

# PART I

## THEORY AND CONCEPTS



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# 1

## Norms of International Law Relating to the Constitution-Making Process

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Does international law have anything to say about the way in which a constitution is negotiated or drafted? This paper attempts to address this issue by approaching it from several perspectives. After an overview of the general principles of international law (both treaty and customary law) which may be relevant for this purpose, we focus on the provisions of one particular treaty, the International Covenant on Civil and Political Rights (ICCPR), and the manner in which states and the UN Human Rights Committee have interpreted its provisions. We next analyze recent state practice on the issue by seeking to ascertain whether recent exercises in constitutional drafting have followed any general norms.

### **How to Read the Applicable Law**

International law consists of customary law and treaty law. We cannot find persuasive evidence that customary law requires any particular modalities to be followed in the

process of writing a state's constitution.<sup>1</sup> States are presumed by international law to be sovereign and it has been held that this sovereignty cannot be limited without a state's consent.<sup>2</sup> As the Permanent Court of International Justice pointed out in 1927, "the rules of law binding upon States emanate from their own free will as expressed in conventions or usages generally accepted. . . . Restrictions upon the independence of States cannot therefore be presumed."<sup>3</sup>

Nevertheless, in the twenty-first century, sovereignty is not absolute. Treaties are construed to give effect to their general purpose; as the Vienna Convention on the Law of Treaties states, they are to be interpreted "in the light of [the treaty's] object and purposes."<sup>4</sup> It may thus be inferred that even if a human rights treaty pertaining to the governance of states does not specifically apply to constitution drafting, such applicability may still be implied by reference to the object and purposes of the treaty. A treaty's norms and strictures may have a penumbra of necessarily

implied additional terms because its provisions are deemed, by the other parties or the organ of treaty interpretation, to have broad objectives and purposes requiring adherence to these implied terms to effectuate its purposes.<sup>5</sup> As the separate opinion of Judge Sir Percy Spender noted in a significant International Court of Justice case,

a general rule is that words used in a treaty should be read as having the meaning they bore therein when they came into existence. But this meaning must be consistent with the purposes sought to be achieved. Where, as in the case of the [UN] Charter, the purposes are directed to saving succeeding generations in an indefinite future from the scourge of war. . . . the general rule above stated does not mean that the words in the Charter can only comprehend such situations and contingencies and manifestations of subject-matter as were within the minds of the framers.<sup>6</sup>

Customary law, too, may have implications for a state even in the absence of specific consent. Professor Theodor Meron, a former president of the International Criminal Tribunal for the Former Yugoslavia, argues that rules established by treaties to which most states have subscribed may become law of a “customary character” that may also obligate “states that are not parties to the instrument in which the norm is stated.”<sup>7</sup>

Thus, the treaty provisions applying more generally to governance may apply to constitution drafting in specific states, either by a broad construction of the object of a treaty on governance to which they are parties or by operation of customary law if they are not parties to the relevant universal instrument. Treaty parties would be bound to observe the general norms applicable to governance by virtue of the binding nature of those treaties as broadly construed in the light of their object and purposes. New states, which may not yet be party to such treaty obligations, might be bound by the universal customary norm that emanates from the fact of near-universal adherence to a treaty on gover-

nance. As the International Court of Justice has observed, states which, because of special circumstances, are not bound by the norms set out in a treaty of almost-universal ratification may nevertheless be bound by approximately the same normative requirements as the actual parties by operation of customary law—deriving from states’ compliance with the treaty—that reflects the common practice of states.<sup>8</sup>

Not infrequently, the United States has accepted and utilized the tendency of universal treaty law to manifest itself to nonparties as customary law. With respect to at least two universal conventions—the Law of Treaties<sup>9</sup> and the Law of the Sea<sup>10</sup>—the United States has taken the position that until its objections to a particular provision have been met, it will not ratify the convention, but will regard all its other provisions as enunciation of binding international customary law.

With such interpretive considerations in mind, it is possible to consider the international norms applicable to governance. However, because the principal treaty establishing rules pertaining to the lawmaking processes of states—the way legislators are elected, the public right to be consulted—is not specifically directed toward the constitution-drafting process, this can only be done speculatively, as it is far from clear whether the general terms of the normative structure are implicitly applicable to this particular aspect of governance. If the answer to the preceding question is in the affirmative, we may then speculate how the terms of the principal source of such international rules pertaining to governance might apply to the process of constitution drafting.

The principal source of such universal procedural norms is the ICCPR,<sup>11</sup> particularly articles 1(1), 2(1), 3, 25, 26, and 27. While the ensuing discussion focuses on these norms as they might apply to constitution drafting—in either established states that are parties to the ICCPR and in the process of drafting a

new constitution, or new states that may not yet be parties to the ICCPR but may nevertheless be bound by the customary law emanating from it—in the jurisprudence of the Human Rights Committee, which is charged with monitoring and implementing the ICCPR, there has so far been little consideration of how the obligations and rights of that treaty apply to the constitution-drafting process. The few instances in which the Human Rights Committee has made observations on this specific aspect will be analyzed in the next section.

### **The International Covenant on Civil and Political Rights**

Article 1(1) of the ICCPR stipulates that “all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” This provision has received a substantial amount of interpretation by the Human Rights Committee, established under the convention and consisting of eighteen experts elected by the UN General Assembly.<sup>12</sup> None of this interpretation, however, has pertained to constitution drafting. Nevertheless, the ICCPR provides for complaints of noncompliance to be heard by the committee when instituted by other state parties and—when the state complained against has declared its acceptance of the requisite optional protocol—by individual persons claiming to be victims of a violation.<sup>13</sup> In addition, the committee makes periodic observations on the meaning of parts of the treaty and reviews periodic reports on compliance, which parties are required to present and to explicate before the committee. It is entirely possible that, in the future, a complaint could allege that a constitution-drafting process has violated the right of self-determination. That this is not fanciful is suggested by the third paragraph of the same article, which specif-

ically obliges states with dependent territories to “promote the realization of the right of self-determination.” In the context of decolonization, this requirement evidently envisages that the right of peoples “freely [to] determine their political status” should apply equally to the process of achieving independence, including the design of the new nations’ constitutions.

In practice, this is precisely what happened when the transfer of power from colonial authorities was conducted in an orderly fashion under UN supervision.<sup>14</sup> In the thirty-five years following the end of World War II, self-determination transformed the political landscape. Beginning with India, Burma, and West Africa’s Gold Coast, Britain led the way in compliance with the norm’s requirements, negotiating independence constitutions with elected parliamentary representatives of the colonial populations under the watchful monitoring eye of the UN committee on dependent territories established under Article 73(e) of its charter. As early as May 1956, the UN Trusteeship Council sent monitors to the plebiscite in which British Togoland chose to join Ghana in its move to constitutional governance. Preindependence plebiscites followed in the British Cameroons in November 1959 and in Belgian-administered Ruanda-Urundi. In 1961, the United Nations aided New Zealand, the administering authority, in conducting a plebiscite in Western Samoa that endorsed the draft constitution and a form of association with the former trustee.<sup>15</sup> On June 17, 1975, the United Nations observed the vote in which residents of the Northern Mariana Islands endorsed a loose form of association with the United States,<sup>16</sup> and at various times in the 1980s, it supervised plebiscites in the rest of the U.S. Pacific Islands Trust, which determined the future constitutional status of those several archipelagos.

The monitoring of political progress in trust territories led to a case-by-case enun-

ciation of principles applicable to an implicit emerging democratic entitlement that gradually became more generally applicable. Throughout the 1950s and 1960s, on the basis of reports from visiting missions, the Trusteeship Council and General Assembly recommended to the administering powers specific steps necessary to create democratic participation for the territories' inhabitants in the process of choosing their political future. In the Trusteeship Council's 1959 report concerning Belgian administration of Ruanda-Urundi, it called for the introduction of universal suffrage and an increase in the responsibilities of elected local authorities.<sup>17</sup> Such advice was influential in determining both the rate and direction of a dependent territory's emancipation and in formulating a generally shared expectation as to what the emerging democratic entitlement entailed. The United Nations demanded that every adult should be entitled to vote and that those elected should rule, which colonial systems that had fostered qualified franchises and limited self-government only gradually accepted. It cannot be said that the right to self-determination emerged from this period of practice as a developed code of specified requisites, but it is demonstrable that it was accepted as requiring, at a minimum, the direct and democratic participation of all adult men and women in a parliamentary, plebiscitary, or both a parliamentary and plebiscitary process of constitution drafting.

Against the background of the above developments, the concept of self-determination was cast as a right extending beyond decolonization into the pantheon of universal rights captured in the ICCPR. By the time the United Nations began to administer the transition to independence of Namibia in 1990, deploying more than seven thousand military and civilian personnel at a cost of \$373 million, it was considered routine that it would supervise elections in the runup to independence and the drafting of a new consti-

tution.<sup>18</sup> Most recently, this plebiscitary and parliamentary norm was implemented in the UN administration of East Timor leading to independence.

The rights set out in the ICCPR are expressly to be respected in the process of governance without distinction and on the basis of strict equality of persons. Thus, Article 2(1) requires states "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The U.S. Constitution, drafted by persons chosen in part in accordance with distinctions of sex and property, would not have accorded with the contemporary requirements established by this provision. This is underscored by Article 3, which states that "the parties to the present Covenant undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." Article 26 reemphasizes the right to strict equality "before the law," and Article 27 reiterates the entitlement to equality as it extends to minorities.

The ICCPR envisages extensive rights of persons to participate in the political process. Article 25 specifies that

every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal, and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

The Human Rights Committee of independent experts has had extensive opportunity, both in its review of obligatory country compliance reports and in hearing individual



petitions alleging violations, to develop the jurisprudence of this provision.<sup>19</sup> In deciding upon a complaint filed by the Mikmaq tribal society in Canada, the Human Rights Committee was required to interpret and apply Article 25. The committee appears to have concluded that while the right “to take part in the conduct of public affairs, directly or through freely chosen representatives,” applies also to constitution making, it does not provide any particular model for this. In the words of the committee, “it is for the legal and constitutional system of the State party to provide for the modalities of such participation.”<sup>20</sup>

The Human Rights Committee also has made a general comment on the matter, indicating that the “right to participate in public affairs” set out in Article 25 is satisfied, *inter alia*, when citizens “choose or change their constitution or decide public issues through a referendum or other electoral process.”<sup>21</sup> This comment, together with the committee’s willingness to take jurisdiction in the Mikmaq case, may indicate a tendency to regard constitutional drafting as coming within the purview of the ICCPR.

In sum, all states contemplating the drafting or redrafting of their constitutions are well advised to consider the ICCPR in organizing the framework within which their citizens participate in that process. Whether this is a legal or merely prudential requisite is not yet clear. Possibly it is also not very important, except to theorists. Regional norms may be even more relevant. For African states, attention needs be paid to the Banjul Charter.<sup>22</sup> For European states engaged in constitution drafting, similar consideration is appropriate for the even more extensive and intrusive provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>23</sup> Not only are its terms even more explicit in guaranteeing popular rights of political participation and other democratic entitlements, but the treaty

also has sharper teeth. Admission of a state to the Council of Europe and its parliamentary institutions is conditional upon acceptance of the treaty and of the jurisdiction of the European Court of Human Rights, to which access is available to citizens who allege violations of the rights extended to them by the treaty.

### **Analysis of State Practice: Recent Constitution-Making Experiences for International Normativity**

International law derives not only from treaties and international custom but also in part from state practice. When the state practice of many states becomes consciously patterned, these patterns are recognized as evidence of international customary law. “General principles of law recognized by civilized nations” are also considered a source of international law.<sup>24</sup> Therefore, analyzing the practice of states, and the general principles of law that they follow, can help in ascertaining norms of international law.

We examine two distinct phases of constitution making that occurred in the recent past with a view to discerning whether common norms relating to the process of constitution making can be said to have evolved. The first of these is the flurry of constitution drafting that occurred in Africa as its nations sought to legitimize their governance. The second occurred in central and eastern Europe with the end of communist rule.

#### ***Constitutional Drafting in Africa in the 1990s***

The 1990s witnessed a spate of constitutional reform across Africa. While several states, including Namibia, Malawi, Uganda, South Africa, and Benin, adopted new constitutions, several others, including Tanzania, Kenya, and Zimbabwe, experienced major constitutional reforms. What distinguished this phase from the earlier rounds of constitutional-

drafting exercises in the period of and following decolonization was the extraordinary emphasis on public participation in the processes of constitution making.

Postcolonial Africa has witnessed several rounds of constitution making. In what one scholar has termed “the old approach,”<sup>25</sup> in the era after the departure of the colonial powers, constitution-making processes across Africa were largely driven by the elected government or ruling power. The government either appointed or attempted to control the election of a constituent assembly, parliamentary committee, technical committee, or select committee of lawyers and politicians to write a new constitution for the country. Usually, the process of the old approach ensured that there was little or no public debate prior to or during the drafting process, no consultation with ordinary people, and no referendum on the draft constitution before it became law. Even where there was some limited debate, the result was predetermined and manipulated and not informed by the debate’s logic or content. African scholars contend that it was largely because of such processes that at the end of the 1980s, constitutionalism across Africa was viewed as a failed project. Nigeria, which became independent from British colonial rule in 1960, has experienced five different attempts at constitution making since then, and all of these processes could be considered as variations on the old approach.

At the beginning of the 1990s, there seemed to be widespread acceptance among Africans that the process of constitution making had to change. This led to the adoption of the “new approach,” which emphasizes participation and puts great premium on dialogue, debate, consultation, and participation. It is guided by principles including diversity, inclusivity, participation, transparency and openness, autonomy, accountability, and legitimacy.<sup>26</sup> This focus on processes of constitution making has generated productive and innovative methods as well as a healthy debate on effective modes of public

participation. It has also resulted in a number of different approaches being followed. One leading scholar has identified two principal strategies as part of the new approach: first, appointment of a constitutional commission, followed by the election of a constituent assembly to adopt and enact the new constitution (this was the process followed in Uganda and Malawi); and second, establishment of a national (sovereign) conference or convention that leads to the enactment of a new constitution (this process was followed in Benin and later adopted in Mali, Niger, Gabon, and Togo).<sup>27</sup>

To understand the details of the process requirements, we focus on two specific instances of constitution making: the adoption of the Ugandan constitution in 1995 and that of the constitution of South Africa in 1996. Both these processes are now considered landmark events in African constitutional history and have generated an impressive body of scholarly literature.<sup>28</sup> For our purposes, it is not necessary to narrate the entire story of constitution drafting in Uganda and South Africa; much about both cases has already been painstakingly documented and analyzed in the literature cited beforehand, and further analysis of both cases appears in this volume. We must, however, note patterns in the processes that are relevant to our purposes.

In Uganda, the process of drafting the 1995 constitution began in earnest in 1988, when Uganda’s constitutional commission was established by a statute.<sup>29</sup> The commission, created to solicit the views of the Ugandan people on the content of the new constitution, was the first step in the constitutional drafting process, followed by the creation of a new constituent assembly, for which fresh elections were held. The newly constituted assembly ultimately drafted the 1995 constitution. The constitutional commission included representatives of various interest groups in Uganda, including those who had opposed the president domestically, giving



the commission the required legitimacy.<sup>30</sup> Scholars have commended the lengthy process—nearly four years—employed by the commission for its recognition of the importance of taking whatever time was necessary to truly receive wide citizen input.<sup>31</sup> The commission undertook special efforts to ensure that groups that had traditionally remained outside the consultative process, including women, were consulted and that their views would be taken into account.<sup>32</sup>

The Ugandan constitutional commission adopted a variety of methods to collect views from the public.<sup>33</sup> To consider all submissions equally, each and every one of the 25,000-odd submissions was summarized and translated into English from local languages. All the submissions that the commission received were eventually published, along with the final report. The commission solicited the views of the large community of Ugandans who live abroad, and also traveled to several countries to gain a comparative understanding of constitutional practices and experiences.

Soon after the commission submitted a final report, the Constituent Assembly Bill was enacted. This statute placed great emphasis on building consensus.<sup>34</sup> It dictated that the constituent assembly was to be constituted through fresh elections, though the president had the power to nominate ten members. Special provisions were included to ensure that women were adequately represented.<sup>35</sup> Elections were held in March 1994, supervised by international observers, donor agencies, and local monitors, and were viewed as free and fair. The assembly began its work in May 1994 and completed the draft of the new constitution in August 1995. The assembly's draft was enacted as law by the government on September 22, 1995, and was officially promulgated on October 8, 1995.<sup>36</sup> The assembly's constitution is substantially similar to the commission's draft and appears to give credence to the view that the actual text of the constitution reflects the views of

the Ugandan people, as expressed by them in their submissions to the commission.

Because of its unique history, South Africa's constitutional drafting process had several features that were peculiar to it, dictated by the political and social circumstances that existed in South Africa in the late 1980s and early 1990s.<sup>37</sup> Although the negotiations for drafting a new constitution formally began in March 1993, it was only after an interim constitution had been adopted in November 1993, and the constituent assembly elected in May 1994, that attempts to involve the public in the constitutional process were initiated. Although begun late in the process of evolving the constitution, the public participation process was enthusiastically pursued between January 1995, when the assembly launched its media campaign shortly before it began its work, and September 1995, when the first draft of the constitution was produced.

The program developed to achieve the participation of 40 million-odd South African citizens, most of whom were illiterate and did not have access to print or electronic media, was extremely ambitious and multifaceted. The program had three modes: community liaison, media liaison, and advertising.<sup>38</sup> The first component involved participatory workshops; between February and August 1995, twenty-six public meetings were organized in all nine provinces, in which more than two hundred assembly members became involved.<sup>39</sup> As part of the media campaign, the press, radio, television, and Internet were employed to spread the message about the new constitution.<sup>40</sup> In response to all these initiatives, the assembly received nearly 1.7 million submissions from the public, though the bulk of these were more in the nature of petitions. Of these, 11,000 were substantive submissions and canvassed a broad range of issues. After the first draft of the constitution had been finalized in November 1995, it was published and distributed, and the public was asked to respond to the specific provisions of the draft. This time, the assem-

bly received more than 250,000 submissions and attempted to record and reply to each individually.<sup>41</sup> After hectic deliberations, on May 8, 1996, the assembly adopted the final text of the constitution. However, thanks to the peculiar circumstances under which the constitution was negotiated, its text had to be reviewed by the South African constitutional court for certification that the final text was in agreement with the preset constitutional principles. On September 6, 1996, the court rendered its judgment, pointing out that the final text was deficient in certain respects. The assembly reconvened to discuss changes in accordance with the judgment, and on October 11, 1996, tabled the new document before the court. On December 4, 1996, the court approved the final text. President Nelson Mandela signed the final constitution on December 10, 1996, and it came into force on February 4, 1997.<sup>42</sup>

The developments in South Africa seem almost revolutionary in character, but African scholars themselves have added cautionary notes to this discourse. It has been pointed out that though the new approach is far more participatory than earlier experiences, even in South Africa, the participation was largely limited to urban intelligentsia and the middle classes.<sup>43</sup> The process either bypassed rural folk, or they had little interest in what was essentially a middle-class social project. Several commentators criticized the South African public participation process in particular, pointing to the huge volume of submissions and asking if any constitutional draftsman could be reasonably expected to review them all. Several argued that the entire program was an elaborate hoax, designed to hide the fact that even the final constitution was to be a negotiated document and would not be submitted for the general public's approval.<sup>44</sup> Similar criticisms were directed at the 1997 Eritrean constitution, although it too was the product of an elaborate procedure to involve the public in the drafting

process.<sup>45</sup> This has been one of the notable aspects of recent exercises in constitution making in Africa: Though there are attempts to involve the public at various stages of the constitution-drafting process, apart from the recent exception in Rwanda,<sup>46</sup> there have not been attempts to have the general populace approve the final product. The reasoning appears to be that assembly members possess sufficient representative capacity to obviate the need to seek the final nod of approval of the people through a referendum.

In analyzing the recent exercises in constitution drafting in Africa, one has to note the emergence in practice of several similar devices designed to increase public participation. At the same time, however, it must be emphasized that there are no general norms that have been uniformly applied in these countries. Both Uganda and South Africa, while employing several innovative strategies to increase public participation, used them at different stages of the constitution-making process. In Uganda, public participation was sought at the very outset. In South Africa, the public were involved at a fairly late stage, after an interim constitution had been adopted and elections for the new constituent assembly had been held. Another distinction is that in South Africa, the views of the populace were sought on a draft of the constitution; in Uganda, the views of the public were sought to prepare the draft of the constitution without seeking their specific reactions to the actual provisions of the draft of the constitution itself. Based on these trends, one can safely declare that while all African countries currently seem to feel an obligation to involve the public in constitution-making or constitution-reform processes, there seem to be no clear rules for how and when the public are to be involved. Each country appears to feel free to fashion appropriate strategies based on its own internal circumstances.

*Constitutional Drafting in Eastern and Central Europe in the 1990s*

In the aftermath of the Cold War, starting from the late 1980s, the former Soviet republics as well as the countries of Eastern and Central Europe underwent periods of constitutional reform that saw a number of them either adopting wholly new constitutions or substantially amending their existing constitutions. Due to constraints of space, this paper does not analyze in detail the constitution-making processes in the former Soviet republics, including Estonia, Latvia, Lithuania, Belarus, Moldova, Russia, Ukraine, Azerbaijan, Kyrgyzstan, and Kazakhstan, though nearly all these countries adopted new constitutions in the first half of the 1990s. In general, public participation in the process of drafting new constitutions for the former Soviet republics has been low. However, in some of these countries—specifically, Estonia, Lithuania, and Russia—the newly drafted constitutions were approved in a national referendum before being brought into force.<sup>47</sup>

Unlike African countries in the 1990s, which by then had varying but relatively substantial experiences of constitutionalism, all the countries in Eastern and Central Europe as well as in the former Soviet Union were coming out of a shared past of communism.<sup>48</sup> In transitioning to constitutional democracies, all these countries faced multiple challenges at the same time, in that they had to simultaneously transition to market-based economies while also seeking to fashion themselves into constitutional democracies.<sup>49</sup> As they sought to tackle the various legal, political, social, and economic issues that confronted them, each country adopted different strategies to reconcile its communist past with a democratic future. Although at times the countries used similar strategies, very different results were seen in different cases, depending on the mix of domestic factors that controlled the consequences. Involving the

public in constitution-drafting exercises has generally been considered a significant aspect, but it never assumed the importance or the scale that the issue garnered in Africa in the 1990s.

Trying to describe constitution-making processes across Central and Eastern Europe generally is a difficult exercise: Despite some shared characteristics, the constitutional experiences of these nations have been very different. In view of this difficulty, this section offers a broad overview of the processes of constitution making employed in these countries, focusing on the extent of public participation.

In several of Central and Eastern European countries, including Bulgaria, Hungary, Poland, Czechoslovakia, and East Germany, the transition to democracy was negotiated through a process of roundtable talks, whereas different paths were followed in the rest. In countries where roundtable talks were held, they featured the Communist Party—together with various satellites and pseudo-independent organizations—on the one hand and a more or less well-organized opposition on the other.<sup>50</sup> Several countries opted for setting up a constituent assembly to draft a new constitution. In Albania, Bulgaria, and Romania, constituent assemblies were established after holding elections, whereas in Poland, Hungary, and Czechoslovakia, they were self-constituted bodies. It was generally believed that the genesis of the constituent assembly might be crucial for its legitimacy and the legitimacy of the final document produced.<sup>51</sup> In most of these countries, once the constitution was finally adopted, it was subjected to the referendum process to obtain the approval of the people. This was a departure from the trend in Africa, where the participation of the public was sought at earlier stages, but not after the assembly adopted the final draft of the constitution. By contrast, the views of the public in several of

these countries were sought only at the final stage, that is, during the referendum.

Albania, described as being “without question, the most problematic of the post-communist states,”<sup>52</sup> experienced major struggles in transitioning to democracy in the 1990s. However, on November 22, 1998, despite calls for a boycott from the former leader, Sali Berisha, and his Democratic Party, Albanians ratified a new constitution in a nationwide referendum. Records showed that more than 50 percent of the total population voted in the referendum despite heavy snow in the north, and almost 90 percent of those who voted affirmed the new constitution. The constitution had been drafted by a constitutional commission, which conducted a robust program of public participation in connection with the production of the draft, finished its work in July 1998, and obtained approval of its work from the Council of Europe’s Venice Commission on Law and Democracy in a bid to increase the legitimacy of the draft. Subsequently, on October 21 1998, the Kuvend Popullorë (People’s Assembly) approved the draft constitution. After ratification by the people of Albania, the new constitution came into effect on November 28, 1998.<sup>53</sup>

Bulgaria and Romania were the first countries in the region to draft new constitutions. In Bulgaria, once elections were held in 1990, the old Communist Party—renamed the Bulgarian Socialist Party—won a majority of seats and exploited the window of opportunity to quickly adopt a new constitution. In view of the fear of the drafters that the people would not approve the new constitution, it was brought into force in July 1991 without a referendum. Public participation in this process was therefore minimal.<sup>54</sup> In Romania, after engineering the fall of the dictator, Nicolae Ceausescu, the National Salvation Front (NSF), comprising communists, dissidents, and intellectuals, won a huge majority in the 1990 elections and swiftly began the constitution-making process. There

is some debate about the exact nature of the NSF. Some scholars have referred to them as the old communists in a new guise, while others have pointed out that by causing the overthrow of Ceausescu and breaking from the past, they constituted a new political force.<sup>55</sup> The NSF appointed a constitutional commission, which involved representatives from the communist-dominated parliament, and completed its work in fifteen months. Though the NSF’s methods in the assembly have been described as “dictatorial” and “heavy-handed,”<sup>56</sup> the NSF did seek public approval for the final draft of the constitution. It was only after the constitution was approved in a referendum held in November 1991 that it was brought into force.<sup>57</sup>

Constitutional politics in Czechoslovakia were unusually strained and unpredictable, even by the generally tumultuous standards of Eastern and Central Europe. After the Velvet Revolution—a reference to the bloodless transformation of power—of 1989, the differences between the two main ethnic groups, the Czechs and the Slovaks, began to emerge. As elections were held in the federation and steps were taken to drafting a constitution, the main political parties of the two groups agreed to break up the Czechoslovak federation as of January 1, 1993. This decision has been criticized as being against the popular will. Public polls showed that a majority of people in both parts of the federation opposed it. This, coupled with the fact that no referendum was held on the issue, led to questions about the legitimacy of the decision.<sup>58</sup> Nevertheless, the velvet divorce was effected. The constitutions adopted by Slovakia (on September 1, 1992) and the Czech Republic (on December 16, 1992) before the official date of extinction of the Czechoslovak Federation went on to become the constitutions of the two separate and independent states.<sup>59</sup>

Poland garners interest as the earliest country in the region to start planning for a new constitution and among the last to



complete the task.<sup>60</sup> When Solidarity won elections by a landslide in 1989, the popular expectation was that Poland would have a new constitution within a short span of time. However, as Wiktor Osiatynski has noted, one of the main problems with constitution making in Poland in particular was that the process became intertwined with ordinary politics, resulting in long delays.<sup>61</sup> From 1989 to 1991, two separate constitutional committees of the Sejm (lower house) and the Senate prepared different constitutions, neither of which was ultimately accepted. A new parliament, elected in 1991, consisted of representatives from twenty-nine political parties and proved to be too fragmented to form a constitutional majority. It did manage, however, to agree on the so-called Little Constitution, which served as an interim document. Seven draft constitutions were submitted to the national assembly before parliament was dissolved on May 30, 1993. Following a Sejm decision to permit a "citizens' constitutional initiative," various groups submitted several drafts.<sup>62</sup> However, the process kept getting delayed, until finally, on May 25, 1997, a new constitution was adopted by national referendum. This constitution had earlier been adopted by the National Assembly on April 2, 1997, by a vote of 451 to 40. The new constitution was validated by the Supreme Court on July 15, 1997, and came into force on October 17, 1997. However, the long delay in adopting a new constitution has had its negative repercussions. Only about 43 percent of eligible voters participated in the referendum, and polls showed that as many as 46 percent of the population stated that they had no interest in the constitution. Some constitutional scholars have argued that the long gestation period of nearly seven years has severely undermined the legitimacy of constitutionalism in Poland.<sup>63</sup>

Hungary is unique in that it did not adopt a new constitution. Instead, the Hungarians

decided to amend their old constitution several times, and later on, crafted a workable constitutional order by a series of special statutes and decisions made by their strong constitutional court. During the roundtable talks between the governing Hungarian Socialist Workers' Party and the democratic opposition in 1989, it was agreed that, though the drafting of a new constitution would be left to the first freely elected parliament, the existing 1949 constitution would be significantly amended. The commonly accepted theoretical reason for not adopting a new constitution in 1989 was the illegitimacy of the parliament elected in 1985.<sup>64</sup> On October 23, 1989, the 1949 constitution was drastically amended, affecting nearly 90 percent of the document. In retrospect, it can be argued that the legality of the entire roundtable itself is questionable, as the parties at the roundtable had not been elected.<sup>65</sup> The preliminary draft of the significant 1989 amendment had in fact been prepared by expert commissions under government directions. Different sections of the draft were then discussed in the working groups and subcommittees of the roundtable talks, when the democratic opposition thoroughly modified its final text. The parliament passed the constitutional amendment with no serious debate. It is therefore clear that the important amendments passed in 1989 were evolved through a very closed, nonparticipatory process. Yet Hungary made its peaceful transition from a communist state to a liberal state largely as a result of this amendment. The 1989 amendment gave all Hungarians open access to the constitutional court, and in later years, that court was instrumental in bringing about monumental changes in the Hungarian legal order. However, the further amendments passed by the new, freely elected legislature served as the express acknowledgment of the revisions in the 1989 amendment, adding legitimacy to the new order. Later, the idea of writing a completely new constitution took a back seat,

as it became obvious that the 1989 text was a new, democratic document that had provided the constitutional base for Hungary's smooth transition.<sup>66</sup> By 1997, through a series of constitutional amendments and statutory changes, Hungary had almost completely transformed the legal order established by the constitution of 1949.<sup>67</sup> Yet this process had happened with little direct participation from the masses in the process of constitutional change.

Constitutional scholars from the region have offered explanations for the limited involvement of the masses in the constitution-making processes. Nenad Dimitrijevic argues that it is wrong to point to the mixing of constitutional and normal politics as a flaw in the region's constitution making. According to Dimitrijevic, constitution making in postcommunist Europe was part of a larger process of regime change and the only way to avoid violence. To do this successfully, it became necessary to limit the participation of the public. Dimitrijevic agrees that compared with Africa, the process in Eastern and Central Europe was extremely closed to public participation, but he contends that by keeping the context and political circumstances in Eastern and Central Europe in mind, one cannot but conclude that it was the right approach.<sup>68</sup> Gabor Halmai contends that East Europeans generally are extremely skeptical of the direct approach to constitution making and prefer a more aristocratic approach, which may also partially explain the phenomenon.<sup>69</sup>

## Conclusion

A survey of the practice of the international system in the application of treaty law and custom reveals no firm evidence of rules applicable to the process of constitution making. What does appear, however, is a general requirement of public participation in governance. This emerges from the

UN-supervised practice of decolonization, in which the democratic participation of the colonial peoples became a practical prerequisite, and also from the textual requirements of the ICCPR and the interpretation and implementation of those norms by the Human Rights Committee. Moreover, the textual requirements of the ICCPR and the Human Rights Committee's General Comment no. 25 on that text suggest that these norms may well be applicable to processes of constitution drafting whether the countries undergoing them are parties or not; nonparties might be subject to such requirements by operation of customary law.

A quick review of the process of constitution making in the most recent exercises of constitutional drafting—in East Timor,<sup>70</sup> Rwanda,<sup>71</sup> and Afghanistan<sup>72</sup> (see this volume also)—reveals that the drafters were, or are, as the case may be, greatly concerned with involving the public in the actual process of drafting the constitution's final text. It would appear that involving the public in the process is now a universal trend. One can argue that the drafters of all modern constitutions have attempted to increase the legitimacy of the drafting process by adopting different strategies aimed at imparting a representative character to the final text. Moreover, in recent times, these strategies have become extremely innovative and seek to cover a substantial proportion of the target population.

Despite such discernible trends in the practice, the question of whether there are any specific uniform norms to be followed when drafting a constitution must, as yet, be answered in the negative. The survey conducted over the previous pages reveals that, while all recent constitution-drafting experiences have witnessed the use of one or several strategies and devices to involve the public, no two countries have followed precisely the same procedures. Even within Africa, where there is a tendency to adopt open procedures, there is great disparity in the strategies



used and the timing of various phases of the consultative process. This is clearly demonstrated by contrasting the working methods by which consultation occurred in the contemporaneous drafting of constitutions for Uganda, South Africa, and Eritrea.

While following the global trend toward openness in the process of constitution making has advantages, and would seem to be both desirable and pragmatic, it is not yet clear that anything in international law requires a state to adhere to uniform practices. Constitutions of nations that have used relatively closed drafting procedures are not considered to violate international law or be less legal than those that have adopted more open procedures. As Hungary's experience seems to demonstrate, sometimes constitutions that have been adopted (or amended) by closed procedures can prove equally adept at promoting democratic ideals within a society. Nevertheless, a high degree of public participation appears to be becoming axiomatic. This does not constrain states' choice as to how, and at what stage, this participation occurs. In the African model, a constitutional assembly's legitimacy may derive from its having been elected at the beginning of the drafting process, there may be widespread public consultation, and the final product may then not require further direct approval. In other situations, notably in Eastern Europe, the drafting may occur in unelected commissions with little public participation, but the final product will be legitimized only by its submission to popular approval. There is no evidence of a requirement for a particular mode of public participation, but there is growing evidence that public participation is required. The elements that make up international law—the treaties, customs, and practice of states—indicate a growing convergence around universal principles of legitimate governance, and these are tending to be applicable also to the process of constitution drafting. It appears,

therefore, that there is growing acceptance of the norm that constitutions should be prepared through participatory processes with a high degree of transparency.

## Notes

1. An anonymous reviewer of the manuscript of this chapter offered this reaction to our conclusion on customary international law: "This is not a surprising conclusion insofar as what is sought is a set of specific prescriptions as to mechanisms to be used in constitution making. However, if the matter is viewed somewhat more broadly. . . . If instead of looking for specific, affirmative requirements in the law, one looks for injunctions against certain conduct, then the customary law may well be seen to contain a certain guidance in constitution making. At the very least, peremptory norms of international law forbid a state from acts such as genocide and systematic racial discrimination." The reviewer goes on to suggest that there may be rules in customary international law that would frown upon, say, the exclusion of a segment of a national population from a process of constitution making. We believe that the question we were asked to address was precisely the narrow one identified by the reviewer, namely, whether there are specific prescriptions in international law about the mechanisms to be used in constitution making, and stand by our conclusion expressed in the text accompanying this endnote. We are, however, reproducing the reviewer's concern in this endnote for those who may be interested in the broader issue identified by the reviewer.

2. The "Lotus" Case (*France v. Turkey*), 1927 P.C.I.J. (ser. A) no. 10

3. The "Lotus" Case.

4. U.N.Doc. A/CONF. 39/27 (1969). Entered into force 1980.

5. Advisory Opinion regarding Certain Expenses of the United Nations, 1962 I.C.J. 151.

6. Advisory Opinion regarding Certain Expenses, 182, 186.

7. Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Oxford University Press, 1989), pp. 80–81.

8. Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. 392 424.

9. U.N. Doc. A/CONF. 39/27(1969), entered into force 1980.

10. U.N. Doc. A/CONF. 62/122(1982).

11. 999 UNTS 171, entered into force March 23, 1976.

12. For a discussion of the interpretive jurisprudence, see Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995), pp. 140–72.

13. Some seventy countries have agreed to permit individual citizens to petition the committee under the optional protocol.

14. Franck, *Fairness*, pp. 95–98. For an authoritative analysis of the transfer of power in British colonies, see S.A. de Smith, *The New Commonwealth and Its Constitutions* (London: Stevens & Sons, 1964). For an insightful analysis that relies on recently released Colonial Office records that provides revealing new information on this process, see Charles O.H. Parkinson, *Bills of Rights and Decolonization* (Oxford: Oxford University Press, 2007).

15. G.A. Res. 1579, 1961 and G.A. Res. 1605, 1961.

16. *Report of the United Nations Visiting Mission to Observe the Plebiscite in the Northern Mariana Islands, Trust Territory of the Pacific Islands*, 43 UN TCOR Supp. (no. 2) 24, U.N. DOC. T/1771 (1976).

17. UN TCOR Annex I (Agenda Item 3) 21, U.N. DOC. T/L.928 (1959).

18. “Namibia, Independence at Last,” *UN Chronicle*, vol. 27, no. 2 (June 1990), p. 4.

19. See Dominic McGoldrick, *The Human Rights Committee* (Oxford: Oxford University Press, 1991), p. 461ff. See also Franck, *Fairness*, pp. 100–04.

20. Communication no. 205/1986, CCPR/C/43/D/205/1986, *Report of the Human Rights Committee*, U.N.G.A.O.R., 47th sess., Suppl. no. 40. U.N. Doc. A/47/40.

21. General Comment No. 25(57), *Report of the Human Rights Committee*, vol 1., U.N. G.A.O.R., 55th Sess., Suppl. no. 40. U.N. Doc. A/51/40 para. 6 (1996). We are thankful to Professor Vivian Hart for her USIP paper where this aspect has been dealt with in some detail.

22. OAU DOC.CAB/LEG/67/3/Rev. 5, entered into force October 21, 1986.

23. 213 UNTS 221, Europ. T.S. no. 5, entered into force September 3, 1953.

24. Art. 38 (1)(d) of the Statute of the International Court of Justice, June 26, 1945, art. 4, 59 Stat. 1031, T.S. no. 993.

25. Otiye Igbuzor, “Constitution-Making in Nigeria: Lessons for Making a People’s Constitution,” Paper presented at the Conference on Constitutional Development, Kibuye, Rwanda, August 19–24, 2001, p. 6, available online [www.cdd.org.uk/cfcr/constitutionlessons.htm](http://www.cdd.org.uk/cfcr/constitutionlessons.htm) (accessed April 19, 2009).

26. Igbuzor, “Constitution-Making in Nigeria,” p. 7. For more details on the new approach, see generally Julius Ihonvbere, *Towards a New Constitutionalism in Africa*, CDD Working Paper Series no. 4 (2000), pp. 50–57; Julius Ihonvbere, “Towards Participatory Mechanisms and Principles of Constitution Making in Africa,” in *The Path to People’s Constitution* (Lagos, Nigeria: Committee for the Defence of Human Rights, 2000); Issa Shivji, ed., *State and Constitutionalism: An African Debate* (Ann Arbor, MI: SAPES and University of Michigan Press, 1991); Owen Sichone, ed., *The State and Constitutionalism in Southern Africa* (Harare, Zimbabwe: SAPES, 1998).

27. Issa Shivji, “Three Generations of Constitutions and Constitution-Making in Africa: An Overview and Assessment in Social and Economic Context,” in *Constitutionalism in Transition: Africa and Eastern Europe*, ed. Mihaela Serban Rosen (Warsaw: Helsinki Foundation for Human Rights, 2003), pp. 84–85.

28. For literature on the 1995 Ugandan constitution, see generally David Mukholi, *A Complete Guide to Uganda’s Fourth Constitution: History, Politics and the Law* (Kampala: Fountain Publishers, 1995); Sam Moyo and Kayode Fayemi, “Zimbabwe’s Constitution-Making Process of 1999/00: A Multi-Dimensional Assessment,” in *Constitutionalism in Transition*, pp. 323–49; and Maria Nassali, “Women and the Constitution of Uganda of 1995: Challenges and the Future,” in *Constitutionalism in Transition*, pp. 261–79. For literature on the 1996 South African constitution, see generally Hassan Ebrahim, *The Soul of a Nation: Constitution-Making in South Africa* (Oxford: Oxford University Press, 1998), pp. 239–50; Christina Murray, “A Constitutional Beginning: Making South Africa’s Final Constitution,” *University of Arkansas at Little Rock Law Review*, vol. 23 (2001), p. 809; and D.J. Brand, “Constitutional Reform—The South African Experience,” *Cumberland Law Review*, vol. 33, no. 1 (2002–03), pp. 1–14.

29. The three previous postindependent Ugandan constitutions of 1962, 1966, and 1967 were

either abrogated or rendered useless and irrelevant by a succession of dictatorial regimes. Mukholi, *A Complete Guide*, p. 82.

30. Moyo and Fayemi, "Zimbabwe's Constitution-Making Process," p. 333.

31. The first phase of the consultation process stretched over one year and focused on determining whether the citizens of Uganda believed a new constitution was required for the country and, if so, what the new document should contain. During this stage, documents were disseminated that explained the context of constitutional reform in both national and vernacular languages.

32. For instance, to ensure that women's interests would be represented before the commission, women leaders were trained in all 167 counties to solicit women's views on the constitution. This resulted in the submission of a common "women's memorandum" to the commission, apart from the fact that views of individual women accounted for nearly one-third of the total of 25,542 submissions that the commission received. For an elaborate analysis of the various methods initiated to ensure that views of Ugandan women were represented in the constitution-making process, see Nassali, *Women and the Constitution of Uganda of 1995*.

33. These included written memoranda, public meetings, oral submissions, newspaper articles, and position papers delivered at seminars of professional bodies, interest groups, and educational institutions. Mukholi, *A Complete Guide*, pp. 29–30.

34. The Constituent Assembly Bill contained a provision which provided that in the absence of a two-thirds majority, contentious issues should be sent back to the citizens for consultation.

35. Out of the 284 members of the constituent assembly, there were a total of 51 women delegates, of which 39 were from affirmative action seats, 9 were directly elected from constituency seats, 2 were presidential nominees, and 1 was a worker's delegate. Nassali, "Women and the Constitution of Uganda of 1995," p. 265.

36. Mukholi, *A Complete Guide*, p. 59.

37. For a brief overview of these circumstances, see Murray, "A Constitutional Beginning," pp. 809–16. For details about the historical background of South Africa and the circumstances leading to the constitutional drafting process, see generally Ebrahim, *The Soul of a Nation*, p. 28.

38. Ebrahim, *The Soul of a Nation*, p. 242.

39. It was estimated that 20,549 people attended these workshops, which also witnessed the participation of 717 organizations. Between May 8

and June 4, 1995, a series of public hearings were organized in which 596 organizations were consulted. Ebrahim, *The Soul of a Nation*, pp. 244–45.

40. Radio was an extremely effective delivery mechanism because it could reach more people in both urban and rural areas. On October 1, 1995, a weekly constitutional education radio talk show was launched, comprising hour-long programs broadcast on eight radio stations in eight languages. These programs were estimated to reach over 10 million South Africans every week. Television programs were launched on April 24, 1995, and continued until October 10, 1995, for a total of twenty-five programs on two channels. The constitutional assembly's official newspaper, *Constitutional Talk*, was produced to provide information to the public by presenting material in a detailed and educative manner. It was usually an eight-page publication produced fortnightly and distributed to 160,000 people. A constitutional talk line was established, allowing callers to leave messages requesting information or to record their suggestions and comments. Over 10,000 people used it. The constituent assembly also made use of an Internet home page that was visited quite regularly by people across the globe. Ebrahim, *The Soul of a Nation*, pp. 242–46.

41. *Ibid.*, p. 248.

42. *Ibid.*, pp. 224–37.

43. Shivji, "Three Generations," p. 86.

44. Murray, "A Constitutional Beginning," pp. 821–22.

45. Richard A. Rosen, "Constitutional Process, Constitutionalism, and the Eritrean Experience," *North Carolina Journal of International Law and Commercial Regulation*, vol. 24 (1999), pp. 307–09. In Eritrea, the members of the commission, though representative of the various divisions of Eritrean society, were appointed by the government and were not democratically elected. Members of other political groupings were consequently excluded from the constitutional commission. These aspects of the constitution-making process also attracted criticism. Rosen, "Constitutional Process," pp. 304–06.

46. In Rwanda, a legal and constitutional commission was set up in 1999 to solicit the views of Rwandan citizens in preparing a draft constitution. In January 2002, the commission began to organize public meetings to involve the public, holding at least two. On April 24, 2003, the parliament of Rwanda adopted the draft constitution, which was later approved by a national referendum on May 26, 2003. Voter turnout at the referendum was 89 percent of the total population, and 93 percent of those voting approved. The new constitution was



promulgated by the president of Rwanda on June 4, 2003. Official Web site of the Legal and Constitutional Commission of the Republic of Rwanda, available at [www.cjcr.gov.rw/index.htm](http://www.cjcr.gov.rw/index.htm) (accessed on April 18, 2009).

47. For a recent survey of constitutional developments in several of the former Soviet Republics, see generally Gisbert H. Flanz and Rett R. Ludwikowski, eds., *Comparative Human Rights and Fundamental Freedoms* (New York: Oceana Publications, 2002), describing constitutional developments in Estonia, Latvia, Lithuania, Poland, Belarus, Moldova, Russia, and Ukraine. See also Rett R. Ludwikowski, "Constitutional Culture of the New East-Central European Democracies," *Georgia Journal of International and Comparative Law*, vol. 29, no. 1 (2000); and Rett R. Ludwikowski, "Constitution Making in the Countries of Former Soviet Dominance: Current Developments," *Georgia Journal of International and Comparative Law*, vol. 23 (1993), p. 155.

48. For details of the constitution-making processes employed in these various countries, see generally Jon Elster, "Constitutionalism in Eastern Europe: An Introduction," *University of Chicago Law Review*, vol. 58, no. 2 (Spring 1991), pp. 447–82; Jon Elster, "Forces and Mechanisms in the Constitution-Making Process," *Duke Law Journal*, vol. 45, no. 2 (November 1995), pp. 364–96; Rett R. Ludwikowski, "Constitution Making in the Countries of the Former Soviet Dominance.," Dick Howard, ed., *Constitution Making in Eastern Europe* (Washington, DC: Woodrow Wilson Center, 1993); Ludwikowski, "Constitutional Culture"; Flanz and Ludwikowski, *Comparative Human Rights*; Andrew Arato, *Civil Society, Constitution, and Legitimacy* (Lanham, MD: Rowman and Littlefield Publishers, 2000); "Constitutional 'Revolutions' in the Ex-Communist World: Rule of Law," *American University Journal of International Law and Policy* (1997); Eli M. Salzberger and Stefan Voight, "On Constitutional Processes and the Delegation of Power, with Special Emphasis on Israel and Central and Eastern Europe," *Theoretical Inquiries in Law*, vol. 3, no. 1 (2002), p. 207.

49. Some scholars have noted an additional difficulty: Among those participating in the preparations of the new constitutions were representatives of the old regimes, seeking to retain their power. Faced with a dramatic loss of control, these proponents of communism adopted a wide range of tactics, ranging from a willingness to compromise and engage in coalition building to a far more aggressive opposition to constitutional development. Joanna

Regulska, "Self-Governance or Central Control? Rewriting Constitutions in Central and Eastern Europe," in *Constitution Making in Eastern Europe*, p. 150.

50. Elster, "Constitutionalism in Eastern Europe," pp. 455–56. For details of roundtable talks held in Poland, Hungary, the former East Germany, and Czechoslovakia, see Jon Elster, ed., *The Roundtable Talks and the Breakdown of Communism* (Chicago: University of Chicago Press, 1996).

51. The legitimacy of constitutions has been an extremely important issue in the context of Eastern and Central Europe. For literature on this issue, see generally Ulrich K. Preuss, *Constitutional Revolution*, trans. Deborah Lucas Schneider (Amherst, NY: Prometheus Books, 1995); Arato, *Civil Society, Constitution, and Legitimacy*, pp. 129–66; and Andras Sajó, "Preferred Generations: A Paradox of Restoration Constitutions," in *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives*, ed. Michel Rosenfeld (Durham, NC: Duke University Press, 1994), p. 341.

52. Terence Duffy, "Albania: Beyond the Hoxha Legacy," in *Transformations of Post-Communist States*, ed. Wojciech Kostecki, Katarzyna Zukrowska, and Bogdan J. Goralczyk (New York: Palgrave Macmillan, 2000), p. 73.

53. "Constitution Watch: Albania," *East European Constitutional Review*, vol. 7, no. 4 (1998), p. 1.

54. Salzberger and Voight, "On Constitutional Processes," p. 222.

55. Arato, *Civil Society*, pp. 159–63.

56. *Ibid.*, p. 163.

57. Salzberger and Voight, "On Constitutional Processes," p. 223. See also Regulska, "Self-Governance or Central Control?" p. 150, arguing that the relative urgency in drafting these two constitutions can be attributed to the decisions by members of the old Communist guard—who knew that their days were numbered but were determined to preserve whatever legitimacy possible—to present themselves as progressive founding fathers of a new era.

58. Katarina Mathernova, "Czechoslovakia: Constitutional Disappointments," in *Constitution Making in Eastern Europe*, p. 78.

59. See generally Jiri Grosopic, "Some Constitutional Problems of the Czech Republic," in *Constitutionalism and Politics*, ed. Irena Gross (Bratislava: Slovak Committee of the European Cultural Foundation, 1993), pp. 220–29; Martin Butora,

“Constitutionalism in Values and Stories,” in *Constitutionalism and Politics*, pp. 324–28, arguing that the absence of a referendum renders the division of the Czechoslovak republic illegitimate; Dusan Hendrych, “Constitutionalism and Constitutional Change in Czechoslovakia,” in *Constitutional Policy and Change in Europe*, ed. Joachim Jens and Nevil Johnson (Oxford: Oxford University Press, 1995), pp. 278–95.

60. Some scholars have argued that the process of drafting a new constitution for Poland began as far back as in 1982, with a fundamental transformation in the way the Poles viewed their constitution. Salzberger and Voight, “On Constitutional Processes,” p. 224.

61. Wiktor Osiatynski, “A Brief History of the Constitution,” *East European Constitutional Review*, vol. 6, no. 2–3 (1997).

62. Wiktor Osiatynski, “Rights in New Constitutions of East and Central Europe,” *Columbia Human Rights Law Review*, vol. 26, no. 1 (1994), pp. 119–21.

63. Ewa Letowska, “A Constitution of Possibilities,” *East European Constitutional Review*, vol. 6, no. 2–3 (1997). For literature on constitutionalism in Poland, see generally Wojciech Sokolewicz, “The Relevance of Western Models for Constitution-Building in Poland,” in *Constitutional Policy and Change in Europe*, pp. 243–77; Mirosław Wyrzykowski, ed., *Constitution-Making Process* (Warsaw: Institute of Public Affairs, 1998); Jacek Kurcewski, “Democracy and the Rule of Law: Poland after 1989,” in *Constitutionalism and Politics*, pp. 200–19; and Andrzej Rapaczynski, “Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament,” in *Constitution Making in Eastern Europe*, pp. 93–132.

64. Peter Paczolay, “The New Hungarian Constitutional State: Challenges and Perspectives,” in *Constitution Making in Eastern Europe*, p. 29.

65. It appears that the Hungarian participants at the roundtable talks were aware of this problem and have been described as being “obsessed

with their lack of legitimacy.” Arato, *Civil Society*, p. 148.

66. Paczolay, “The New Hungarian Constitutional State,” pp. 30–31.

67. For literature on constitutionalism in Hungary, see generally Attila Agh, “The Permanent ‘Constitutional Crisis’ in the Democratic Transition: The Case of Hungary,” in *Constitutional Policy and Change in Europe*, pp. 243–77; Gabor Halmai, “Democracy versus Constitutionalism? The Re-establishment of the Rule of Law in Hungary,” in *Constitutionalism and Politics*, pp. 301–10; Mate Szabo, “Constitutional Change in Hungary,” in *Constitutionalism and Politics*, pp. 288–92.

68. “Comment, Discussion on Reconstructing the State through Constitution-Making,” in *Constitutionalism in Transition*, pp. 102–03.

69. *Constitutionalism in Transition*, pp. 103–04.

70. In East Timor, the constituent assembly consisted of elected representatives of the people and was aided by thirteen constitutional commissions established to ascertain the views of the public. These commissions conducted public meetings throughout East Timor involving some 38,000 people. However, the need to draft the new constitution at great speed appears to have cast some doubt on the actual impact of the consultations on the final draft of the constitution of East Timor, which came into force in May 2002. Hillary Charlesworth, “The Constitution of East Timor, May 20, 2002,” *International Journal of Constitutional Law*, vol. 1 (2003), pp. 325–34.

71. For details on Rwanda, see note 46.

72. In Afghanistan, the constitution-drafting commission produced a draft constitution in April 2003, which was subject to a public consultation process between May 1, 2003, and June 30, 2003. See chapter in this volume; Amin Tarzi, “Afghanistan’s New Constitution: A Sneak Preview,” E-Ariana.com, April 24, 2003, e-arianacom/ariana/eariana.nsf/allArticles/EFFC46729FD0C5D387256D1300523C38?OpenDocument (visited on April 18, 2009).