressed above as well. The discussion here is focused on direct public participation in the form of consultation procedures that solicit substantive citizen input and, in the best-managed cases, also educate the public about constitutional questions to be decided.<sup>69</sup> The East Timor chapter highlights the importance of distinguishing between civic education and popular consultation—sometimes conflated in both constitution-making practice and analysis of public participation. Though this point is not explored throughout the chapters, future constitution makers would be well advised to focus separate attention on both of these aspects of citizen outreach.

What does a serious program of public education and consultation look like? South Africa stands as perhaps the most elaborate and best-regarded example of such a program to date.<sup>70</sup> The outreach effort there was very wide-ranging and extensive, including public meetings, civil-society workshops, a newsletter published by the constitutional assembly, constitutional education television and radio programs, a telephone talk line, a Web site for the assembly, distribution of millions of copies of the draft constitution at various

stages, posters, pamphlets, and advertising. The consultation process was conducted in two phases. In the first, more open-ended phase of consultation, the process elicited nearly two million submissions to the assembly, though the vast majority of these were signatures on petitions regarding a variety of issues. Of the submissions received, just over 11,000 contained substantive comments, some of which amounted to wish lists. The bulk of the substantive submissions reflected popular sentiment that the most important issues for inclusion in the constitution concerned immediate material needs, such as more jobs, more housing, better educational opportunities, crime prevention, and clean water. The petitions addressed issues including language rights (about half the petitions called for Afrikaans to be one of the official languages, an inevitable outcome of the process in any event), animal rights, abortion, the death penalty, and the seat of the parliament. Of less demonstrated concern were issues more typically associated with democratic constitutions, such as civil and political rights.<sup>71</sup>

In the second phase, the constitutional assembly invited comments on a working draft and received 1,438 submissions and almost 250,000 petitions concerning issues similar to those raised in the first phase. Much skepticism was expressed, including in some of the submissions and in responses to surveys, about the seriousness of the invitation for public comment, though the assembly was lauded for seeking to involve the public. However, while the submissions in both phases were mostly not directly translatable into constitutional text, they were carefully analyzed and summarized in reports presented to the constitutional assembly and certainly informed the constitution writers of the main trends in citizen interest in the substance of the constitution.

The emphasis on constitutional education, neglected in some other cases, was a

hallmark of the South African consultation process. It was recognized at the outset that without empowering a population with no culture of constitutionalism, high levels of illiteracy, and low levels of access to media, the consultation process would be hollow. Thus, throughout the constitution-making process and interwoven with the consultation initiatives, interactive programs involving members of the constitutional assembly and the general public, media campaigns, advertising, and various types of printed matter were all used to create awareness of the constitutional process and opportunities to provide input, and to provide information about constitutional issues.

Moreover, the iterative nature of the public participation program—a more open-ended first phase, followed by a more focused second phase based on a draft—was a useful feature.<sup>72</sup> This approach allowed the constitutional assembly to begin consultation by broadly canvassing public opinion on constitutional priorities, and then to seek public comment on actual draft constitutional provisions and alternatives. As a result, opportunities were enhanced for meaningful popular participation in the constitutional design, as well as for a more extended—and in the second phase, more specific—civic education and consultation component.

Eritrea also conducted a very extensive public education and consultation process. Civic education organized by the constitutional commission reached more than 500,000 citizens. Seventy-three local committees and a series of provincial offices organized public education. In addition to commission members, over 400 specially trained instructors conducted public seminars in village and town meetings. In light of an 80 percent illiteracy rate in Eritrea, the commission organized songs, poetry, short stories, a comic book, mobile theater groups, and concerts dealing with constitutional themes, along with extensive use of radio programs. During the consultation phase, public meetings

on constitutional proposals in 157 locations involved 110,000 participants. An additional 11,000 Eritreans participated in consultations in sixteen locations outside the country. Rounds of public consultation occurred prior to drafting, on the commission's draft, and on the version approved by the legislature.

Even with respect to these exemplary consultation and education procedures, it must be acknowledged that their precise impact is exceedingly difficult to measure. In South Africa, the direct impact of public input on the text appears to have been slight, but the participation process is credited with having generated broad public awareness and positive popular perceptions of the constitution-making process. In Eritrea, the commissioners fully expected at the outset that public input would shape the constitution, but the concrete effect on the text was limited, as many of the public comments were not translatable into constitutional provisions. Nevertheless, the case study author (who chaired the commission) remarks that "it is beyond dispute that the public consultation and debates throughout the constitution-making process were important in instilling a sense of public ownership in the constitution. Whether and to what extent public input actually influenced the text of the constitution ultimately adopted is more difficult to discern." Some commissioners were clearly inspired by the depth and extent of public comment: "The spirit of such public input is reflected in the constitution." But the ideas that the public put forward were, for the most part, "not susceptible to being explicitly translated into the language of a modern constitution." In the end, the commission's hypothesis that public participation would critically influence the text "cannot be said to have been proven." But, as Selassie makes clear, the sense of public ownership the process created was certainly valuable in laying a foundation for constitutionalism, even though that value may have dissipated with the government's refusal to implement the

new constitution and the passage of a long period of undemocratic rule.

The constitution-making experiences of Uganda and Zimbabwe suggest that invitations of public input may be little more than empty gestures unless accompanied by intentions to reflect seriously on that input. Both countries undertook extensive public consultation efforts, even though the constitutional commissions that conducted the consultations were effectively under the thumbs of the governments. The Uganda case study author observes that “rarely in Africa has one seen the level of popular engagement in education seminars, debates, media discussions, and submission of opinion memoranda that was evident in the Ugandan constitution-making process.” In Zimbabwe, the commission held over 5,000 meetings in all fifty-seven districts, conducted a nationwide poll, and administered a questionnaire. And yet, in both of these two cases, the constitutional text was bent to the government’s will. Indeed, the consultation process in Uganda “may have lent unwarranted legitimacy to the more undemocratic aspects of the process and the resulting constitution, giving the Movement more time to entrench itself.”

Even where the motivations behind a participation program are positive, careful channeling of the results of a consultation process is critical to maximizing the program’s potential benefits, as seen in Brazil. Public involvement in that case was very extensive: The constituent assembly’s media center produced over 700 television programs and over 700 radio programs, and a weekly journal was broadly distributed; 182 public hearings were held; 5 million questionnaires were disseminated to citizens and civic groups; nearly 73,000 popular suggestions were received; and even though a popular amendment required 30,000 voter signatures for consideration, 122 such amendments were submitted, some with more than one million signatures. However, the intense public

participation contributed to an incoherent textual outcome, particularly because of the inability of a weak party system and weak president to channel the public input into a rational framework. Moreover, the highly politicized environment created by using the congress as a constituent assembly opened the door to undue influence by special interests, which lobbied forcefully. While the emphases on openness and democratic process in the Brazilian participation program were laudable, the execution of the program—in particular, the failure to define reasonable parameters for the issues to be considered and to impose reasonable constraints on the influence of organized pressure groups—led the process seriously astray.<sup>73</sup> Without such constraints, or any dominant party to exercise control over the process, “in principle and in final result, nothing was deemed too trivial for possible inclusion in the new constitutional text.”

The Albania case study is the only one to quantify the impact of a public consultation process. Compared with some of the other cases, the process involved a relatively small number of participants—in the hundreds—but the program was well organized and conducted, involving several types of consultation procedures. Among the hundreds of suggestions from the public regarding changes to the draft constitution, the parliamentary constitutional drafting commission incorporated more than fifty proposed changes affecting 45 (of 183 total) articles into the revised text, which ultimately was submitted to a popular referendum. The nature of these changes varied widely, but some touched on high-profile subjects, such as property restitution. The sheer number of changes vividly demonstrated how seriously public input was taken. Ultimately, notwithstanding an opposition boycott, the constitution received the support of 90 percent of voters in a referendum, and the opposition eventually came to accept the document as well. While a public

participation process could no doubt affect the general perspectives of constitution writers, and could produce public comments that mirror and bolster the priorities and formulations that the drafters already prefer, impact in these respects is difficult to identify. Including or modifying actual constitutional text in response to public input is, therefore, a helpful, though imperfect, indicator of the genuineness of a participation process. But a public consultation process can be genuine and have a legitimizing effect even if it cannot be tracked to specific identifiable textual modifications.

While most cases do not present dramatic evidence of public input resulting in textual change, Vivien Hart provides several examples of constitution-making experiences—including Canada, Colombia, Nicaragua, South Africa, and Sri Lanka—in which constitutional language was changed as a consequence of participation, the clearest evidence being the addition and development of women's rights and protection of the interests of indigenous peoples in various texts. She proposes that “a handful of examples is enough to indicate the potential of participatory processes to bring previously unconsidered people and issues into the constitutional arena.” Regardless of how many words in a constitution can be traced directly to public input, the tabling of ideas, grievances, and goals by groups and individuals within society can inform the crafting of a national charter. From this perspective, Hart argues that an “increasing body of practical experience demonstrates that public participation can change the constitutional agenda.”

Aside from the impact of public participation on constitutional legitimacy, ownership, and content, and regardless of the difficulty of measuring those effects, there appear to be practical benefits to public participation.<sup>74</sup> It is possible, for example, that opening the constitutional debate to groups previously excluded from, or underrepresented in, the

political process helps to build social consensus. It is also possible that participation processes effectively demonstrate the practice of democracy, and that such processes build capacity in civil society.<sup>75</sup> This volume cannot claim such benefits definitively, particularly given the uneven implementation of participation programs among the cases, but arguments can be made for each. There is little doubt that widespread public education and debate over fundamental rights during a constitution-making process produce increased citizen awareness of those rights, which, in turn, can enable the expression of public demands that those rights be enforced. Vivien Hart cites evidence from a systematic study of Uganda that its legacy of education and participation in the constitution-making process was evident in a more informed, critical, and questioning public in subsequent politics. In Cambodia, where the United Nations and civil-society groups undertook a program of constitutional education—but popular participation was rejected by the drafters—the “process of reading and hearing about the constitution, and of learning that something so significant to their future was being decided in secret may well have influenced the population's long-term expectations.” As a result, Cambodians have been “remarkably persistent in calling for greater transparency and accountability of government.” The case study author speculates that “had the demands for participation by the vibrant civil society that took shape in the course of the process actually been met . . . perhaps the process itself would have been a capacity-building exercise, strengthening the role of civil society and the population at large in the political destiny of the country.”

Furthermore, some of the case studies illustrate clear context-specific rationales for public participation. Several cases illuminate the importance of public expectations in determining the practical necessity of a public participation program. In Iraq, public partic-

ipation was expected, desired, and promised in the interim constitution; the frustration of those expectations was one of the key flaws of the constitution-making process. In South Africa, a cultural “fetish with consultation” dictated the necessity of the strategy there.<sup>76</sup> And in Eritrea, the constitution-making process was part of a broader transition process that stressed public participation and popular authorization. A 1993 referendum on independence—intended to demonstrate the independence struggle’s popular backing—set a precedent for popular participation: “Eritreans saw the constitution as fulfilling the goals of the liberation war, thus helping to vindicate their enormous sacrifice.” Following a revolutionary armed struggle, “the Eritrean political and social context was marked by an anti-imperialist and anti-feudal bourgeois ideology that was suspicious of any event or process controlled by elites.” Against the backdrop of these circumstances, the intensive public consultation process can easily be seen as crucial to ensuring popular acceptance of the outcome.

A dynamic similar to the Eritrean case was evident in Nicaragua. In the revolutionary context of the constitution-making exercise, and the consequent rejection of the legacy of pact making associated with prior constitutions, participation was needed to ensure popular acceptance of the result. Civil-society groups were invited to engage with the constitutional commission before an initial draft was prepared; following the drafting, 150,000 copies of the document were distributed. Twelve debates were televised, and seventy-three town hall meetings held around the country were broadcast live. Finally, a review committee reported on public input and prepared a second draft. In all, about 100,000 people attended the meetings, 2,500 citizens made presentations, and 1,800 more submitted written comments. Some questions were raised regarding the genuineness of the pro-

cess—government critics generally viewed the public meetings as “well-controlled forums to permit only perfunctory modifications to the original draft constitution”—but most independent observers found the discussions generally lively and freewheeling. The emphasis on participation “was part of a larger revolutionary process that aimed to mobilize civil society groups politically.” Public input in this case had concrete effects; changes were made to strengthen women’s rights, the rights of indigenous peoples, protection of minors and the elderly, and recognition of the rights of prisoners.

The Nicaraguan case also shows, however, that public participation is not the only necessary dimension of consensus building. Though this process “achieved significant levels of citizen involvement,” minimal elite consensus was developed. Subsequent constitutional reforms, on the other hand, involved low levels of public participation, but—in a reversion to the historical pattern of pact making—were more successful in achieving mutual elite accommodation. There is generally a role for both public and elite participation at varying stages of the constitutional process.

Another context-based rationale for public participation was evident in East Timor. There, the political dominance in the constituent assembly of the Fretilin party constrained the debate, resulting in the party’s own draft powerfully influencing the final text. A genuine sustained process of public participation might have helped to open up the debate and prevent an outcome in which one political party seemed to own the constitution.<sup>77</sup> Instead, the civic education and consultation process was poorly structured, rushed, and ultimately amounted to “window dressing.”

The Iraq case presents an additional context-specific rationale for conducting a program of broad public participation. By

boycotting the constituent assembly elections, the Sunni Arab community—one of three major communities in Iraq—denied itself an elected seat at the drafting table.

It followed that the only way in which Sunni Arab citizens of Iraq would be able to express their views to the constitution committee [of the constituent assembly] would be by direct communication. . . . In other words, it was clear that unelected Iraqis would need to participate in the drafting. The public participation component of new constitutionalism, therefore, began to look less like the icing on the cake of universal suffrage and more like an essential peace-making instrument to prevent a full-scale civil war in the heart of the Middle East.

In the event, however, the consultation process was unduly rushed and thus became utterly inconsequential. Furthermore, public access to participation opportunities, especially by Sunni Arabs, was uneven due to security issues and sectarian divisions. No results from the consultations were reported in time for drafters to consider them. Similarly, in Albania, the major opposition faction's boycott of the constitutional process heightened the importance of reaching out to the affected members of the public and engaging them directly in the constitutional discussion. However, Albania's consultation process was much better managed and, as a consequence, had greater impact than in Iraq.

The contrast between the Iraq and Albania experiences illustrates the importance of creating the institutional means to link participation to the actual drafting process. In Iraq, while some effort was made to create structures for receiving, digesting, and forwarding public input to the drafters, those efforts came too late, were distorted by sectarian divisions, and ultimately were ineffective. In Albania, by contrast, a professionally managed administrative body supported by foreign donors organized all the public comments received and assisted the parliamentary constitutional commission and its tech-

nical staff in the review process. As a result, the drafters actually considered citizens' and civil-society groups' proposals.

Fiji's experience powerfully illustrates the potential danger of failing to provide for public participation in particular circumstances. The constitutional commission there held some public hearings while developing its lengthy report. However, once the commission submitted its report, the remainder of the constitution-making process was conducted behind closed doors in parliament. The case study authors attribute the coup that occurred one year after the constitution came into effect partly to the secretiveness of the constitution-making process, as well as to the failure to engage in significant public consultation and education regarding the constitution.

A broadly applicable rationale for incorporating a program of public participation into the constitution-making process is the possible emergence of an international legal norm requiring states to do so. The examples of public participation in the present volume appear to have been driven more by evolving political norms and public expectations than by a sense of an obligation under international law. That said, Franck and Thiruvengadam (in this volume) conclude that while they do not yet find a specific requirement under international law for a particular form of participation in constitution making, there is a clear trend in practice and "growing acceptance of the norm that constitutions should be prepared through participatory processes with a high degree of transparency." This view tracks a decision of the UN Human Rights Committee, to which they refer, which found that under the International Covenant on Civil and Political Rights, a public right of participation extends to constitution making, though it is up to each state to choose "the modalities of such participation." Hart (also in this volume) more assertively argues the

case for an emerging legal right to participation in constitution making. She notes that “no single authoritative set of standards has yet emerged in law or from organizational sources” to guide public participation, but affirms that the culture of constitution making has come to include the expectation of democratic practice.

As with other elements of constitution making, an overarching lesson from the case studies is that choices with respect to the degree and nature of direct public participation should be tailored to the particular circumstances. Cases such as South Africa, Eritrea, and Nicaragua illustrate the potential benefits of participation as well as the reality that certain political and social conditions effectively require openness and extensive participation if the results of a constitution-making process are to be regarded as legitimate. On the other hand, in Poland, which eschewed public participation, negative public sentiment with respect to the idea of participation was shaped by prior experience, as sham public discussions were typical in constitution-making processes in communist countries. In 1952, official data record that more than 11 million Polish citizens took part in more than 200,000 meetings within nine weeks, though as the case study author states, “needless to say, there was no room for any criticism, and the whole campaign had a purely decorative character. That was why, forty-five years later, any attempt to copy such a procedure would produce more distrust than support among the electorate.” Although two of the earlier case studies—Spain and Namibia—show that excellent results can be achieved with elite-driven, mostly closed processes, more recent experience suggests that it is now far harder to claim legitimacy without at least some nod to public participation.

That said, while the case studies and thematic chapters on the whole regard public participation as valuable in terms of democ-

ratizing the constitution-making process and legitimating the results, some cases in this volume raise a number of difficult questions still to be answered in theory and practice regarding how to structure and use the results of public participation to maximize its potential legitimating function.<sup>78</sup> Recognizing these questions should not discourage implementation of public participation processes; rather, it should encourage further exploration of their conduct and significance, and further development of effective participation procedures.

At the most basic level, the practical purposes of soliciting participation remain underspecified. Is the purpose to create the perception of legitimacy and the feeling of ownership among the population, or actually to shape the constitutional text? Is a public sense of participation all that is needed to create legitimacy and ownership, or must there be evidence that the constitution writers actually took into account popular views?<sup>79</sup> Is the purpose to develop a culture of constitutionalism, and if so, how does participation serve that purpose? Furthermore, what precisely does participation mean?<sup>80</sup> Should showing up and being counted among the attendees at a public hearing be regarded as participation, or must one actually express a view on a constitutional issue, and must that view be recorded and transmitted to the drafters? Must drafters seriously deliberate on public input for participation to serve plausible normative or instrumental purposes?<sup>81</sup> A program of public participation, regardless of whether outputs are recorded and utilized, might encourage dialogue among citizens about a country’s future, contributing to reconciliation and a culture of respect for the constitution, but whether such a benefit actually is realized is difficult to discern.

The Eritrea case study author argues that “involving the public in the process empowers the public, giving its members a sense of

ownership of the constitution and allowing them to air their views on a range of critical issues that affect their lives. Thus, public participation in the making of a constitution necessarily raises questions of substance.” But is the public truly empowered if the views they express do not directly influence the substance of the constitution? The East Timor case study authors argue that drafters must at least consider the public’s views for a consultation process to be meaningful.<sup>82</sup> Measuring such consideration is challenging, however. In most cases, the actual impact of public input on the text—the most tangible way to gauge the extent of the drafters’ consideration—appears to be limited.<sup>83</sup> The case studies on the whole suggest that the purpose and effect of most consultation processes lie in the realm of conferring legitimacy and ownership rather than providing drafting guidance. And yet, without casting doubt on such aims, it should be noted that the extent to which participation *actually* produces legitimacy and ownership is difficult to assess, at least on the basis of information presented in this volume.<sup>84</sup>

A further set of issues concerns how input by individual citizens or civil-society groups should be treated when constitution writers wish to consider popular views. No clear methodological guidance emerges from the chapters on this point, but the development of such guidance would be useful, given growing interest in forms of participation. For example, what relevance and weight should be attached to individual citizen or interest group submissions, and based on what criteria, particularly where access to the process may be uneven throughout a society?<sup>85</sup> Reflecting public input in a text surely should not be a function of comparing tallies of submissions and comments for and against particular positions. What status should be accorded to public submissions compared to the positions of members of a demo-

cratically elected and soundly representative constitution-making body? Moreover, when many submissions are made, it is likely that different ones could be used to support quite varying textual provisions.<sup>86</sup> Is it reasonable for constitution writers to selectively adopt substantive positions offered by the public, or to selectively rely on submissions to support their own views—or does the invitation to comment imply some obligation to respect in the constitutional text at least dominant themes or requests among the popular views expressed?<sup>87</sup>

Though none of the case studies offers examples of rules applied to the process of review and consideration, in some instances, submissions have been summarized and digested for ease of review by constitution drafters. The common approach has been to allow the constitution makers to exercise their own discretion in determining whether and how to account for public input in crafting the text. This approach is reasonable, but it is apparent that even with the best of intentions, hundreds or thousands of public submissions cannot effectively inform the thinking of those negotiating and drafting the constitutional text unless they are organized into a usable form. Those designing future constitution-making processes would be well advised to make arrangements, and provide resources, for doing so. At the end of the consultations and debate, it is the responsibility of the members of a democratically selected constitution-making body to make choices, informed not only by the views received from members of the public but also by their own understanding of what is correct.

Finally, it must be acknowledged that it is difficult to distinguish the outcomes of the cases where serious efforts were made to involve the public from those where no space was made for participation, or where it amounted to little more than window dressing.<sup>88</sup> Future studies may usefully ex-

plore the question—not addressed in this volume—whether participation leads to substantively better or more durable and well-implemented constitutions.<sup>89</sup> Regardless of the results of such further inquiries, however, it is likely—and the impressions of some case study authors support the idea—that participation produces enhanced legitimacy, or popular perceptions of legitimacy, and supports the development of a culture of constitutionalism.<sup>90</sup> In cases where the public had opportunities to participate, the responses were generally enthusiastic and widespread, based on the numbers of participants in meetings and submissions of comments. Interested groups and the general public have seized chances to provide their input. These experiences demonstrate that in many contexts across a variety of cultures and regions, people want to participate; logically, where such desires are fulfilled, the citizenry's sense of ownership of the constitution is enhanced. And as the number of such experiences around the world increases, it is reasonable to assume that knowledge of those experiences will contribute to expectations on the part of the public in new cases that they should also be able to participate in their own constitutional reform exercises.

### **Timelines and Deadlines: When Is a Constitution-Making Process Too Long or Too Short?**

The appropriate timeline for constitution making is one of the most idiosyncratic factors examined in this volume. The cases show that *long* and *short* have different meanings in different contexts, and that the value or harm of imposing deadlines cannot be generalized easily.<sup>91</sup> The most useful lessons from the case studies come from those in which timing was a central problem.<sup>92</sup>

In three such cases, external political forces set timelines that served their own needs and

interests rather than those of the country in question.<sup>93</sup> In East Timor, the United Nations, anxious to conclude its work and rack up a success, set an agenda that rushed the process, thereby excluding the possibility of meaningful public consultation. In Zimbabwe, the three-month long constitutional negotiations in 1979, controlled by the British government, left key issues unresolved, including property rights and land reform, past human rights violations, and economic empowerment of the black majority. In Iraq, the severely rushed timetable, which weakened the process and its outcome, was driven by the demands and priorities of the United States, rather than by domestic needs. The extent to which rushing the process degraded its legitimacy was heightened by the fact that public hopes were otherwise. Focus-group research in April 2005 “revealed strong reservations across Iraq regarding the value of a hasty constitutional process.” The actual process did not respect these public interests: “The sheer pace of the timetable made a farce of both idealist constitutionalism and any pragmatic form of intercommunal political bargaining.” More specifically, the Iraq case indicates that constitution making should not be rushed when there is a need to develop popular authorization for unpopular positions, especially where leadership is new and weak. In other circumstances, bold and experienced leaders may be able to make bold and unpopular moves and bring their constituents along with them. Iraq's Sunni Arabs, however, without well-organized leadership and a clear vision of their own interests, needed time to develop their community's support for constitutional solutions such as federalism.

The self-interested agenda of an internal force can lead to a truncated process as well. In Venezuela, the short timeline—two-and-a-half months from the start of drafting to assembly approval, with the referendum one

month later—was a manifestation of political manipulation by President Chavez, who pressed that timetable. But the suitability of a timetable cannot be judged by its length alone. Namibia's successful constitution-making exercise also was completed in two and a half months, from the first meeting of the constituent assembly to adoption. The appropriateness of a very short timeline and simple process may be explained by the high degree of consensus that existed before the constitution-making process started (for example, consensus on the importance of creating a unitary state). As all parties realized that creating a sovereign Namibia depended on the outcome of the process, they were "bent on making the process successful. SWAPO not only supported the constitution-making process wholeheartedly, but simultaneously pushed for its timely conclusion because it knew that an operating independence constitution was a prerequisite for SWAPO's entry into government." The process was, in the case study author's view, an "unqualified success," both in terms of the substance of the resulting document and the pride Namibians take in their constitution and the values it contains. In implementation, however, the constitution clearly was breached when the president obtained a third term of office, and power has become concentrated in the hands of the central government.

On the other extreme, Hungary's experience illustrates the potential danger of not having an agreed timetable at all. The process there was so drawn out that the window of political opportunity for crafting a completely new, more legitimate constitution closed before it could be done, and the 1996–97 effort to finally create a wholly new constitution consequently failed.<sup>94</sup> The Polish experience, on the other hand, demonstrates that a long, gradual process can, on balance, be valuable in a particular transitional setting. The eight years of constitution making there enabled the drafting of a text that reflected

new lessons from experience gained along the way. The need for significant institutional and procedural checks on the conduct of the political branches of government only became clear during the course of the process. Also, civil society developed considerably during the constitution-making period, so that it was fairly mature by the time the constitutional discussions entered their final stage. Contrary to the Hungary case study, the author of the Poland chapter concludes that setting time limits and target dates can be counterproductive, because it is impossible to predict the dynamics of a transition process at the outset.

South Africa stands out among the cases in the length of time devoted to negotiating the constitution-making procedures and substantive parameters—issues that were among those at the heart of the transition negotiations. More than three years of talks preceded agreement in June 1993 on a two-stage constitution-making process, with a negotiated interim constitution, a final constitution to be drafted by an elected body, and the use of binding constitutional principles to guide the drafters' work. The interim document was adopted in November 1993 and the final document at the end of 1996. The length of the entire process leading up to the final constitution's adoption was a consequence of many factors, including, perhaps most prominently, the main parties' commitment to achieving the maximum possible degree of consensus on both the procedures and substance of constitution making. Continuing violence stalled progress on many occasions as well, though crises sparked by particular violent episodes sometimes also helped to push the process forward. In the final two-year stage of constitution making, the complexity of the issues at hand, the assembly's undertaking to engage and consult the public, its dual-hatting as the regular parliament, and the decision not to begin by delegating preparation of a draft to a small group of experts were among the fac-

tors that contributed to the mad rush to the finish line as the deadline approached.

Aside from externally imposed (and damaging) constraints on timing, as in Iraq, as well as the impact on timing of political dynamics peculiar to the individual cases, the wide variation in time scales for the processes studied in this volume is partly explained by the varying assortments of procedural elements employed. Not surprisingly, a process that includes electing a constituent assembly, establishing an expert drafting body, meaningful civic education and public consultation, and a ratification referendum takes longer than one that utilizes an ordinary legislature, relies on a preexisting draft, and eschews public involvement. Given the variety of procedural choices to be made, as well as the varying complexity and contentiousness of the substantive constitutional issues to be decided in different countries, no optimal time frame can be calculated. But future constitution makers can be advised to ensure that sufficient time is set aside for all of the process elements that they choose to put in place. The case studies indicate that often the most time-consuming elements are elections for a constitution-making body, especially in countries emerging from conflict, where reliable voter rolls may not exist and electoral administration mechanisms may not be in place; establishing a constitutional commission or constituent assembly, including hiring of staff and development of rules of procedure; drafting, if starting more or less from scratch; and public education and consultation, if intended to be wide-ranging, and if drafters are to have an opportunity to consider public input.

### External Assistance and Intervention

In assessing the role of foreign actors in the constitution-making exercises examined in this volume, a distinction must be drawn between, on one hand, advice and other technical or facilitative assistance provided by

foreign experts, and, on the other hand, intervention in constitution-making processes on the part of foreign governments and international organizations.<sup>95</sup> The case studies show the former to have been quite helpful in a number of countries<sup>96</sup>; the latter has a more mixed history.

In Namibia, foreign experts played a significant role in the drafting process; as noted above, the constituent assembly appointed a three-member panel of South African lawyers to prepare a draft constitution. Foreign experts made useful contributions to the Polish constitution drafting process as well, particularly in the work of the 1989 parliament. But the limitations on their capacity to participate were similar to the limitations evident elsewhere with respect to foreign technical assistance: Few foreign experts spoke Polish well enough to take part in meetings, and, in this instance, few were truly experts in constitutional law. In addition, many of the experts were invited by the parliament's administration or political parties, and therefore were associated with particular political sympathies. In any event, there was a large supply of Polish scholars with expertise in comparative law and foreign constitutions, and thus, domestic experts played a significant role. Other cases in which foreign experts were particularly constructive include Eritrea, where an advisory body of foreigners assisted the constitutional commission, and Albania, where a body outside the national assembly—supported by the Organization for Security and Cooperation in Europe—effectively coordinated foreign advice provided to the assembly's drafters and were key to facilitating public participation. In these two cases, the expert advice had a neutral character, and was not provided through a political party.

However, that neutral foreign expert advice is provided does not necessarily mean that it is heeded; the degree of constitution drafters' receptivity varies across the cases.

In Cambodia, two foreign experts installed by the chair of the drafting committee helpfully provided a comparative perspective, drawing on various traditions, and were accessible to all members of the committee. However, they were quickly cut out of the process due to Prince Sihanouk's order to exclude foreigners from the constitution-making process. Instead, Sihanouk engaged a French law professor to prepare a draft to his liking, which became the basis for the final constitution. In Afghanistan, the drafters were wary of outside influence on their constitution; consequently, expert advice during the drafting phase had to be provided in a low-key manner. In Iraq, the case study author notes that the chair of the constitutional drafting committee was "skeptical of the value and propriety of any international involvement, however enlightened and unobtrusive." Nonetheless, some foreign experts provided by the United Nations and USIP did make progress in working with the committee to develop procedures and substantive proposals. But their opportunity to contribute to the process largely ended once the committee was effectively dissolved and the negotiations shifted to a small political circle working behind closed doors. On the whole, the case studies indicate that foreign expert advice on constitution making can contribute positively and constructively when it is respectful of domestic sovereignty, politics, culture, and history.

Foreign technical assistance can take a variety of forms in addition to offering advice. Practical assistance can include providing equipment and training, assisting (as in Albania) in the coordination of aspects of the process, designing participation mechanisms, and collecting and providing to constitution makers information about comparative models and options. In Afghanistan, for example, the United Nations played a significant role in organizing the logistical aspects of the Constitutional Loya Jirga. In Iraq, the UN

mission and USIP each organized meetings for members of the drafting committee and other constitutional stakeholders, enabling them to explore options, develop proposals and, at times, find consensus on various issues. In addition, the UN constitutional support team assisted the drafting committee in designing thematic and technical subcommittees to organize its work.

While advice and other forms of technical assistance, sensitively delivered, are generally uncontroversial, the exertion of foreign pressure in the constitution-making process is another matter. The preceding section on timelines touches on the point that external agents will tend to pursue their own agendas. When the foreign actors are diplomats, dispatched to influence a constitution-making process, putting their own governments' priorities first is, in fact, their job. The problems posed by overbearing foreign interference are illuminated well in the Iraq case study. As the author notes, "in a dynamic familiar to observers of transitional governments, the idea of a permanent constitution for Iraq became, over time, more and more closely linked, in U.S. policy plans, with a nation-building success and a plausible exit strategy." U.S. heavy-handedness became more extreme as the process wore on. U.S. officials insisted on an unrealistic deadline; hosted Iraqi political leaders in the U.S. embassy for closed-door deal making; and expressed strong substantive views on the main issues, even circulating their own draft constitution in English. The U.S. ambassador personally played a visible role, including attending the national assembly meetings at which the deadline was extended.

In a similar, though perhaps less extreme, vein, UN and U.S. officials asserted themselves in Afghanistan's Constitutional Loya Jirga, not only mediating among various factions in an effort to overcome the final sticking points, but also laying on the table their own substantive "red lines" that the final con-

stitutional text was not to cross. Moreover, as the case study author points out, “the United States and United Nations could have fostered an environment of democratic openness; instead, much of their political influence on the process reinforced the tendency of Afghan power brokers to maneuver out of the public eye.” U.S. priorities in particular affected both the process and the result. During the negotiations, for example, the United States successfully supported the Karzai government’s bid to centralize power in a few hands in Kabul. In the end, international pressure “forced an outcome, but not a consensus.”

The Cambodian experience, on the other hand, suggests that in some circumstances, outside actors may be too stinting in their involvement. The United Nations applauded the conclusion of Cambodia’s constitution-making process—even though the constitution was drafted in secret and the constituent assembly debated it for only five days—in no small part because of the United Nations’ perceived need to end its mission successfully. The case study author argues that the United Nations should have exercised more control of the process to ensure better compliance with the peace agreement and deprive the political factions of control. He contends that the United Nations was “too sensitive” to Cambodian sovereignty. The United Nations paid close attention to the electoral process, but when it came to constitution making, bowed to Cambodian politics and Prince Sihanouk’s preeminent role in the process.

Though Cambodia stands as an exception among the cases, generally foreign influence in a constitution-making process, for better or worse, will be strong—and difficult, if not impossible, for domestic players to avoid—in countries where foreign actors exercise control over the transition process. Such a situation can arise when foreign actors are responsible for ousting the previous regime (e.g., Afghanistan and Iraq)<sup>97</sup> or instrumen-

tal in resolving a conflict (e.g., Bosnia and East Timor). The burden rests on the outside players in such circumstances to gauge carefully the degree and nature of their involvement in constitution making that will contribute positively to the process and results.<sup>98</sup> In general, rather than demanding a particular end product or strengthening a particular party, the role of the United Nations or foreign powers is best focused on ensuring a good process—one that is broadly inclusive and has sufficient resources and staffing, adequate time, and neutral outside expert assistance. In addition, there may be circumstances, especially when constitution making takes place as part of a conflict resolution strategy, in which foreign actors may be seen as helpful or even essential as mediators or sponsors of a negotiation.<sup>99</sup>

Finally, even where the role of outsiders is confined to support for an essentially domestic process, the Ugandan experience provides a warning with respect to foreign involvement: “Many citizens interpreted international donor support for the constitution making process in Uganda as donor support for Museveni and his agenda.” Donors, however, thought they were supporting a neutral process and “underestimated the extent to which the entire exercise was subject to political manipulation and the ways in which an unlevel playing field would influence the outcomes.” A clear understanding of conditions in the recipient country is critical to avoiding such unintended consequences.

### **Incorporating Constitution Making in Peacemaking Processes**

The few cases in which constitution making took place directly within the context of a peace process—as opposed to cases, such as Afghanistan and Cambodia, in which a peace negotiation laid the groundwork for a constitution-making exercise—reveal a special set of issues. Bosnia and Herzegovina is

one such case, and it provides a cautionary tale. Unique among the cases examined here, the constitution was an integral part of the peace agreement. U.S. and European diplomats drafted the constitution, and while its main features were negotiated among the parties to the peace agreement, many of the details were not. Foreign analysts largely regard the constitution as lacking genuine democratic legitimacy, though it is, in effect, treated as legitimate. However, strong international pressure—and, in some instances, actual international control over political and legal decisions—has been required to implement the document.

Though at the time it seemed unavoidable to incorporate a complete new constitution (rather than interim constitutional arrangements) into the peace agreement, which was negotiated with the leaders of the wartime nationalist political parties, doing so institutionalized the stalemate that existed at the war's end. The decision also cemented a pre-eminent political role for Bosnia's ethnicity-based parties, because the peace agreement, including the constitution, divides the political spoils along ethnic lines. Bosnia illustrates that, in a peace negotiation, the driving imperative will be to make a constitutional deal that buys the warring parties' agreement to lay down arms, not necessarily one that is in the long-term public interest or that cloaks the document in democratic legitimacy.<sup>100</sup> Some process elements must be sacrificed in such a context; even actors who might in other circumstances agree on the importance of representativeness, inclusion, and popular participation will regard those to be of secondary concern when faced with the task of ending a war.

Bosnia's experience strongly suggests that when it is deemed necessary to incorporate a new constitution, or the main features of a constitution and new state structures, into a peace agreement, mechanisms should, if possible, be put in place, first, to ensure that the

constitution does not perpetuate indefinitely the wartime political dynamics, and second, to encourage further constitutional development. Such an approach could include characterizing the constitution as explicitly interim, providing for a constitutional review procedure and timeline (whether or not the constitution is labeled interim), or creating a simplified adoption process for amendments within a limited time span. In general, however, it is preferable to include in a peace agreement rules and basic principles for a constitution-making process, rather than a complete new constitution, which should benefit from greater and more inclusive deliberation.

In Colombia, the constitution-making process, which took place during an ongoing conflict, was explicitly used to advance a peace process. The nature of the constitutional reforms responded directly to the sources of conflict, including human rights violations, excessive executive power, and improper use of judicial power. The guerilla groups FARC and ELN refused to participate, however, and their absence dealt a "definitive blow to the capacity of the new constitution to achieve the peace that was among its goals." Nevertheless, other guerilla groups were brought into the political process through the constitution-making exercise, including the M-19, suggesting that the strategy had merit even if it could not be fully implemented. This experience suggests that in some circumstances it may be better to seize the moment rather than wait for all potential spoilers to participate. In the outcome of the Colombian process, room was left open for FARC and ELN to join later in political life.

Zimbabwe's experience in 1979–80 similarly illustrates how the quality of a constitutional process and its outcome can be hostage to the constraints of a peace process. The British-mediated talks on Zimbabwe's independence constitution at Lancaster House in London involved tabling a draft

constitution that was offered essentially on a nonnegotiable basis. Acceptance of all the terms of the proposed constitution became a condition for the transition to a black majority government, even though the document was not conducive to long-term resolution of conflicting interests. A central concession to the white minority included in the constitution dealt with land reform, which had been a stated objective of the war of liberation, and which presented a major challenge for transforming the country.<sup>101</sup> During the intense pressure of negotiations, and owing to the balance of power at the time, the Patriotic Front's leadership accepted the new constitution as the price for independence and the transfer of political authority. But the Lancaster House constitution failed to provide a framework for political and economic actors in Zimbabwe to negotiate the country's transformation from a colonial state with great economic disparities into a more equitable society. The constitution largely entrenched the economic status quo, particularly as it related to land ownership. As protests of the government's corruption and failure to improve the quality of life for most Zimbabweans increased, the government responded by becoming increasingly undemocratic and authoritarian. Many factors have contributed to the country's drastic economic decline and the tremendous political tensions that exist today, but the legacy of the Lancaster House process and the constitution it produced can be seen as one of those factors; certainly, a critical opportunity was missed to craft a basis for a more successful postcolonial transition and a constitutional order that could promote development, good governance, and protection of individual rights.

In Macedonia in 2001 (not among the case studies in this volume),<sup>102</sup> constitutional amendments were incorporated into the terms of a peace agreement with an agreed commitment to ensuring that parliament

would adopt the amendments. Despite the intense involvement of the United States and European Union in forging the peace deal, including the amendment provisions, as well as foreign pressure to ensure their adoption by parliament, using a peace process to change the constitution does not seem to have had deleterious effects. This can perhaps be explained by Macedonia's circumstances as a small, weak state dependent on the goodwill of the international community. Perhaps, too, in contrast to Bosnia's experience, the use of constitutionally required parliamentary procedures to actually adopt the amendments mitigated the undemocratic aspects of the approach.

### **Impact of Constitution Making on Conflict Resolution**

A central concern of this study has been whether and how constitution making can contribute to conflict resolution. In many of the cases in this volume, the act of constitution making was explicitly burdened with helping societies transition from conflict to peace. The possibility of recasting the terms of power sharing, rights, responsibilities, and foundational principles is a tremendous opportunity for a society in need of reconstitution and reconciliation. At the same time, the practical challenges of conducting any constitutional process—let alone a representative, deliberative, and participatory process—in the wake of violent conflict are great.

South Africa is perhaps the best example of a broadly inclusive, participatory process that was crucial to the transition from conflict to peace. Colombia, too, can be credited with having used its constitution-making process effectively to resolve conflict, though only with respect to some guerilla groups. And in Nicaragua, the fact that armed conflict was ongoing during the constitution-making process helped drive the search for consen-

sus during that process. Even the dominant FSLN recognized the importance of considering others' views, though the resulting consensus proved somewhat superficial.<sup>103</sup> Although it is difficult, based on the material in this volume, to draw direct causal connections between the nature of a constitution-making process and positive outcomes with respect to peace building, these cases suggest that it is possible for countries to design constitution-making processes that contribute to conflict resolution. Hart points out that as a component of the high-stakes negotiations among competing powerful interests over the future exercise of power, constitution-making processes generally "have been seen as a means of creating trust: 'to clarify issues, grasp and articulate differences, let people speak in their own voice, and ultimately, build trust and recognition.'" The absence of such trust will undermine "the longer term legitimacy and sustainability of constitutionalism."

Positive outcomes in some cases, though, seem to have little relation to the nature of the constitution-making process. For instance, three of the European cases—Hungary, Poland, and Spain—involved elite processes far from the highly participatory one undertaken in South Africa. Yet, overall, these countries transitioned to democracy successfully. These outcomes suggest that the nature of a constitution-making process may be less important where conditions for conflict resolution and state building more broadly are propitious—such as the presence of democratic, prosperous neighbors interested in ensuring that a country becomes democratic and prosperous; relative economic strength; literacy and other benchmarks of human capital development; and, quite importantly, the peaceful nature of a transition.<sup>104</sup> These outcomes also highlight the extraordinary difficulty of measuring the relative importance of process compared to general social, political, economic, and security conditions.

Nevertheless, an important observation that emerges from the case studies is that flawed constitution-making processes can contribute to conflict perpetuation, worsening of conflict, or at least problems of governance. Such negative outcomes may result either from bad intentions on the part of those with the power to control the constitution-making exercise, or from poor execution of the exercise. Several case studies demonstrate the ways in which a constitution-making process may be abused—if not to create conflict, then certainly not to resolve it. Uganda shows how an undemocratic force seeking a patina of legitimacy can control and distort the process, particularly by creating an appearance of public participation. Venezuela shows how a constitutional reform process can be hijacked by political powers, even with the apparent consent of the people: A constitutionally suspect constituent-assembly process was approved by referendum; the constitution was overwhelmingly approved in a separate referendum; and President Chavez retained his popularity throughout. Chavez used the process to consolidate his own power and execute an effective coup. While the constitution-making exercise bore some hallmarks of democratic process, the reality was different.

In other cases, the constitution-making process itself may have exacerbated conflict. Iraq is the clearest example of this. To mitigate rising sectarian violence, some effort was made to draw the boycotting Iraqi Sunni Arabs into the constitution-drafting process, such as by adding appointed, non-voting members to the constitutional drafting committee. This was a creditable strategy in principle, but it was not given time to work before the committee was pushed aside in favor of political negotiations that largely excluded Sunni representatives. As a result of such choices, the constitution-making process, though nominally democratic, deepened sectarian divisions, contrib-

uting to the descent into civil war. In the end, Sunni Arabs overwhelmingly rejected the constitution in the referendum, “setting the stage for a prolonged conflict with key constitutional issues—including federalism—at the heart of the conflict.”

The Iraq case also illustrates the need to achieve consensus among all the conflicting parties for a constitution-making process to contribute to peace building.

Even if the constitution succeeded at the referendum, failed Sunni opposition to the text would signal a still more profound rupture in Iraq: a permanent sectarian cleavage in Arab Iraq between Sunni and Shia Muslims. This would spell the utter failure of Iraqi nationalist, new constitutionalist, and even pragmatist ambitions for a constitutional compact to include all three of Iraq’s major groups.

Failure to develop consensus among all groups on the terms of the text “would be a permanent reminder of Sunni Arab withdrawal of consent to the Iraqi state and the permanent threat of violence.”

Zimbabwe offers another example of the dangers of a flawed process. As noted above, the government entirely controlled the 1999 process, despite some efforts to create the appearance of consultation and transparency, and mounted a vigorous campaign for the draft constitution’s approval in a referendum. Voters’ rejection of the document provoked a violent response by government loyalists, and “ushered in a rapid deterioration of the human rights situation.” The case study author observes that “a defective process is unlikely to lead to a constitution that reflects the wishes of the people” and unlikely to gain sufficient popularity or legitimacy to endure.

In Fiji, the adoption of the constitution was followed a year later by a coup. While the case study authors do not draw a direct line between that event and the constitution-making process, the need to compromise in the constitutional process and the general

lack of understanding of what the constitution actually provided, due to the absence of any civic education component, seems to have helped ripen conditions for a coup. The authors observe that “both major [ethnic] communities were worried about the constitution at some level, and even harbored a sense that they had been betrayed.” Consequently, it “was all too easy for those who wanted to stir up strife to portray the constitution to both sides as a sellout.”

The Bosnian constitutional experience has a mixed legacy regarding conflict resolution. In the short term (but not at all unimportantly), adopting the constitution as part of the peace agreement helped to end the fighting. But the constitution itself—and perhaps its lack of democratic legitimacy—is problematic for the longer term, as it preserves the ethnic nationalist dynamics that helped fuel the conflict. Vested interests in the status quo have so far thwarted efforts to amend the constitution.

The Brazilian experience has a mixed legacy as well, though in a different sense. According to the case study author, the 1988 constitution can be credited with providing a peaceful means of conflict resolution, but it did little to improve governance and weak institutions, and it exacerbated political conflict. Because it sets out detailed rules instead of emphasizing fundamental principles, the constitution is a straitjacket, posing a serious obstacle to effective democratic governance and socioeconomic modernization, though some negative features have been dismantled in recent years.

Also related to the question of conflict resolution, though indirectly, Eritrea illustrates the potential limitations of constitution making as a means for political reconstruction and transition to democracy. In that case, the constitutional surgery was successful in that the process was well planned and executed, but the patient died anyway—the constitution still has not been implemented

and the regime has failed to hold elections. The venal self-interest of those holding political power killed it: “a process that was participatory and earned general admiration has been defeated by a willful president who hijacked the democratic process.”

To mitigate procedural flaws, in some circumstances, it may be possible to decide that a new constitution will be reviewed after a certain period of time, or will be relatively easily amendable during a certain period. This would create an opportunity for reflection on constitutional issues after passions have cooled, or for taking stock of how well a constitution has performed. Consideration should be given, however, to whether such provisions would create unwanted constitutional uncertainty. The case studies do not deeply explore this approach, but two touch on it briefly.

In Brazil, an opportunity to review and correct the constitution was provided, but not taken. The 1988 constitution permitted a plebiscite to be held five years after adoption on issues that had been central to the constitutional debate. A vote was held on two issues concerning the basic form of government, but the constitutional overhaul that was possible at that point was not undertaken. While the plebiscite provision left open the option (not exercised) for improving a flawed document, it also produced a five-year period of institutional uncertainty. During the Namibian constitution-making process, a proposal was considered that the constitution be subject to a periodic review. The constitutional committee rejected the idea because it “feared that such a procedure would create the impression that the constitution was a precarious document that needed to be amended and changed,” and that such an impression “might encroach on the fundamental character of the text.”

### **Relevance of International Law to Constitution-Making Process Requirements<sup>105</sup>**

Franck and Thiruvengadam’s chapter in this volume asks whether international law has anything to say about the nature of constitution-making processes. It concludes that there is a trend in practice toward involving the public in such processes, but that there are not, as yet, any specific international legal norms that must be followed. Their chapter identifies an apparent “growing acceptance of the norm that constitutions should be prepared through participatory processes with a high degree of transparency,” but, again, no requirement. Hart’s chapter more assertively argues the case for an emerging legal right to participation in constitution making, and observes the emergence of normative political criteria for participation. She contends that the culture of constitution making has come to include the expectation of democratic practice.

The case studies generally support the reflections of these two chapters on the nature of contemporary practice in constitution making (though in some of the most recent cases especially, the rhetoric of participation has exceeded the reality). Some also indicate an aspiration toward the culture of constitution making that Hart describes. But the case study chapters do not focus on the legal precedents that Hart in particular discusses, nor suggest that constitution makers in the cases considered the possible relevance of international law to their procedures. The sentiment that good form in constitution making requires public participation is evident in many of the cases, but, as this chapter earlier makes clear—and as Hart acknowledges—the genuineness of the solicitation of public input has been quite uneven.

The question at the heart of both conceptual chapters is whether there is or should be a legal basis for ensuring or ascertaining

the legitimacy of a constitution. In discussing the deficit of democratic legitimacy in the Hungarian constitution-making experience, the case study authors suggest that whether or not a constitution is backed by a popular mandate is “an extralegal reality.” They note that “there is no general rule that would furnish the criteria for deciding whether or not, in a particular case, a popular mandate is obtained.” The particularities of the constitution-making experiences examined here and the contexts in which they unfolded have been highlighted throughout this chapter. It is not a difficult leap from the observation that the practical requirements of a constitution-making process depend very much on context to the conclusion that criteria for legitimacy must vary from place to place as well.<sup>106</sup>

### **Should Constitution Making Adhere to Existing Law?**

While not explored widely throughout this volume, some of the case studies raise interesting questions regarding the benefits and detriments of adhering to existing constitutional and other domestic legal rules applicable to the constitution-making process. One aspect of this set of issues, touched on in some of the transition cases, concerns legal continuity—that is, the adherence to existing constitution making or amendment rules in a context of regime change. Is it important to ensure political stability? In principle, it can be argued that applying the existing rule of law is unnecessary because the whole point of drawing up a new constitution is to reconstitute the state and to create a new foundation for all subsidiary laws, as well as for procedures for instituting further constitutional modifications. On the other hand, proceeding with constitutional change in a way that respects the pertinent existing rules and treats them as valid has been helpful in a practical sense in some circumstances, including in Hungary, Poland, and South Africa.<sup>107</sup>

The Hungary case study authors note that a “remarkable feature of this process was the legalism of all the actors, who scrupulously adhered to the letter of the law even when it was to their disadvantage.” They conclude that, “though legal continuity rested on the fiction of the rule of law under a lawless old regime, its value was considerable” because it helped to build consensus at the Round Table, and helped to keep the transition on a peaceful path.

Venezuela illustrates the potential costs of breaching existing legal rules in the constitution-making process. Following its election in 1999, the constituent assembly promptly violated the existing 1961 constitution by assuming wide powers it lacked under both that text and the terms of the referendum that created the constitution-making body. Instead of serving as a vehicle for dialogue, the assembly became “a mechanism for confrontation, crushing all opposition or dissidence” and effectuating President Chavez’s bid to control all levers of power.

Colombia’s experience, however, further complicates the question. As noted earlier, the existing constitution authorized only the congress to effect constitutional reforms, but a popular referendum, followed by a presidential decree, established a constituent assembly to perform that role instead. The Supreme Court then approved the procedural violation on the ground that it conformed to popular will. The referendum was a bottom-up initiative, and an overwhelming 88 percent of voters supported the creation of a constituent assembly. It is difficult to find fault with such a popularly mandated process. What distinguishes this case, in which a failure to adhere to the rule of law appears to have served a greater good, from the Venezuela case? The latter case study’s author notes that the Colombian approach enjoyed wide support, including among the political parties, while in Venezuela the constituent assembly effectively executed a coup d’etat.<sup>108</sup> The distinction is not a principled one, but

it offers the pragmatic lesson that the intentions that lay behind a decision to disregard the rule of law matter greatly.

## Conclusion

The basic premise of this study is that process matters; its central project has been to show how process matters and to suggest ways to design processes that can be expected to achieve the most desirable outcomes. In the end, the case studies show more clearly that process failures can produce negative outcomes—perhaps especially in conflict-prone or weak state systems—than that well-designed processes necessarily produce positive outcomes. But the cases also show that constitution making is a moment of great opportunity to chart a positive course and to forge democratic practices, and, therefore, it is undoubtedly wise to make the most of it. Constitution makers in some cases—such as Eritrea, South Africa, and Albania—worked to seize that opportunity. In other cases—notably East Timor, Afghanistan, and Iraq—the opportunities for constitution making to help build state legitimacy and sustainable peace were missed.

Iraq in particular shows how serious the implications of bad process can be in unstable circumstances. The constitutional text that resulted from the process, in the case study author's view, is substantively acceptable to most Iraqis. But the way constitution making was carried out—the failure to use the process to develop consensus on the future of Iraq and the process's contribution to the alienation of Iraq's Sunni Arabs—had dire consequences. Measured by implementation, legitimacy, or contribution to stability, the Iraqi process, as of the writing of this volume, can be deemed a failure.

Other cases illustrate how factors outside the constitution-making process can affect the result more than do weaknesses in procedural form; such outside factors can also obscure those weaknesses. In Cambodia, for

example, the process was flawed in many respects: It lacked transparency, the constituent assembly engaged in no genuine debate, monarchical provisions were grafted onto the text at the last moment, and the text only weakly incorporated international standards. But popular expectations of the process were not great, and therefore, the public generally was not disappointed, even though a vibrant civil society had demanded participation. The weaknesses of the process and the result must be judged, in the case study author's view, in light of Cambodia's very difficult political and physical conditions at the time. The process probably could not have been much different given the country's lack of experience with democracy, the autocratic and communist experiences of the recent past, time pressure due to continued military action, a limited window of opportunity, and the unavoidable role of a difficult character (Prince Sihanouk). The case study author observes that the constitution's long-term viability depends less on how the constitution was drafted than on the country's subsequent consolidation of democracy.

Bosnia and Herzegovina's experience also suggests that even where the process is problematic and the outcome substantively weak, the question must be asked whether the process and outcome could have been much different in the prevailing circumstances. In Iraq, the case study author points out, more time could very well have enabled a better process, and a better process could have been constructed if the U.S. government in particular had pursued a different strategy. But in Bosnia and Herzegovina, what were the real alternatives? The parties to the Dayton peace agreement wanted a constitution as part of the peace deal, a notion that the international negotiators did not push or resist. The parties also wanted a document with the security of a final—though obviously amendable—constitution.<sup>109</sup> A better course may have been to put in place an interim constitution, perhaps with a specific sunset provision, but whether

that could have been achieved is uncertain. Unlike South Africa or Namibia, the contending parties in Bosnia and Herzegovina had not come to a basic consensus about the country's future before constitution making, and none were prepared to acknowledge that they might eventually need to cede some political ground to build a functioning state. In South Africa, such consensus, developed during lengthy preliminary negotiations, formed the basis of the parties' agreement to an interim power-sharing constitution, with the certain prospect of a more majoritarian permanent constitution to follow. The interim constitution was not simply a temporary compromise; rather, it confirmed the seismic shift in South African politics and, through the incorporation of binding principles and the parameters of the final constitution-making process, laid a definitive basis for the final constitutional dispensation. These examples illustrate the importance of context with respect to both the choices actually made and the process choices realistically available.

Clearly, what always matters to the outcome of a constitution-making process is the presence of political will to develop a genuine constitutional consensus and to implement the constitutional text.<sup>110</sup> The case studies routinely demonstrate the decisive negative impact of the absence of such political will (most clearly in Eritrea, Iraq, Uganda, Venezuela, and Zimbabwe), as well as the significance of its presence (e.g., Albania, Namibia, Poland, South Africa, and Spain). As the authors of the Fiji chapter observe, "experience shows that if politicians, who have a special purchase on state institutions, are not committed to a constitution, its prospects remain dim."<sup>111</sup>

A challenging question that arises from the case studies is whether constitutionally required mechanisms or procedures can be developed that would bolster the prospects for implementing a constitution.<sup>112</sup> But neither good procedural form nor techni-

cal implementation mechanisms can make up for lack of genuine political will. Some cases, notably Venezuela and Uganda, demonstrate that a constitution-making process can be used to cloak a regime in some of the trappings of constitutional democracy while actually enhancing or preserving the regime's powers and privileges. Political will to formulate and implement constitutional change is an ingredient that can be encouraged, as through international pressure, such as that applied to the apartheid regime in South Africa, or through domestic pressure, such as the student-led movement that contributed to sparking the constitution-making process in Colombia. But international actors or domestic reform advocates cannot create political will where powerful forces have other ideas in mind, as in Eritrea.<sup>113</sup> Practical advice, such as this volume offers, is a helpful resource for decision makers who seek to serve the public interest, but, ultimately, constitution-making—being about the allocation of political power—is a political, not a technical, process.

The question of political will is closely tied to the decisive role of individual leaders. While this is not a point explicitly addressed at length throughout the chapters, the value of the right leaders being in place at the right time is apparent. In South Africa, particularly given their personal histories, Nelson Mandela's and F.W. de Klerk's willingness to compromise and commit to consensus was nothing short of remarkable. The mature and effective leadership that they and other key figures exercised sustained momentum over the course of a long constitution-making process, overcoming numerous obstacles and crises along the transition path. In Spain, King Juan Carlos and Prime Minister Adolfo Suarez played pivotal—and, in the king's case, unexpected—roles in the transition to democracy. Franco had groomed Juan Carlos to be his successor as head of state, but the king "turned out to be the opposite of Franco's dreams—a man profoundly dedicated to de-

mocracy.” Juan Carlos took the first critical step toward reform and democratization when he dismissed the initial post-Franco prime minister and appointed Suarez in his stead. Together, the king and Suarez became the “major engineers of Spain’s transition to democracy.” In Namibia, Dirk Mudge, a former member of the ruling white Nationalist Party who broke away to form an alliance of eleven ethnic political parties, played a major role in broadening the Namibian political elite, without which “the constitution-making process would not have had its successful outcome.” The variation in circumstances that brought these leaders to the scene and the personal nature of the qualities they exhibited make clear that leadership, like political will, cannot be manufactured. But its significance should be recognized when assessing the prospects for a constitution-making process and identifying obstacles, such as the absence of effective leaders or presence of obstructionist leaders, that will have to be overcome.<sup>114</sup>

### *Common Pitfalls to Avoid*

The process of making constitutions amid political transition, social upheaval, and conflict is enormously burdened by the challenges such environments pose for any serious undertaking that requires developing political and social consensus, let alone one of such potential significance. It is, therefore, hardly surprising that many such exercises fail to accomplish all the goals heaped upon them, including (re)creation of a social compact, nation building, protection of human rights, democratization, and national reconciliation. While these challenges are unavoidable, the case studies helpfully reveal several serious pitfalls that have marked the constitution-making experiences of multiple countries and that could be avoided in the future. Some of the more common ones evident in the cases are highlighted below.

First, several cases underscore the importance of devising a strategy for and devoting

sufficient time to building broad consensus on a new constitutional arrangement. Afghanistan, Iraq, and East Timor are notable failures in this regard. South Africa provides a good example of deliberate and extensive consensus building, while the Namibia case suggests that drawn-out efforts to establish consensus may not be needed where considerable common ground has been achieved prior to constitution making.

Second, the problem of sometimes overbearing and detrimental involvement of foreign actors with their own agendas could be remedied if those actors adopted better policies and strategies for supporting constitution making. Iraq and East Timor are the preeminent examples of the problem; Albania, where a more light-handed and supportive approach was taken, provides a helpful contrast. Afghanistan presents a more mixed picture: There, foreign actors provided constructive and unintrusive logistical support and technical advice for the constitutional commission and Constitutional Loya Jirga, but the exceedingly high-profile role of the U.S. ambassador in the negotiations can be seen as troubling.<sup>115</sup> One specific aspect of the problem, which was central in Iraq and East Timor, and evident in Zimbabwe in 1979–80 as well, is the exertion by foreign actors of pressure on timetables for constitution making.

Third, several cases evince the phenomenon of using a constitution-making process to achieve ends other than developing genuine consensus on a new social contract. In Uganda, for example, the constitution-making process was driven by the government’s interest in legitimating and embedding what is effectively a one-party system. In Iraq, the U.S. policy interest in racking up what could be billed as a success distorted the process. In Venezuela, President Chavez used the process to concentrate power in his own hands. In Bosnia, the motivations behind the process were not venal—the desired end of the process was to make peace—but the

means required to achieve that end were not those best suited to crafting a durable, democratically sound constitution. The Uganda and Venezuela cases also indicate that foreign donors and international organizations should be wary of supporting or showing approval of constitution-making processes used as cover for other political purposes.

A fourth pitfall concerns drafting procedures. Several cases suggest that attempting to draft a constitution from scratch in a constituent assembly or parliament is problematic. Using as a starting point an expert's draft, a draft produced by an appointed commission (either independent or comprised of selected members of the assembly or parliament), or a political party draft that all the relevant parties accept (as in Namibia) is often a better course of action.<sup>116</sup>

Fifth, several cases illustrate the importance of ensuring that the deliberation and decision-making forum includes all parties whose agreement to constitutional terms is needed for conflict resolution or development of meaningful societal consensus. Both positive and negative examples are well represented.

Finally, the failure to design a public participation program that created meaningful opportunities for public input, and for constitution makers to account for that input, weakened the potential of the constitution-making process in several cases. In Afghanistan, East Timor, and Iraq, for example, participation opportunities were limited, and the results of consultation that did occur were not fed into the drafting process.

#### *Contextual Factors to Consider for Future Cases*

In examining the factors that have shaped the processes considered here and their outcomes, this chapter has emphasized the importance of context. Much work remains to be done to determine the precise contours of the ways in which context affects both pro-

cedural choices and how well those choices serve the public interest. It would be useful to build on the material in this volume by identifying more comprehensively the contextual variables that matter most and mapping those variables to the impact of specific procedural choices. Even without a definitive map, it is possible to draw some ideas from this volume regarding the aspects of context that should be assessed when preparing to design a constitution-making process.<sup>117</sup> Aside from the general political, social, cultural, and historical conditions to take into account, the case studies suggest a series of important questions that, if considered in advance, could help those engaged in the design and implementation of a constitution-making process make choices that will enhance the effectiveness of the process and its likelihood of success<sup>118</sup>:

- On popular and elite *expectations and attitudes*:
  - What is the nature and intensity of public expectations regarding how the constitution-making process will unfold?
  - Do particular procedural options, such as the use of referendums or provisional constitutions, carry negative historical associations?
  - What is the level of public trust in elites, including political parties, and what are cultural views more generally regarding respect for authority?
  - Is there a history of free and fair elections and, if so, does that history indicate public trust in the political process?
  - Is legal continuity valued or at least palatable in the circumstances, or is there a demand for a clean break with past constitutional arrangements?
  - What are popular and elite views concerning the legitimacy of international involvement, including the involvement of foreign experts?

- On available *resources and capacity* for designing and managing the constitution-making process:
  - How mature and cohesive are political parties? Would party leaderships in the assembly be able to organize and carry out a constitution-making process effectively, or should an independent commission be appointed?
  - Are domestic constitutional experts available to assist with the process?
  - Are there sufficient resources to conduct effective civic education and public consultation, and what level of financial and technical support is required from international organizations or foreign donors?
  - Are there sufficient resources to fund elections and referendums (which may in particular pertain to decisions on the question whether to elect a constituent assembly in addition to a regular parliament)?
- On *challenges to ensuring representation and inclusion* in the process:
  - What are the natures of the relevant cleavages (social, political, ethnic, sectarian, and other) in the country, and the significance of those cleavages for determining who should be included in the process and in what proportion?
  - What is the likelihood that all relevant social, ethnic, and other groups in society will be able and willing to participate in a constitution-making process and, consequently, what special measures or procedures may be needed to ensure their representation and participation?
  - Are political parties genuinely representative of the range of ideological views, and of ethnic, religious, geographic, or other relevant interests?
  - Are all political parties able and willing to participate in the process?
  - Is there an existing elected body that is broadly representative of relevant groups and interests and could legitimately serve as a constitution-making forum, or will a new forum need to be created?
- Do security conditions permit free and fair elections and referendums to be conducted?
  - Does a single figure, party, or faction dominate the political scene? Should that actor's power over the process be diluted?
- On *conduciveness of the environment* to public consultation and participation:
  - What is the extent of freedom of expression, and, thus, the prospect for genuine public participation?
  - How does the security environment affect access to information about the process and to opportunities for participation for all relevant groups throughout the country?
  - Are there representative groups within civil society with which to engage, consult, and partner?
  - What are the levels of development of print and broadcast media and the degree of media penetration throughout the country? Will parties to the process be able to rely on established media to transmit messages about the process, or will they need to create their own dissemination mechanisms?
  - How will the level of literacy affect the design of a public outreach campaign?
- On relevant *rules and precedents*:
  - Does an existing constitutional arrangement, peace agreement, or other relevant text provide guidance on the expected nature of the process? If not, is there a need for preliminary ground-rule negotiations on the constitution-making procedures and possibly on essential principles to bound the process?
  - What is the substantive quality and symbolic acceptability of the previous constitution? Does it provide a positive plat-

form on which to develop a new text, or is a clear break with the past required?

- Do any earlier constitutions provide helpful substantive or symbolic precedent?
- What is the degree of attachment, if any, to constitution-making traditions? What implications do any such traditions have for the choice of decision-making institution, appropriate techniques for ensuring inclusion, and other procedural mechanisms and rules?

The many trials and tribulations of the constitution-making processes explored in this volume fully support Elster's observation of "an inherent paradox" in constitution-making processes: "On the one hand, being written for the indefinite future, constitutions ought to be adopted in maximally calm and undisturbed conditions. On the other hand, the call for a new constitution usually arises in turbulent circumstances."<sup>119</sup> It is unavoidable that the constitutional moment is an exceedingly challenging one in which to make a lasting contribution to constitutionalism. Yet this challenge must be met, not only to foster democracy, stability, and the protection of rights, but to contribute to building lasting peace.

## Notes

1. Commenting on the period 1987–2002, Jennifer Widner observes that there is "enormous variety in the procedures employed to make new constitutions. In the era of decolonization, processes were often remarkably similar to one another, but there is no longer a template—not surprising given the number of permutations and combinations of stages, delegate selection rules, decision rules, consultation processes, etc." Jennifer Widner, "Constitution Writing in Post-Conflict Settings: An Overview," *William and Mary Law Review*, vol. 49, no. 4 (2008), pp. 1513–41, p. 1525.

2. Donald Horowitz has pointed out that because constitutions "are made by people who have not made a constitution before and will not be likely to make a constitution again," there is "a great deal

of lost knowledge from one constitution-making process to another and a good deal of fumbling along the way." Donald L. Horowitz, "Conciliatory Institutions and Constitutional Processes in Post-Conflict States," *William and Mary Law Review*, vol. 49, no. 4, pp. 1213–1248, p. 1227. This volume is intended to help capture and disseminate such knowledge.

3. For example, the Commonwealth Human Rights Initiative has argued that the "process of constitution making is, and is seen to be, as important as the substantive content of the constitution itself," and a "credible" process is one that "constructively engages the largest majority of the population." "Recommendations to Commonwealth Heads of Government," in Hassen Ebrahim, Kayode Fayemi, and Stephanie Loomis, *Promoting a Culture of Constitutionalism and Democracy in Commonwealth Africa* (Pretoria: Commonwealth Human Rights Initiative, 1999), available at [www.humanrightsinitiative.org/publications/const/constitutionalism\\_booklet\\_1999.pdf](http://www.humanrightsinitiative.org/publications/const/constitutionalism_booklet_1999.pdf) (accessed May 11, 2009). A background paper associated with these recommendations on best practices in constitution making advocates a "shift from juridical *constitutionalism* to political *constitutionalism* by emphasising process as well as substance in the quest for constitutional and democratic governance." "Background Paper to Accompany CHRI's Recommendations to CHOGM '99," in *Promoting a Culture of Constitutionalism*, p. 10 (emphasis in original).

4. See, e.g., Yash Ghai and Guido Galli, "Constitution Building Processes and Democratization," (International Institute for Democracy and Electoral Assistance, 2006), available at [www.idea.int/publications/cbp\\_democratization/index.cfm](http://www.idea.int/publications/cbp_democratization/index.cfm) (accessed June 29, 2009), p. 9 ("The design of the process, that is, the *institutions* for the making of decisions and the *method* of making decisions, has a bearing on a number of factors such as which interests are articulated and which are excluded, how the views of participants are aggregated, and the congruence of the text with social realities.") Cf. Jennifer Widner's observation that "our instincts tell us that process makes a difference . . . [but] it is devilishly difficult to show, empirically, that procedures made the difference" in particular cases. Widner, "Constitution Writing in Post-Conflict Settings," p. 1514.

5. For a philosophical argument for a participatory style of constitutionalism, see James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press,

1995). As explored in Vivien Hart's chapter, Tully argues that to achieve just and peaceful constitutional settlements in circumstances of cultural diversity, constitutions should be "seen as a form of activity, an inter-cultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time in accordance with the three conventions of mutual recognition, consent and cultural continuity" (p. 30). In this view, "constitutions are not fixed and unchangeable agreements reached at some foundational moment, but chains of continual intercultural negotiations and agreements" (pp. 183–84).

6. Other literature on constitution-making processes highlights this gap in understanding the links between process and outcomes. See, e.g., Tom Ginsburg, Zachary Elkins, and Justin Blount, "Does the Process of Constitution-Making Matter?" *Annual Review of Law and Social Science* 2009 (forthcoming), version of January 15, 2009, manuscript on file with the author, p. 13 ("There is much speculation, but relatively little evidence, about the impact of these processes [of constitutional design and adoption] on different outcomes.")

7. This example is drawn from the Eritrea case, discussed further below.

8. Spain is a pertinent example here. It could be argued that public involvement could have made the process or result even better, but the argument would be difficult to substantiate.

9. Ginsburg, Elkins, and Blount, in their review of the literature on constitution-making processes, highlight the problem of endogeneity, which is "endemic in efforts to tie process to outcomes." It is likely that certain process choices and certain outcomes reflect the "common impact of an unobserved variable." Ginsburg, Elkins, and Blount, "Does the Process of Constitution-Making Matter?" p. 27.

10. For one list of suggested criteria for measuring success or failure in constitution making, and some of the attendant ambiguities, see Proceedings of the Workshop on Constitution Building Processes, Princeton University, May 17–20, 2007, Bobst Center for Peace and Justice, Princeton University, in conjunction with Interpeace and International IDEA, pp. 6–10, available at [www.princeton.edu/bobst/program/program\\_archives/](http://www.princeton.edu/bobst/program/program_archives/) (accessed June 26, 2009). Vicki Jackson proposes that "the goal of constitution-making should be understood, not as producing a written constitution, but as promoting constitutionalism." Focusing on post-conflict states, she suggests a variety of

possible criteria for evaluating whether constitution making has advanced constitutionalism, including a more peaceful commitment to governance by law and politics, successful elections and changes in government, and the duration of the constitution and its success in protecting human rights. Vicki C. Jackson, "What's in a Name? Reflections on Timing, Naming, and Constitution-Making," *William and Mary Law Review*, vol. 49, no. 4 (2008), pp. 1249–1305, pp. 1254–1255. In an analysis based on twelve case studies, Kirsti Samuels adopts "democracy" and "peace" as the two criteria by which to assess the impact of constitutions. Without providing a detailed explanation, she finds that "the more representative and more inclusive constitution building processes resulted in constitutions favoring free and fair elections, greater political equality, more social justice provisions, human rights protections, and stronger accountability mechanisms." Kirsti Samuels, "Post-Conflict Peace-Building and Constitution-Making," *Chicago Journal of International Law*, vol. 6 (Winter 2006), pp. 665, 668. The quoted statement shows the problem of a limited sample, however, as some non-inclusive processes have also led to some of these results. In addition, cause-and-effect relationships are not explored here; for example, in some cases, the conditions that give rise to representativeness and inclusion certainly also generate such outcomes. See also Widner, "Constitution Writing in Post-Conflict Settings," pp. 1515–1517, for a discussion of some dimensions of "success."

11. Widner, "Constitution Writing in Post-Conflict Settings," p. 1526. Widner's study was supported by funding from the United States Institute of Peace. See also Ginsburg, et al., "Does the Process of Constitution-Making Matter?" p. 28 ("On the theoretical side, we found a broad consensus in the literature about the importance of public involvement as well as an apparent trend in practice. Yet many of the assumptions of proponents of participation remain untested, and the precise relationships between participation and desirable outcomes of interest remain underspecified.")

12. Jennifer Widner, "Constitution Writing and Conflict Resolution," *The Round Table*, vol. 94, no. 381 (September 2005), pp. 504–05. See also Widner, "Constitution Writing in Post-Conflict Settings," p. 1522.

13. *Ibid.*, p. 1532.

14. *Ibid.*, p. 1531. Widner remarks that based on the evidence in her study, "one might say that the choice of procedure does not really matter much.

More representative processes may yield better results in contexts where the level of violence is relatively low; the evidence is not overwhelming, however” (p. 1532).

15. See the introduction to this volume for a description of the concept paper that guided the chapter authors’ work.

16. In Cambodia, for example, the constitution-making process was far from ideal: It was largely secretive and opaque, the constituent assembly failed to hew to constitutional principles specified in the 1991 peace agreement, expert advice was offered but not utilized, and both public and assembly debate were very limited. Nevertheless, the case study author characterizes the final product of the process as “reasonable.” Moreover, no clear picture emerges regarding implementation of the text and its impact on political stability in Cambodia. The creation of constitutional structures has suffered delays, and the consolidation of democracy has proceeded problematically (including unstable power sharing, a coup in 1997, and election troubles). Yet there are some hopeful signs of good prospects for long-term democratization and stability, such as development of civil society. Given the difficult circumstances in which constitution making proceeded, and the multiplicity of variables affecting subsequent events in Cambodia, locating the case on a continuum between success and failure does not seem realistic or helpful.

17. With regard to the use of transitional constitutions, Vicki Jackson identifies many contextual factors that confound comparison of cases and generalization. Jackson, “What’s in a Name?” pp. 1270–1271.

18. Context narrows not only the procedural options realistically available to constitution makers but the substantive options available as well. Donald Horowitz observes “there is no escaping the fact that process choices, like the choice of institutions to be incorporated in a constitution, are heavily colored by constraint.” For example, civil or secessionist wars are likely to be resolved through negotiation, a process that is conducive to settling on consociational arrangements in a constitution. In these and other circumstances, “constitutional planning, with full scrutiny of available options, is unusual.” Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict States,” p. 1247.

19. Andrew Arato, “Forms of Constitution Making and Theories of Democracy,” *Cardozo Law Review*, vol. 17 (1995), p. 219.

20. The characterizations and analyses of the case studies in this chapter are the author’s own, and should not be viewed as necessarily coinciding with the views of the individual case study authors.

21. See the introduction for an explanation of how the cases were selected.

22. The term *post-conflict*, while convenient shorthand, is generally a misnomer, as in many cases conflict does not abruptly and definitively end. It is usually more accurate to characterize countries as transitioning or emerging from conflict.

23. Some structural elements not included here have been used in cases other than those considered in this volume. For example, large national conferences have been held as part of the constitution-making processes of some countries, particularly in Africa.

24. Others have sorted cases according to generalized historical types of constitution-making processes. Jon Elster identifies eight historical modes of constitution making. See Jon Elster, “Ways of Constitution Making,” in *Democracy’s Victory and Crisis*, ed. Axel Hadenius (Cambridge: Cambridge University Press, 1997), pp. 125–31. Andrew Arato identifies five main types of constitution-making processes. See Arato, “Forms of Constitution Making,” pp. 194–95. These approaches, while useful from a scholarly perspective, are less relevant to a pragmatically oriented study such as this one. Moreover, the cases here do not cover all the historical modes of constitution making. As all the cases are of relatively recent vintage, Table 22.3 supports the observation that most modern constitution-making processes, at least in form, fit among the more democratic of the historical types. Arato comments that “non-democratic procedures of constitution making cannot be justified today; the age-old figure of the ‘law giver,’ the non-participant architect of constitutions, can no longer be plausibly revived.” Arato, “Forms of Constitution Making,” p. 192. Elster notes that the widespread use of directly elected assemblies to make constitutions in the twentieth century “confirm[s] the general claim that as constitutions become more democratic so do the processes by which they are shaped.” Elster, “Ways of Constitution Making,” p. 130.

25. Another possibility is to consider structure in terms of general reform models. Widner’s study of 194 cases during the period 1975–2003 identifies five main models: a commission or committee/elected constituent assembly model; a commission or committee/legislature model; a national conference; executive-directed constitution writing;

and peace negotiations. To this she adds “hybrid forms and unusual approaches.” For some data on the frequency of use of each model and selected examples, see “Reform Models” at Princeton University’s Constitution Writing and Conflict Resolution Web site, available at [www.princeton.edu/~pcwcr/drafting/models.html](http://www.princeton.edu/~pcwcr/drafting/models.html) (accessed May 11, 2009). Not all these approaches are represented in the case studies here; moreover, this chapter distinguishes the use of appointed commissions separate from an elected body from commissions or committees composed of members of an elected body.

**26.** At least in Afghanistan, however, the putative public consultation process seems to have had some educational benefit, as explained in the Afghanistan chapter.

**27.** Widner’s study of 194 cases finds that “in most countries an elected or indirectly elected assembly has primary responsibility for debating, amending, and adopting the draft.” See “Drafting Process” at Constitution Writing Web site, available at [www.princeton.edu/~pcwcr/drafting/index.html](http://www.princeton.edu/~pcwcr/drafting/index.html) (accessed May 11, 2009). The case studies in this volume are consistent with that pattern. South Africa’s experience, though, indicates that using an elected body should not be considered a foregone conclusion. In that case, the question of whether an elected assembly would write and adopt the final constitution or whether that work would be done by a selected group of political party representatives was very hard fought during the transition negotiations. Ultimately, the African National Congress’s view that purely democratic authorization for the agents of the constitution-making process was essential to secure the legitimacy of the final result won out, and a constitutional assembly was elected using proportional representation. South Africans elected 400 members of a national assembly (elected by proportional representation, using national and provincial candidate lists), and 90 members of a senate (10 from each of the nine provinces). A joint sitting of these parliamentary bodies made up the assembly.

**28.** In Uganda and Venezuela, elected bodies were, formally speaking, key to the constitution-making process, but in reality, members from the dominant political party in each case towed their party’s line, delivering the result that the party sought from the outset. In Iraq, too, the constitution-making process accorded a central role to the national assembly, but in fact, political party leaders controlled the process in such a way that assembly members were marginalized and the

party leaders’ own backroom deals were ratified. In a separate example of how political imperatives can affect formal procedures, Widner has found that contrary to her initial expectations, voting rules for the deliberative bodies used in constitution-making processes “often display high levels of ambiguity. Why? In case after case, we encountered assemblies whose members were sensitive to the needs of the occasion—usually the desirability of higher thresholds for more sensitive items or for slightly less-than-perfect consensus in order to move forward to ratification.” In addition, “cognizant of the need to save political face, yet also to adopt a new constitution, delegates in many settings made creative use of selective absences and abstentions.” See “Voting Rules” at Constitution Writing Web site, available at [www.princeton.edu/~pcwcr/drafting/voting.html](http://www.princeton.edu/~pcwcr/drafting/voting.html) (accessed May 11, 2009).

**29.** Colombia offers an interesting twist on the separation of the roles of a constituent assembly and ordinary legislature. Because the existing legislature could have been an obstacle, the constituent assembly dissolved the regular legislature and created an interim legislative commission to adopt laws and approve (or veto) executive decrees regarding implementation of the new constitution until new elections were held. Whether other countries could follow such an approach, if useful, would depend on the legal mandate of the constituent assembly.

**30.** Quotations in this chapter without citations are drawn from the chapters in this volume.

**31.** Ginsburg, Elkins, and Blount find, at least preliminarily, an absence of empirical support for the widely shared hypothesis that legislatures acting as constitution makers are likely to engage in institutional self-dealing. Ginsburg, et al., “Does the Process of Constitution-Making Matter?” pp. 15–18. Nonetheless, anecdotal evidence of self-dealing, such as that noted here, suggests constitution-making process designers should consider the potential risk of this phenomenon.

**32.** Fifteen years after the constitution’s adoption, it was learned that three articles were slipped in at the last moment before the final vote, despite careful and detailed rules of procedure. The length of time it took to make this discovery perhaps illustrates the complexity of the document.

**33.** However, the authors of the Hungary chapter in this volume note that the later experiences of Bulgaria and South Africa showed that creating an interim constitution through a round-table process could be successfully combined with subsequent use of a constituent assembly.

34. The case study authors observe that there was no time to convene a constitutional convention when the April Amendment was drafted in 1989, and such a body could not be elected before the constitutional foundation for democratic elections was established.

35. Widner's study of 194 cases shows a similar variety: "In a little over half of all of the cases in this study, the development of a first draft rested with an appointed commission whose members were selected by the executive, the members of a round table, a legislature, or some other authority, such as a transitional legislature in tandem with a national conference. In about a quarter of all cases studied here, a sub-committee of the main deliberative body developed the first text. In eight percent of cases, an elected chamber wrote the initial text itself, in working groups that reported to a plenary. There are also instances in which political parties prepare and submit their own texts." See "Drafting Process" at Constitution Writing Web site available at [www.princeton.edu/~pcwcr/drafting/voting.html](http://www.princeton.edu/~pcwcr/drafting/voting.html). With the exception of the national conference, all of these modes of constitution drafting are represented in the case studies in this volume.

36. The experts were among twenty "outside" persons who actively participated (without voting) in the committee's work. The others represented trade unions, professional organizations, churches, and other religious groups.

37. In a related vein, Elster argues that "the role of experts should be kept to a minimum, because solutions tend to be more stable if dictated by political rather than technical considerations. Lawyers will tend to resist the technically flawed and deliberately ambiguous formulations that may be necessary to achieve consensus." Elster, "Ways of Constitution Making," p. 138.

38. Jim Della-Giacoma, "Ensuring the Well-Being of a Nation: Developing a Democratic Culture through Constitution Making in East Timor," conference paper, April 1, 2005, p. 8 (on file with the author). Della-Giacoma points out that the Fretilin draft was available only in Portuguese, and few voters would have understood it.

39. The South West African People's Organization (SWAPO) was the liberation force in Namibia that fought a low-intensity war almost to the end of the peace process.

40. Donald Horowitz argues that commissioning an expert or expertly informed body to engineer a draft constitution is especially important in ethnically divided post-conflict societies. Ordinary

majoritarianism can produce ethnic exclusion rather than "arrangements that will enable conflicted ethnic groups to share power in a country that needs not only democratic government but a heavy dose of institutions for conflict resolution." An exception, he says, is where violent conflict requires urgent resolution, "usually on a heavily negotiated basis." Horowitz, "Conciliatory Institutions and Constitutional Processes in Post-Conflict States," pp. 1240-1241.

41. The case study author notes, however, that a large commission with a "broad and unregimented agenda," as was used in Zimbabwe, is inappropriate for elaborating a document as complex as a constitution.

42. In Hungary, the second stage was never achieved, however, due to the "mistake of Hungarian constitution makers, who postulated the interim nature of their constitution, but provided neither a democratically enhanced procedure for making the permanent constitution nor a timetable armed with relevant sanctions for the production of the definitive document."

43. Widner's study finds that for purposes of ratification, about half of the 194 cases in the study required a national referendum, and that this procedure was most common when the main deliberative body was appointed or indirectly elected. In most of the remaining countries, the assembly that developed the final draft was responsible for ratification, as occurred in the cases in this volume in which no referendum was held. See "Drafting Process" at Constitution Writing Web site. Specifically, 53.7 percent (of 195 cases in the first version of the study) used an assembly to ratify the final document, and 41.5 percent sponsored a national referendum. See "Adoption and Ratification" at Constitution Writing Web site, available at [www.princeton.edu/~pcwcr/drafting/adoption.html](http://www.princeton.edu/~pcwcr/drafting/adoption.html) (accessed May 11, 2009).

44. Similarly, in Venezuela, a majority of the voting public abstained from both the interim and ratification referendums held there.

45. Depending on the issues at stake and the sentiments of the majority of the population, the anticipation of public preferences to be expressed later in the process could have a positive or negative effect. See Ginsburg, et al., "Does the Process of Constitution-Making Matter?" p. 6, noting that ratification "can hamstring leaders in an earlier stage."

46. See "Ground Rules" at Constitution Writing Web site, available at [www.princeton.edu/~pcwcr/drafting/rules.html](http://www.princeton.edu/~pcwcr/drafting/rules.html) (accessed on May 11, 2009).

47. One instance among the case studies in which a referendum was, in some respects, problematic was the all-white referendum held during the South African transition negotiations. While the result was an overwhelming victory for the National Party and confirmed that the majority of white people favored a negotiated settlement, it unfortunately also encouraged the National Party to overplay its hand and hold back for a time on some necessary compromises.

48. See “Drafting Process” at Constitution Writing Web site, available at [www.princeton.edu/~pcwcr/drafting/rules.html](http://www.princeton.edu/~pcwcr/drafting/rules.html) (accessed May 11, 2009).

49. Preconstitutional arrangements that lay the groundwork for constitution making are not a recent innovation: “Although there has been much discussion of this role especially with regard to Hispanic and Latin American constitutions, almost every liberal-democratic constitution was preceded by some kind of pact or covenant that made constitution making possible.” See “Conclusion,” in *Constitution Makers on Constitution Making*, ed. Robert A. Goldwin and Art Kaufman (Washington, DC: American Enterprise Institute for Public Policy Research, 1988), p. 453 (comment of Daniel J. Elazar).

50. Vicki Jackson points out that distinguishing a category of “transitional” constitutions is difficult considering that “avowedly transitional constitutions” have sometimes become permanent, and “permanent” constitutions that endure must allow for “contest over changing understandings and new circumstances, whether through amendment or interpretation.” Jackson, “What’s in a Name?” p. 1281. In Bosnia, the Dayton constitution was not characterized as transitional, yet the international negotiators who helped craft it expected that it would be amended over time, and the text itself invited changes (such as the enhancement of central government powers) as political circumstances developed. This suggests that a constitution may be transitional in effect, even if not in form.

51. An additional set of transitional arrangements in Spain took the form of “preautonomy laws,” adopted in 1977–78, which accelerated political regionalization. These were in response to the need to satisfy the demands of Catalonia and the Basque country before approving a constitution. While nominally the laws were not supposed to prejudice the terms of the constitution, they, in fact, “with some exceptions, determined the regional division of Spain without testing the popular support for autonomy in different parts of Spain. . . . The preau-

tonomy stage . . . illustrates something that those studying transitions from authoritarian regimes to democracy should never forget: decisions made during the transition period by a government that is either weak or not fully institutionalized become irreversible at a later stage.” Juan J. Linz, “Spanish Democracy and the Estado de las Autonomías,” in *Forging Unity Out of Diversity: The Approaches of Eight Nations*, ed. Robert A. Goldwin, Art Kaufman, and William A. Schambra (Washington, DC: American Enterprise Institute for Public Policy Research, 1989), pp. 272–73.

52. The Cambodia chapter notes: “With the benefit of hindsight and the knowledge of other constitution making processes that included comprehensive programs of public participation, it would have been preferable for the Paris Agreements to set out the basic structure of the process of citizen involvement and transparency. Without unduly extending the process, the agreements could have required transcription of the deliberations and some degree of popular consultation. Such requirements might have helped transform a closed and opaque process into a more open and democratic one.”

53. Such as an independent electoral commission and an independent media commission.

54. See Cyril Ramaphosa, “Negotiating a New Nation: Reflections on the Development of South Africa’s Constitution,” in *The Post-Apartheid Constitutions: Perspectives on South Africa’s Basic Law*, ed. Penelope Andrews and Stephen Ellmann (Johannesburg: Witwatersrand University Press, 2001), p. 80.

55. See Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict States,” p. 1247, focusing on post-conflict environments (“If interim arrangements have been put in place, political actors who benefit from them are unlikely to wish to start a wholly new constitutional process. Interests crystallize quickly in such settings.”).

56. See note 51.

57. Vicki Jackson suggests that “although it is difficult to justify this court’s creation through a theory of democratic consent, its independence from the prior regime and its high stature enabled it to perform the vital role of offering assurance to all parties that the rights and structures they negotiated would be carried forward.” Jackson, “What’s in a Name?” p. 1295.

58. At the insistence of the National Party, the interim constitution was adopted by the last

apartheid-era parliament, but the democratic credentials of that body were obviously weak.

59. Comment of Nicholas (Fink) Haysom, Working Group Session on South Africa, Project on Constitution Making, Peace Building, and National Reconciliation, September 28, 2001, pp. 162–63 of transcript (on file with the U.S. Institute of Peace Rule of Law Program). Haysom, who was closely involved in the South African constitution-making process, commented further that the South African constitution frequently uses the constitutional court as a logjam breaker. He also has found that in other countries, it is not possible to replicate the role created for the South African constitutional court because of lack of public trust in the courts.

60. The Zimbabwe case study author explicitly notes that this approach would not have worked in that country because the judiciary is not perceived as independent.

61. It is not clear, however, whether inclusiveness affects other important outcomes. According to conclusions drawn from a set of constitution-making case studies commissioned by International IDEA, “there seems to be no concrete correlation between inclusiveness and successful implementation/sustainability.” Guido Galli, “The Role of Constitution-Building Processes in Democratization,” working paper, May 29, 2005, p. 9 (on file with the author).

62. Heinz Klug argues that modern constitution making calls for a democratically elected and representative constitution-making body because the precommitments entered into in the process “are presented as a form of self-binding, implying democratic participation in the constitution-making process.” He adds that a body created on the basis of proportional representation “provides the greatest opportunity for including the voices of all those willing to enter into a compact of future self-restraint.” Heinz Klug, “Participating in the Design: Constitution-Making in South Africa,” *Review of Constitutional Studies*, vol. 3, no. 1 (1996), p. 56.

63. See note 27. In Afghanistan, the constitution-making body was indirectly elected.

64. In East Timor, Fretilin’s political dominance undermined the extent to which the constituent assembly membership represented the variety of voices in the country. The case study authors suggest that appointing a broad-based constitutional commission could have mitigated the problem, though Fretilin’s dominance would still be felt in the elected body needed to deliberate on and approve the text. Such an approach would have faced

the same challenges related to the appointing authority as in circumstances in which some assembly members are appointed.

65. In Ethiopia, not among the case studies in this volume, excluding the opposition-denied legitimacy to the constitutional commission; in the end, important issues were left unresolved, feeding secessionist trends. Jamal Benomar, “Constitution-Making after Conflict: Lessons for Iraq,” *Journal of Democracy*, vol. 15, no. 2 (April 2004), p. 85.

66. There are several examples in the case studies of boycotts at various stages of the constitution-making process, including Albania, Iraq, and Uganda.

67. Spain has developed into a stable and prosperous democracy, though the country has suffered violence related to Basque separatism. With respect to the transition process, Juan Linz has observed that “the change from an authoritarian regime to democracy was basically peaceful and orderly, without the vengeance expected by those who feared a reenactment of the Civil War. This was one of the great achievements of the political elites, from the Communists to the heirs of the Franco regime.” Linz, “Spanish Democracy,” p. 263. Linz explains that the constitutional negotiations took place often behind closed doors, with many parliamentary leaders excluded and no public debate, because leaders during the transition found the Spanish democratic tradition based on majority rule ill-suited to resolving the issues of a multiethnic, multilingual, segmented society: “The actions of the Spanish leaders fitted both the style and the outcomes of consociational democracy, though they did not know it. . . . The context of consociational politics afforded no room for a great national debate” (pp. 268–69).

68. Ginsburg, Elkins, and Blount note their “sense is that actual constitutional design processes employ scattered and usually rather anemic forms of popular participation and oversight to substitute for actual consent.” Ginsburg, et al., “Does the Process of Constitution-Making Matter?” p. 8.

69. Widner’s study finds that some form of popular consultation was carried out in roughly 40 percent of the 194 cases. In just over 30 percent, more than one technique for soliciting views was used, and in 25 percent, consultation efforts extended to remote as well as urban locations. See “Participation” at Constitution Writing Web site, available at [www.princeton.edu/~pcwcr/drafting/participation.html](http://www.princeton.edu/~pcwcr/drafting/participation.html) (accessed May 11, 2009).

70. A number of the case studies illustrate rather weak examples of public participation pro-

grams. In Fiji, for instance, a limited degree of public consultation was conducted through commission hearings and receipt of submissions, but no civic education was provided (except to some extent by civil society). The constitution draft was not even translated into local languages. The case study authors describe an absence of public understanding and ownership of the constitution. Interestingly, three of the weaker instances of public participation occurred in East Timor, Afghanistan, and Iraq, all situations in which the international community urged implementation of a public participation process (though at the same time failed adequately to facilitate participation). It may be that those processes were weak, in part, because, unlike South Africa, Eritrea, Brazil, and Nicaragua, for example, they were not organic.

71. See Heather Deegan, "A Critical Examination of the Democratic Transition in South Africa: The Question of Public Participation," *Commonwealth and Comparative Politics*, vol. 40, no. 1 (March 2002), pp. 49–50. See also Siri Gloppen, *South Africa: The Battle over the Constitution* (Aldershot: Dartmouth/Ashgate, 1997), pp. 257–58, 262.

72. Albania, Eritrea, and Nicaragua provide other examples of phased consultation processes.

73. See Ghai and Galli, "Constitution Building Processes and Democratization," p. 15 ("Public participation tends to lead to numerous demands and can greatly expand the scope of the constitution.").

74. See Ghai and Galli, "Constitution Building Processes and Democratization," pp. 10–15 for an exploration of the rationales for public participation.

75. But see Ghai and Galli, "Constitution Building Processes and Democratization," p. 16, noting that participatory processes are not automatically institutionalized, "so participation may fail to produce long-term change or create new social forces."

76. Ebrahim, Fayemi, and Loomis, *Promoting a Culture of Constitutionalism*, p. 17.

77. Some public meetings and discussions were held in East Timor, but the consultation process was very rushed and no civic education was offered to prepare for consultation. Two phases of consultation were conducted: prior to drafting (run by the UN mission), but with no impact on drafting; and after a draft was prepared (run by the constituent assembly). But the process was very ad hoc, based on no real plan; often participants had not seen the draft. In the case study authors' view, the lack of meaningful public consultation diminished the constitution's legitimacy.

78. For views questioning the value of public participation processes, at least in some circumstances, see Horowitz, "Conciliatory Institutions and Constitutional Processes in Post-Conflict States," p. 1232 ("To make participation and transparency the touchstones of the legitimacy of a constitution is to exaggerate the benefits and underestimate the costs of such a course. A single process model is unlikely to be apt for all situations, and over the long run the content of the institutions embodied in a constitution is likely to be more important for the democratic future of a state than is the presence of the highest levels of public participation and openness in the way in which the constitution is created."); and Mark Tushnet, "Some Skepticism about Normative Constitutional Advice," *William and Mary Law Review*, vol. 49, no. 4 (2008), pp. 1473–1495, p. 1492 ("These mechanisms do obtain some degree of public buy-in at relatively low cost. The consultative processes have, I believe, generally resulted in no more than cosmetic changes to the proposed constitution. And the up-or-down referenda have been, I believe, basically rubber stamps.").

79. Questions such as this remain unsettled in the academic literature. For example, Vicki Jackson observes that "although there is arguably an emerging international consensus that 'legitimate' constitution-making requires public participation or ratification [citing Vivien Hart and Thomas Franck], history suggests that a fairly wide range of processes may, over time, create bonds of legitimacy between a constitutional instrument and a majority of the polity to which it applies. . . . Depending on existing social and political norms, constitutions negotiated by elite representatives of groups . . . may prove sufficiently durable to move towards constitutionalism without having the added qualities of legitimately entrenched law that popular ratification may be thought to provide." Jackson, "What's in a Name?" pp. 1293–94.

80. The case studies employ rather varied implicit definitions of participation, as may be appropriate, given the varying circumstances.

81. See Angela M. Banks, "Expanding Participation in Constitution Making: Challenges and Opportunities," *William and Mary Law Review*, vol. 49, no. 4 (2008), pp. 1043–1069. Focusing on post-conflict contexts, Banks argues that inclusion in participatory constitution making requires "not only that individuals are physically present in the decision-making forums, but that they have an 'effective opportunity to influence the thinking of others'" (p. 1044). She argues further that "signifi-

cant participation without power . . . undermines the theoretical and legal justifications of participatory constitution making” (pp. 1045–46). Unless constitution makers engage with public input, citizen participants will lack the opportunity to exert influence (p. 1062).

**82.** See also Ghai and Galli, “Constitution Building Processes and Democratization,” p. 16 (“Mere consultation is inadequate. The framers of the constitution must be obliged to take public views seriously into account and analyse and incorporate them into the constitution.”).

**83.** Focusing on Rwanda as an example, Banks observes that elites will permit interest groups to influence constitution-making outcomes, so long as the general balance of political power is not affected. In Rwanda, gender equity advocates successfully gained access to the constitution-making process and influenced the content of the constitution, because their proposals “did not disrupt the governance system envisioned by Rwanda’s political elites.” Multiparty advocates, on the other hand, whose proposals “threatened the political elites’ sense of certainty,” were not similarly included in the process and “achieved little substantive success.” Banks, “Expanding Participation in Constitution Making,” pp. 1064–66.

**84.** In their review of the literature on constitution making, Ginsburg, Elkins, and Blount observe that “the claim that participatory design processes generate constitutions with higher levels of legitimacy and popular support has been subject to only limited study. We can find case studies that seem to support both the more optimistic and more pessimistic hypotheses.” Ginsburg, et al., “Does the Process of Constitution-Making Matter?” p. 22.

**85.** See Gloppen, *Battle over the Constitution*, p. 259, pointing out that in the South African case, a disproportionate share of submissions appeared to come from the well educated, the middle class, former politicians, academics, professionals, and political activists. Gloppen asks, “Is it justified, on democratic grounds, to take into serious consideration the output of such a process?”

**86.** See John Hatchard, Muna Ndulo, and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth* (Cambridge: Cambridge University Press, 2004), p. 34, commenting on Zimbabwe.

**87.** A number of questions in addition to those identified above could provide fruitful lines of further inquiry. How can the actual impact of par-

ticipation on legitimacy be measured? Can a generalized list be constructed of the types of issues for which it is most important to seek popular views? Are there certain types of issues on which popular views should not hold sway, particularly where public passions may be inflamed by recent conflict? And how, practically speaking, should public input be accounted for when there is interest in doing so?

**88.** Ghai and Galli make a similar point, citing successful cases without participation and failures with participation. Ghai and Galli, “Constitution Building Processes and Democratization,” p. 14.

**89.** The IDEA study referenced earlier found that the “failure to adopt or implement a constitution developed by a participatory process has also resulted in increased dissatisfaction and societal tensions.” Kirsti Samuels, “Constitution Building Processes and Democratization: A Discussion of Twelve Case Studies,” paper prepared for International IDEA, available at [www.idea.int/conflict/cbp/upload/IDEA%20CBP%20Comparative%20paper%20by%20Kirsti%20Samuels-2.pdf](http://www.idea.int/conflict/cbp/upload/IDEA%20CBP%20Comparative%20paper%20by%20Kirsti%20Samuels-2.pdf) (accessed May 11, 2009), p. 23. That study further found that while use of participatory and inclusive processes tended to broaden the constitutional agenda, they also “tended to threaten the established power structures, which reacted by undermining the constitutions, amending them, preventing their adoption, or preventing their enforcement.” In three of the four cases in that study—Kenya, Guatemala, and Colombia—a representative and participatory constitution-making process was employed, but “the constitution was not adopted, or adopted and not implemented, by the dominant power structures because it challenged their power” (p. 27).

**90.** Writing about South Africa, Siri Gloppen questions, however, whether there must be a real impact of participation on the text to reap the by-product—legitimacy—of the participation process. Gloppen, *Battle over the Constitution*, pp. 259–60.

**91.** One theory discussed in the working group meetings (see the introduction to this volume) is that longer processes might allow time for civil-society structures and political parties to develop more fully, thus enhancing possibilities for broad-based participation. Although the case studies do not address this point, it merits further exploration. As noted, idiosyncratic conditions seem to matter most in determining the appropriate length of a process.

**92.** The case studies focus more on timing questions concerning the length of the process than

when a process should be initiated. As Vicki Jackson points out, “there may not be as much choice as might be imagined about whether and when to have a constitution-drafting process—any choice is often highly constrained.” Jackson, “What’s in a Name?” p. 1291.

**93.** This may reflect a more general dilemma of state building that is led or pushed by international intervention rather than by organic dynamics.

**94.** The constitutional reform efforts that were completed are technically “interim,” in accordance with the Round Table Agreement, and, in form, substantially amend the 1949 constitution.

**95.** Ghai and Galli suggest that assessment of foreign engagement must disaggregate the kind of engagement, who is engaging, and the purpose and means of engagement. They propose that “the general principle should be that the foreign parties’ role should be facilitative at all times, enabling local people and sometimes even empowering them to make their own decisions, assisting them with logistics, and making them familiar with the experience of other countries which have faced similar problems. As far as possible, intervention should be on a multilateral basis (with a key role for the UN).” Ghai and Galli, “Constitution Building Processes and Democratization,” p. 10.

**96.** For a skeptical view of the value of normative advice-giving—on both the content of constitutions and the process of creating them—by experts outside the political process, see Tushnet, “Some Skepticism about Normative Constitutional Advice.” Tushnet argues that “intensely local political considerations” primarily determine the content of constitutions, and therefore “normative recommendations about what ‘should’ be included in a constitution or constitution-making process are largely pointless” (p. 1474). He further argues that the procedural mechanisms for eliciting elite buy-in during a constitution-making process “will depend quite heavily on the array of political forces on the ground,” and that “under some arrays of political power, almost anything will do” while “under others, perhaps only one or two mechanisms will produce sufficient buy-in” (p. 1489). Thus, the particular context in which constitution making takes place will outweigh any normative advice about how to design the process.

**97.** Kosovo (not among the case studies in this volume) provides another example. After NATO forces pushed Serbian forces out of the province in 1999, the UN Security Council established the

United Nations Mission in Kosovo (UNMIK) effectively to govern the territory. In 2000, UNMIK adopted a provisional constitution for Kosovo. While the text was negotiated with Kosovar leaders, who influenced its terms, the United Nations controlled the negotiating process and its final outcome. (This author participated in those negotiations.)

**98.** One form of beneficial substantive external influence, addressed briefly in the Poland chapter, has been the demand placed on countries desiring to join the European Union to shape or modify their constitutions—as well as ordinary laws and regulations—to conform to EU norms and requirements. This demand has powerfully influenced postcommunist countries in Central and Eastern Europe.

**99.** The experience in Kosovo in 2000, described in note 96 above, is one example. A provisional constitution was important to Kosovo’s political development, but Serb leaders in Kosovo were unwilling to negotiate directly with Kosovar Albanians. For this and other reasons it was essential that the United Nations sponsor the negotiations. Also see Tushnet, “Some Skepticism about Normative Constitutional Advice,” p. 1491 (“Advisors who know something about negotiation, bargaining, and the like might be able to move negotiations forward, acting essentially as mediators do in nonjudicial dispute resolution processes.”)

**100.** While not literally a peace negotiation, the roundtable process in Poland that produced the 1989 April Amendment had some of the characteristics of such a negotiation. The case study authors remark that “the connection between political agreement and constitutional amendment was so close that the constitution-writing process lost its authenticity.” Parliamentary participation in the process was pro forma, and constitution writing was subordinated to political compromise. Nevertheless, the April Amendment played an important role during the first months of transition.

**101.** Section 16 of the constitution denied to the new government wide powers of land acquisition and redistribution or discretion in compensating landowners.

**102.** As a U.S. government official, this author was directly involved in the negotiation and drafting of the Ohrid Agreement in 2001. The discussion of this agreement is based on her personal observations.

**103.** The case study authors point out that “instead of resolving key differences, the constitution contained much ambiguity, combining contradic-

tory elements to provide something for everyone.” The constitution-making process thus “contributed partially to resolving conflict in Nicaragua.”

**104.** The Hungary case study authors (in note 4) suggest that in such a case factors such as relatively successful economic performance and joining the European Union may have neutralized the impact of the legitimacy deficit that they regard as a critical failing of the Hungarian process.

**105.** The question whether international law speaks to the process of constitution making must be distinguished from questions concerning the impact of international and regional norms on the substance of constitutions, which in many cases has been profound.

**106.** If, instead, an international legal requirement of public participation was established, the difficult question would be raised whether a constitution that is *not* produced through a participatory process should truly be considered illegitimate or illegal—even if the process accorded with domestic law requirements, and even if the constitution is implemented and popularly respected.

**107.** In South Africa, legal continuity—which involved having the last apartheid-era parliament approve the interim constitution of 1993—was an important objective of the white political leadership during the transition negotiations. The ANC’s willingness to compromise on this point facilitated consensus on the overall transition process.

**108.** Remark by Allan Brewer-Carías at Working Group Session on Colombia Project on Constitution Making, Peace Building, and National Reconciliation, p. 117 of transcript (on file with the U.S. Institute of Peace Rule of Law Program).

**109.** In Afghanistan, too, the clarity and security of a final rather than provisional document were sought. Political leaders were concerned that something less than a fully elaborated, permanent constitution would risk creating space for spoilers. But see note 50.

**110.** See Sam Moyo and Kayode Fayemi, “Zimbabwe’s Constitution-Making Process of 1999/2000: A Multi-Dimensional Assessment,” in *Constitutionalism in Transition: Africa and Eastern Europe*, ed. M. Serban-Rosen (Warsaw: The Helsinki Foundation for Human Rights, 2003), p. 329, in which the authors make the similar point that adoption of the principles and mechanics of new constitutionalism in Africa is “heavily dependent on the dominant political trends and social processes at play in the country in question.” They note further

that “process and content issues are somewhat subordinated to wider political issues.”

**111.** See also Ghai and Galli, “Constitution Building Processes and Democratization,” p. 12 (“No way has yet been found to make constitutions politician-proof!”).

**112.** As Ghai and Galli point out, “a constitution cannot guarantee its own protection. Its fate depends on forces outside itself.” Ghai and Galli, “Constitution Building Processes and Democratization,” p. 11. But it may be possible for a constitution to create arrangements that will encourage or facilitate its implementation. These may include a constitutional implementation commission, provisions for court review of implementation, public monitoring, and requirements for reporting on implementation or the lack thereof. In Colombia, for example, the United Nations funded a special presidential agency, the tasks of which included preparing draft legislation needed to implement the new constitution. Few good answers exist, and there is a need to develop more focused strategies to bolster the chances for effective implementation, particularly in countries without a strong history of constitutionalism.

**113.** See Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict States,” p. 1229, in which Donald Horowitz points out the impact of political will on decisions regarding the nature of institutions established in a new constitution: “In ethnically divided societies, there is a special, and especially pernicious, version of this problem [group and party interests posing an impediment to constitutional planning]. Politicians who benefit from hostile sentiment toward other groups and its concrete results in the political system are unlikely to transform the conflict-prone environment that supports their political careers. As a result, severely divided societies, which may be most in need of institutions to reduce conflict, may be least likely to adopt them.”

**114.** Leaders can play a decisively negative role as well as a positive one. President Chavez’s role in twisting the Venezuelan constitution-making process to his own ends is one example; Prince Sihanouk’s unhelpful domination of the Cambodian process is another.

**115.** Ethiopia provides another example of problematic foreign intervention. The United States showed favoritism toward the dominant party, thus skewing the constitution-making process toward that party’s interests.

**116.** As discussed earlier, East Timor and Cambodia illustrate the possible negative conse-

quences of starting with a political party draft when that party is dominant. In both those cases, the tabling of a political party draft circumscribed the possibility of entertaining alternative proposals.

**117.** Andrew Arato observes that an analysis of the difficulty of imitating the U.S. constitutional model suggests that variables to consider include “the underlying political culture, the inherited institutional conditions, and the conditions for consensus.” Arato, “Forms of Constitution Making,” p. 231.

**118.** The Iraq case study provides a particularly clear example of the need for accurate assessment of the context: “It should have been clear from the outset that Iraqi constitution making would require a complex three-way negotiation in circumstances where nothing—and certainly not a residual shared Iraqi identity—could be taken for granted. Conventional wisdom among U.S. policy makers presented Iraq as a centralized state undergoing a form of decentralization, when the reality was almost diametrically opposite.”

**119.** He continues: “On the one hand, the intrinsic importance of constitution-making demands procedures based on rational argument. On the other hand, the external circumstances of constitution-making invite procedures based on threat-based bargaining.” Elster, “Ways of Constitution-Making,” p. 138. Barnett Rubin, writing about Afghanistan’s 2004 constitution, makes a similar point: The “central paradox of postconflict constitution making [is that] societies emerging from civil conflict need to agree on rules for national decisions that seem reasonably fair to all or most parts of the society. . . . Yet this historical moment when societies most need a constitution is also the one when they are least prepared to adopt it. Not only are their national capacities depleted by war and emigration, but it is uniquely difficult to draft for the ages when even the fairly immediate future is so uncertain.” Barnett R. Rubin, “Crafting a Constitution for Afghanistan,” *Journal of Democracy*, vol. 15, no. 3 (July 2004), p. 18.