



United Nations Development Programme

## **Constitution-Making and Peace Building:**

## **Lessons Learned From the Constitution-Making Processes of Post-Conflict Countries**

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## EXECUTIVE SUMMARY

As Iraq engages in the process of drafting a new constitution, it encounters questions and dilemmas, which have been addressed by a number of countries over the past couple of decades. Although each country's history and institutions greatly determine the answers to these questions, examining the experiences of others may be insightful.

This paper surveys the lessons drawn from the experiences of a number of post-conflict states in drafting their constitutions. It focuses mostly on the **process of constitution drafting and the institutions established for the duration of this process**. It is based on the findings of a joint project sponsored by UNDP/BCPR in partnership with the United States Institute of Peace. The project has examined case studies and drew lessons on the process of constitution making, peace building and national reconciliation. The Working Group of the project includes well known international experts who have provided expertise and advice to various countries in developing new constitutions. Experts, who often played a prominent role in the constitution making process in these countries, drafted the fourteen case studies. The present paper summarizes the lessons learned from these processes. It provides also a comparative analysis that could serve as a guiding document for the ongoing debate in Iraq about the nature, structure and modalities of a constitution making process that could lead for the first time to a national consensus on the key parameters of democratic governance in the country.

The following countries are surveyed: Bosnia and Herzegovina, Brazil, Cambodia, Colombia, East Timor, Eritrea, Ethiopia, Fiji, Namibia, Nicaragua, South Africa, Spain, Venezuela and Zimbabwe.

The paper captures through comparative analysis the following themes:

First, there are benefits in separating the termination of violent conflict and the signing of a peace agreement from the process of drafting the

constitution. The cases surveyed point out that, when these two processes are collapsed into one, long-term concerns of institution building may be compromised. Also, in such cases, public participation is usually minimal.

Second, it is beneficial for purposes of conflict resolution to broaden the number of groups participating in the constitution-making process. Exclusion of key actors from the drafting process may undermine the legitimacy of the final outcome. When dominant groups are excluded, the constitution adopted has dim prospects of enduring. Experience demonstrates that, for purposes of conflict resolution, an initial or interim power-sharing agreement guaranteeing representation to the main parties is beneficial. Ideally, such an agreement should develop into an arrangement, which relies on democratic mechanisms to resolve inter-group disputes rather than on fixed guarantees to each party.

Third, a process of negotiations among stakeholders on key constitutional principles is crucial. Extended deliberation and consultation among key groups clarifies the commitment of the participants to the constitution-making process and lays the groundwork for a political culture of multiparty consultation and cooperation.

Fourth, the participation of the public in the drafting of the constitution is a crucial component of the process. It adds indispensable legitimacy to the final document adopted. It also assists the definition of a national identity and the articulation of common popular aspirations for the future.

## INTRODUCTION

Societies emerging from conflict face the difficult task of channeling future political contestation through institutional paths. Their endeavors often take place in the context of weak or even collapsed state institutions, weak political will for reconciliation, and distrust. The goal is to build political systems based on democratic and constitutional principles. Democracy ensures the alteration of power and rule by changing majorities, while constitutionalism defines the limits within which such majority may exercise power. The constitution-making process attempts to represent the will of the people, to achieve a consensus on the future of the state, and to ensure respect for universal principles such as respect for human rights and democratic governance.

In Iraq, the constitution-making process faces the difficult task of carrying out broad-based consultations among the main political groups as well as extensive public participation. It also confronts the short-term priority of resolving disagreements among key stakeholders and the long-term priority of creating stable institutions. The constitution drafting process and the resulting constitution will not alone resolve inter-group conflict. Nevertheless, if the constitution-making process is inclusive and transparent, it may succeed in managing conflict and in facilitating bargaining, reciprocity and collaboration.

There is potentially a tension between democratic principles and constitutional principles, which is reflected in the constitution-drafting process. Constitutionalism limits majority decisions. A constitution is a set of norms and principles limiting the political power of the majority and protecting the rights of individual and minority groups. Constitutions form an obstacle to certain political changes, which would have been carried out had the dominant majority had its way. Another tension between democracy and constitutionalism is that democracy institutionalizes uncertainty, while constitutionalism institutionalizes long-term principles, which are very difficult to change. While democratic principles dictate that political

outcomes are to some extent indeterminate and that none can be certain that their interests will ultimately triumph, constitutional principles limit this uncertainty by defining the boundaries within which political power can be used.

There are several reasons why a government should be restrained and uncertainty reigned. Very importantly, there is a risk that a government might use its powers to serve the interests of a narrow interest group and that it will violate the rights of some individuals simply to promote the interests of other individuals. Also, constitutionalism creates the expectation of stability and duration of political institutions and therefore allows for long-term planning for the members of the society. If state institutions are constantly changing, individuals in power will be tempted to exploit their positions for private purposes and those outside positions of power will hesitate to invest in long-term projects.

During the constitution drafting process, decisions are made as to the limits and practices of the new regime, and the rights and duties of the citizens. The process is a rare moment in a state's history when detailed discussion rises above the give-and-take of everyday majority politics and focuses on the nature and future of the state. The process of drafting a constitution may significantly contribute to national reconciliation. It requires negotiations among key groups on constitutional principles. It also requires public participation in order to gain legitimacy and to reflect popular aspirations. Thus, constitution-making has the potential of contributing both to the short-term goal of conflict resolution and peace-making and to the long-term goal of peace-building and strengthening of the state institutions. Also, it has the potential of ensuring that universal principles such as respect for human rights are enshrined in the new constitution.

The following discussion elaborates in detail the ways in which a number of countries have balanced the different priorities present during the process of constitution-making.

## **1. SEPARATE THE PEACE AGREEMENT AND THE CONSTITUTION-MAKING PROCESS**

Constitution-making is a vital component of conflict resolution and national reconciliation. Nevertheless, not all disputes can be resolved through the process of constitution-making. Specifically, military and security-related issues are preferably addressed separately and before the advent of the constitution-making process. Past experiences demonstrate the advantage of separating the negotiations of a peace agreement from the drafting of the constitution. The termination of the war and the conclusion of a peace agreement are of vital importance in setting the stage for the constitution making process.

The negotiations leading to a peace agreement are concerned with the short-term issue of conflict termination. Combining these negotiations with constitution drafting often compromises the long-term concerns on the nature of state institutions. The termination of armed hostilities and the signing of a peace agreement are therefore pre-conditions that enable the constitution-making process to contribute to peace building. Namibia is an example of a country where the peace agreement was concluded before the drafting of the constitution. In Namibia, conflict resolution and peace building went hand in hand with constitution making. Nevertheless, the conclusion of a peace agreement was a precondition, which enabled the negotiations among the interested parties on the future of the state.

### *Lessons regarding the relationship between constitution-making and security concerns*

**Do not combine the conclusion of a peace agreement with constitution-making.** Bosnia and Herzegovina and Zimbabwe are quintessential examples of countries where the peace agreement and the drafting of the

constitution were combined into one negotiation process. In both cases, the constitution entrenched disagreements without providing avenues for political change.

In the Bosnian case, the exclusively elite-based 1995 Dayton negotiations focused on satisfying the interests and demands of the actors with the capability to continue the violence. The emphasis was on the termination of armed hostilities. As a result, the new constitution did not mirror an agreement among the warring parties on a common future in one state. It rather entrenched their disagreements and power positions. As a result, the constitution does not have the capacity to ensure the longevity of the current political system.

In Zimbabwe, the militarized nature of the conflict conflated the peace-making process with the making of the 1980 constitution. The constitution was not conducive to the resolution of conflicting interests in the long-term. The deeply entrenched protection of white farms, a necessary component of the peace-making process, proved to be an intractable problem. The Zimbabwean case indicates that, although co-ordination between the constitution-making and peace-making processes may be beneficial, their coincidence is not.

**Address the security concerns preventing an open and transparent constitution-making process from taking place.** The experiences of Ethiopia and Cambodia demonstrate that unresolved security threats could significantly hamper the constitution drafting process. Political leaders often use security concerns to justify inadequate public participation in the drafting of the constitution.

In Ethiopia, the turbulent security situation rendered the constitution-making process difficult. There was no legally constituted national army or police force to ensure the security necessary for elections, nor was there adequate time to establish the conditions for effective local participation.

In Cambodia, the main parties agreed to a comprehensive political settlement, the Paris

Agreements. The settlement was implemented under United Nations supervision. Nevertheless, the implementation of the military and security aspect of the Agreements, such as disarmament, demobilization and cantonment of forces, and prevention of cease-fire violations, was unsuccessful. The UN took the calculated risk to proceed with the elections of the Constituent Assembly, which would be responsible for drafting the constitution, despite the failure to implement the military provisions of the Agreements. As a result, political violence continued to the run up to the election, during the voting and before the installation of the interim government. The elections were free and fair and enjoyed massive participation by the Cambodian people. Nevertheless, the continuation of violence was used as a justification for the brevity and secrecy of the constitution-making process, as will be discussed later in this paper.

**Address security issues inhibiting meaningful debate and consensus-building among all stakeholders.** In Nicaragua and Colombia, the armed conflict continued during the constitution-making process and significantly impaired the ability of stakeholders to reach a consensus on the future of the state. In both cases, the continuation of violent conflict jeopardized the durability of the constitution.

In Nicaragua, the process of constitution-making and the 1987 Constitution contributed to the resolution of the armed conflict, which only ended in 1990. Nevertheless, the continuation of the conflict during the constitution drafting process meant that the 1987 Constitution left many issues undecided. The need to engage in extensive compromises among the participants prevented the emergence of a substantive consensus on the nature of the state. For example, the type of democracy that Nicaragua was to be was not agreed upon in the 1987 Constitution. When the conflict ended, these issues needed to be addressed and the Constitution was amended.

In Colombia, the 1991 Constitution was an attempt to mitigate the ongoing violent conflict. The constitution drafting process

provided for substantial public participation and guaranteed the representation of a wide range of political actors. Nevertheless, the two main guerrilla groups, the FARC and the ELN, did not participate. Their absence from the process served a blow to the capacity of the constitution to achieve peace. The country's combination of internal conflict, narcotics trafficking and a weak state has defied the capacity of Colombian democratic institutions to achieve peace and stability through the country.

**In summary, past experience demonstrates that** when the conflict has not ended and the negotiations on a peace agreement and on the constitution are conflated, constitutional principles may be compromised. Experience of constitution-making, while conflict continues, demonstrates that constitution-making cannot serve as a peace process. Minimum conditions need to be in place before constitution-making commences. When peace negotiations and constitution-making are collapsed, attention is paid to short-term considerations of conflict termination as opposed to long-term concerns of institution building. It is therefore advisable for these two processes to be separated.

## **2. ENHANCE THE BENEFITS, & MANAGE THE RISKS OF AN INCLUSIVE CONSTITUTION-MAKING PROCESS**

A constitution contributes to peace and stability, when it reflects an acceptable political compact between those who control political power and capital in the post-conflict context. In the case of countries exiting civil conflicts, the vanquished party is not always included, as the case of Cambodia indicates. Nevertheless, even parties of questionable moral standing have in the past been included in the constitution-making process, as the South African case demonstrates.

This is a delicate process. On the one hand, accommodation of powerful actors is crucial for the survival of any post-conflict



agreement. For purposes of conflict resolution, it is important to broaden the number of elite groups participating in the constitution-making process. In certain situations, such as the Balkans, it is difficult to envisage a post-war political settlement that does not guarantee to all the major antagonists some permanent political representation, decision-making power, and autonomous territory in the post-war period.

On the other hand, a broadening of the participants in the constitution-making process carries risks. An emphasis on accommodation of diverse interests may lead to an agreement lacking a common vision for the future of the state. When the constitution-making process is purely an exercise in political compromise, it risks producing a short-term accord serving the interests of elite groups at the expense of building strong democratic institutions and long-term stability. It also risks compromising key principles of international law and respect for human rights. The constitution-making process should be an instance of principled discussion on the future of the society and the state, and not a negotiation over narrow interests.

**Experience demonstrates** that, for purposes of war termination, an initial or interim agreement guaranteeing representation and decision-making power to all parties is beneficial. Ideally, such an agreement should be short-term. It should develop into an arrangement, which relies on the democratic process to resolve inter-group disputes rather than on power-sharing guarantees to each party. Thus, a constitutional process, which ensures power-sharing, does not necessarily lead to a federal or decentralized state.

### *Lessons regarding the importance of an inclusive constitution-making process*

**Include key stakeholders in the drafting of a new constitution for purposes of conflict resolution as well as to ensure the longevity of the new constitution.** South Africa is the quintessential example of how constitution-making can contribute to conflict resolution through power-sharing among key groups.

Namibia and Spain also demonstrate the advantage of an inclusive constitution-making process, while Ethiopia, Venezuela and Colombia confirm the detriments of exclusion of major elites.

In South Africa, power-sharing and a culture of bargaining existed from the early stages of the transition to democratic government. The 1993 Interim Constitution was a political pact, a power-sharing agreement. The basic rationale for power-sharing was to prevent a counter-revolutionary threat to the new political order emanating from the bureaucracy and security forces. Concessions were given to potential spoilers of the pact and brought these parties into the power-sharing agreement, the Government of National Unity. Very importantly, the South African power-sharing arrangement was to expire within five years and indeed it withered away and was replaced by a modified majority-rule democracy. Nevertheless, the culture of inter-group bargaining persists and is deeply embedded in many sectors of South African society, including its new political institutions.

In Namibia, all interested parties reached in 1981 an agreement on the Principles concerning the Constituent Assembly and the constitution of an independent Namibia. After its election in 1989, the Constituent Assembly unanimously adopted the Principles as a framework for drawing up a constitution for the country. Furthermore, without the broadening of the elite group participating in the process, the final phase of the constitution-making process would not have had its successful outcome. When the elites of a dominant group in a country have left or are excluded from the process, the eventual constitution-making in that country has few prospects of lasting success.

In Spain, except for a very small but vocal minority, the majority of all relevant groups chose to participate in the process rather than creating obstacles. There seemed to exist a general willingness by the major actors to move closer to the political center in order to create a democratic regime.

**Avoid exclusion of key stakeholders in order to ensure that genuine agreement on key issues is reached.** Ethiopia, Venezuela and Colombia exemplify the dangers of a process, which excludes some significant actors.

The Ethiopian opposition resented its exclusion from the transition agenda and the constitution drafting process. Opposition leaders rejected the legitimacy of the Constitutional Commission and its project, and called for its resignation. Also, the fact that the Commission worked behind closed doors did not contribute to its legitimacy. Furthermore, the lack of debate among the various political groups meant that important and controversial issues regarding ethnicity, self-determination and federalism were never adequately deliberated.

One group used the 1999 constitutional process in Venezuela to facilitate the take over of the state. The Constituent Assembly was dominated by representatives of one party and almost all opportunities for inclusion of a large number of political forces and for public participation were squandered. As a result, the central concerns of the people of Venezuela, such as decentralization and political party reform, were not addressed. The Venezuelan political system is still in need of significant reforms. Observers predict that the new constitution will be as durable as the current elites.

As has already been mentioned, the Colombian constitution-making process did not succeed in achieving peace mainly due to the absence of the two main rebel groups from the negotiating table.

**Ensure that the constitution is based on a substantive consensus on key constitutional principles.** The Nicaraguan and Brazilian constitution-making processes demonstrate the disadvantages of greatly broadening the number of participants and of emphasizing compromise among actors to the point of failing to achieve a substantive consensus on the nature of the state.

The Nicaraguan process emphasized the importance of conflict resolution. The dominant

political force in the country, the political party FSLN, could have imposed a constitution that was completely unacceptable to the opposition. Instead, the FSLN reached out to diverse sectors of society and accommodated a number of key opposition concerns in an attempt to resolve conflicts. Nevertheless, the Constitution's appeal to a broad audience meant that key differences among actors were not resolved. Rather, the Constitution contained contradictory principles and ambiguities. Thus, the consensus that emerged was superficial.

In Brazil, the country's Congress was responsible for drafting the 1988 constitution, thus, combining normal legislative functions with constitution-making functions. Because political parties were weakly organized and the country's political forces were divided, the Congress was susceptible to pressures from societal interest groups. Since no single political group dominated the Congress, majority voting resulted from prolonged negotiations and bargaining. As a result, the 1988 constitution lacks organic unity and a coherent vision for Brazil. It is a mixture of inconsistent and unnecessarily complicated provisions. Although Brazil has successfully transitioned to a democratic regime, its political institutions are still weak.

**In summary, past experience indicates that** an inclusive constitution-making process is beneficial to the legitimacy and longevity of the constitution. When one group dominates the process, it fails to reach a genuine consensus among all significant political actors. On the other hand, inclusiveness should not compromise substantive agreement on key constitutional principles.

### **3. DESIGN AN INCLUSIVE CONSTITUTION-MAKING PROCESS:**

## **ELECTED CONSTITUENT ASSEMBLIES VERSUS APPOINTED CONSTITUTIONAL COMMITTEES**

The structure of the constitution-making process is frequently an issue of contention among the key participants. The type of institutions chosen for the duration of the process, and the timing and sequence of the drafting stages is significant. The goal of institutional choice should be to prevent the domination of the process by one group or political party and to ensure the legitimacy of the process through public participation. As has been discussed, an inclusive process is for the most part beneficial to the longevity of the constitution and contributes to national reconciliation.

Inclusiveness is a difficult goal to achieve, since elections for constituent assemblies often legitimize the domination of the constitution-drafting process by the winner of the elections. The winners consider their electoral victory a mandate for exerting decisive influence over the constitution. The constitution-making process must resolve the struggle between the interests of particular groups, on one hand, and ensure the long-term interests of society as a whole, on the other. Nevertheless, elected statesmen often have a short-term perspective dictated by their concerns for re-election.

Appointed Constitutional Committees, on the other hand, may not enjoy the legitimacy of an elected body, but have several advantages. Constitutional Committees contribute to an informed drafting process and provide equal access to all sides of the debates to research and information. Ideally, Committees should be independent and capable of considering the long-term interests of the state and society, instead of the short-term interests of political factions eager for re-election. The combination of an appointed Committee with an elected assembly or a public referendum might solve the dilemma about the Committee's legitimacy.

## *Lessons regarding the choice between appointed and elected constitution-drafting bodies*

**Ensure that substantial preparatory work has been conducted before the election of a Constituent Assembly. Preparatory work might include civic education campaigns and opportunities for consultation and debate among all stakeholders.** In South Africa and Namibia, elections were preceded by long-term and substantial negotiations among elite groups. When elections for Constituent Assemblies were finally held, considerable preparatory work had already been conducted thus preventing a single group from determining the outcome.

In South Africa, as already discussed, an Interim Constitution preceded the 1996 constitution. The Interim Constitution was born out of intense negotiations among the key stakeholders. The Interim Constitution set out the principles governing the election of a Constituent Assembly through a proportional representation system. Before the election of the Constituent Assembly, while the Interim Constitution was in force, a government of National Unity was in power and ensured that one group would not dominate the process of transition.

In Namibia, substantial and long-term discussions among all actors resulted in the agreement that elections would be held to select a Constituent Assembly, which would adopt the constitution of independent Namibia. There was also a Constitutional Committee, which scrutinized the draft constitution after it was submitted to the Constituent Assembly.

**Ensure that the Constituent Assembly is not dominated by one political force.** In Nicaragua and Colombia, elected Constituent Assemblies did not lead to the domination of the constitution drafting process by one political force.

In Nicaragua, elections were held for a National Constituent Assembly in 1984 and the



leading party (FSLN) won by 66.8 per cent. The Assembly was mandated to produce a Constitution within two years. Nevertheless, the FSLN was willing to offer concessions to the opposition and to engage in an extensive campaign of public participation in the process of constitution-drafting.

In Colombia, a referendum was first held on whether a Constitutional Assembly should be convened. Subsequently, the Assembly was elected. One third of the voters voted for independent political forces, thus, breaking the Colombian tradition of a bipolar political system dominated by the Liberals and the Conservatives. The discussions within the Assembly were therefore not dominated by one political force.

Nevertheless, **elected Constituent Assemblies often are dominated by the political force**, which wins an overwhelming electoral victory and eschews in-depth negotiations with other actors on constitutional principles. East Timor, Ethiopia and Venezuela offer examples of this dynamic.

In East Timor, there was disagreement on the type of institution, which would be responsible for initially drafting the constitution. A large number of political and civic leaders preferred that a non-elected Constitutional Commission or Convention work on a draft. The argument in favor of this option was that a non-elected Commission would not suffer from political pressures and would be open to public participation. A different proposal argued that an elected Assembly should draft the constitution in order for the constitution to enjoy legitimacy. In the end, a small political elite opted for the latter option and decided that an elected body should draft the Constitution within 90 days. The 2001 elections led to the overwhelming victory of one party (Fretilin), which as a result did not need to build consensus for its preferred constitution. Fretilin leaders were not inclined to consult the public on the draft, because they felt they had received a mandate through the elections. Critics argue that this process did not contribute significantly to nation-building.

In Ethiopia, a similar but more pronounced dynamic emerged. Given the decisive victory of one political party, early elections probably did not serve to open up the political stage to broad popular discussion over constitutional issues. As already discussed, this victory prevented extensive debate between the victorious party and the opposition. A variety of institutions were created to handle the constitution-making process. A couple of conferences and councils were held before the Constitutional Commission was charged with drafting the 1994 constitution. Finally, the Constitution Assembly was charged with ratifying the constitution. Nevertheless, the emphasis on appropriate constitution-drafting procedures came late, since the domination of the constitution-making process by one party had already occurred.

Finally, in Venezuela, the domination of the 1999 Constituent Assembly by supporters of the government party resulted from fragrant violations of the existing constitution and of the principles of dialogue and collaboration. The elected Constituent Assembly excluded all the traditional political parties. The Assembly proceeded to usurp the powers of other governing bodies and to assume powers, which were not provided for in its mandate. The Venezuelan constitution-making process, therefore, was not a process of reconciliation and consensus building.

**In summary, the above cases demonstrate that** elected Constituent Assemblies enjoy the vital legitimacy of an elected body. Nevertheless, they also bring with them the risk that adequate debate among the key participants will not occur and that public participation may be minimal. The combination of an appointed Committee with an elected assembly or a public referendum might solve the dilemma about the Committee's legitimacy.

#### **4. ENSURE A PROCESS OF CONSENSUS-BUILDING ON CONSTITUTIONAL PRINCIPLES**

## **THROUGH CONSULTATIONS AND NEGOTIATIONS AMONG CONCERNED STAKEHOLDERS**

As has already been discussed, the constitution-making process should ideally not be burdened by peace-making. Nevertheless, when appropriately designed, constitution-making processes may contribute to peace-building. If constitution-making is not rushed and allows ample time for negotiations under conditions of fair-play, a genuine agreement among key stakeholders may be reached.

Some of the more successful post-conflict constitutions have resulted from lengthy political negotiations among the main stakeholders addressing core constitutional principles. These broadly based discussions constitute part of the extensive consultations that the constitution-making process ideally includes. Discussions among key stakeholders hopefully lead to areas of possible compromise that will move the process forward. In addition, international norms dictate that these negotiations are respectful of universal principles, such as human rights, and that they aim toward the establishment of a democratic state governed by the rule of law.

Substantial deliberation contributes to the longevity of the constitution and the durability of the political system in two ways. First, **extended deliberation clarifies the commitment of political actors to participate in constitution-making as a means of achieving stability and national reconciliation.** Therefore, it is crucial that all interested parties commit to constitution-making as a way of managing competing visions and interests. Second, **extended deliberation lays the groundwork for a political culture of multiparty consultation and cooperation.**

*Lessons regarding the importance of consultations on constitutional principles*

**Ensure lengthy consultations and negotiations among key stakeholders.** The experiences of Namibia, South Africa and Spain demonstrate the usefulness of extensive consultations in reaching agreement on key constitutional principles. On the other hand, Bosnia and Herzegovina exemplifies the drawback of a hasty process.

In Namibia, the constitutional debate lasted several years, pervaded the political scene and influenced all political developments. The process provided a means to stimulate active politics and debate on the future of the country for more than fifteen years. It also offered political parties the opportunity to activate political life, and to strengthen themselves. Resulting at least partly from this extensive deliberation, an agreement was reached among all the interested parties on the 1982 Constitutional Principles, which guided the Namibian constitution and set the stage for the negotiation of the constitution. These principles stated: “Namibia will be a unitary, sovereign and democratic state.” This definition guided several aspects of the constitutional discussions for several years. All participants strongly supported the concept of the unitary state, and recognized that the foundation of a sovereign, unitary and democratic Namibia depended on the outcome of the constitution making process.

In South Africa, also, initial talks on the country’s constitutional future occurred among the country’s key stakeholders. As a result of substantial negotiations, the positions of the various parties were known and each party was knowledgeable of the options they faced. South Africa’s path to democracy was a series of political pacts that established informal institutions of negotiation and power-sharing. Over time, the “Record of Understanding” of November 1992 was reached and formed the essential core of the June 1993 Interim Constitution.

In Spain, the initial phase of the constitution-drafting process created the framework for the new constitution. Seven of the most prominent political leaders of the country participated. During this phase, a Consensual

Coalition emerged, which represented extremely diverse interests and which became the dominant political force behind the constitution-making process in Spain. The process addressed core issues such as the parameters of the new political system, the territorial organization of Spain, the guarantee of fundamental freedoms and the elimination of Franco's political institutions.

Bosnia and Herzegovina offers a very different example of a country where the constitution was adopted under extreme time pressure. The Bosnian constitution as elaborated at Dayton did not reflect the agreement of the stakeholders on the nature of the state and of the political system. The constitution, as a result, does not reflect a vision of a common future within a shared state.

**In summary, experience demonstrates that substantial deliberation among key groups contributes to the longevity of the constitution and the durability of the state institutions.**

## **5. ENSURE EXTENSIVE PUBLIC PARTICIPATION**

Experience demonstrates that the constitution-making process contributes significantly to nation-building. The constitution and the legal order may lose legitimacy, when the constitution drafting process has not encouraged civic education, political participation, civic activism and respect for civil and human rights. Laws and institutions cannot be imposed from above. They must reflect an agreement within the population about how to live together. Widespread participation in the process allows citizens to claim the constitution as their own. Through civic education on constitutional issues and through national dialogue, a constitution can help address the underlying causes of the past conflict and assist citizens to define a national identity and their aspirations for the future. **Constitution making is an exercise in democratic empowerment.**

Although international law does not specifically define appropriate policies and processes for the drafting of constitutions, an international norm requiring public participation in the constitution-making process is emerging. The norm prescribes the participation of the general public and of civil society in the debate over a new constitution. Most countries, which have undergone constitution-making processes in the past two decades, have in various ways attempted to incorporate the public.

Public participation is more effective, when it is preceded by civic education on constitutional principles and the constitution-making process. Transparency and clarity on the rules and procedures followed at the various stages of the process are crucial. Such an educational campaign ensures that the public's contributions to the debate are more constructive. It also ensures that the public has confidence that the constitution-drafters will respect its contributions.

### *Lessons regarding the importance of public participation in the constitution-making process*

**Broad public participation contributes to the constitution's legitimacy.** Different countries have handled the balance between the need for public participation and the concern with stability in different ways. As South Africa, Namibia and Eritrea demonstrate, extensive public participation leads to a constitution enjoying considerable legitimacy.

In South Africa, given the country's recent experience with violent conflict, the stakes of the negotiations were high in the period prior to the establishment of the Interim Constitution. Once the basic principles of the constitution were agreed upon in late 1993 and 1994, the process was opened up for extensive public participation in the 1994-96 deliberations by the elected Constituent Assembly. The proceedings of the 1996 constitution were open and transparent with

a very high level of public education on the issues and public input (via email, meetings, surveys, and contributions on the internet). Public participation in South Africa included several components: publication and media broadcasts of all the constitutional debates, consultation by each of the parties at the village level, radio broadcasts educating the public on the constitutional process, and 2 million submissions from the general population. As a result, the constitution enjoys an extraordinarily high degree of legitimacy.

In Namibia, there was intense and long-term public participation in the constitution-making process. The public was well informed about constitutional issues through the election campaigns of political parties. Also, the well-developed radio system contributed to the public's education on the key issues.

The Eritrean constitutional process included one of the most extensive programs of public participation. The program included a public education phase, which consisted of a series of seminars conducted at the village level by more than 400 specially trained instructors. The second phase included a consultation with the population on their response to the proposals prepared by the Constitutional Commission. In the third phase, the Commission received comments on a draft constitution from regional assemblies, localities, and members of profession and civic organizations as well as individual citizens. The Eritrean also constitution enjoys a high degree of legitimacy.

**Public participation should ideally comprise a process of substantial consultations among stakeholders and public awareness raising campaigns leading to more formal mechanisms of public participation such as inviting submissions on a draft constitution or a referendum.** The Nicaraguan, Colombian and Brazilian experiences demonstrate that extensive public participation does not necessarily lead to an enduring Constitution. In these two cases, key groups did not share the consensus on constitutional principles and eventually disrupted the effectiveness of the new constitutions.

In Nicaragua, despite the overwhelming victory of one political party in the 1984 elections and the continuation of the armed conflict, public participation was extensive. The dominant political force in the country, the FSLN, supported an elaborate process of public participation. After the election of the National Constituent Assembly, a Constitutional Commission was appointed to prepare an initial draft constitution. The Commission invited the input of civic groups before presenting a first draft to the National Constituent Assembly. The Assembly, then, distributed 150,000 copies of the first draft throughout the country. Subsequently, seventy-three town hall meetings were held around the country to solicit further public input to this first draft. The meetings were broadcast live on radio and highlights were published in newspapers and covered on television. Approximately 100,000 people attended the meetings. Based on these public comments, a second draft was prepared and delivered to the Assembly. The Assembly vetoed the final draft.

Nevertheless, although the Nicaraguan constitution-making process of 1985-87 achieved significant levels of citizen involvement, it achieved only minimal elite consensus. As had been discussed, the process of drafting the Nicaraguan constitution did not achieve a substantive agreement among key groups on the nature of the state and on key constitutional principles.

The Colombian process also included substantial public participation. The government set up more than 1,500 working groups throughout the country to receive proposals from diverse social groups ranging from academics and lawyers to laborers and farmers. Over 100,000 proposals on constitutional issues were submitted. Nevertheless, public participation did not ameliorate the fact that the two main guerilla groups refused to participate in the process. The new constitution did not strengthen the Colombian state, which remains weak.

In Brazil, as have been mentioned, the country's Congress was responsible for drafting the 1988 constitution and proved susceptible to

considerable influence from societal interest groups. The Congress was subject to an unprecedented amount of popular participation. About 61,000 amendments were proposed. A computerized data bank contained the thousands of popular suggestions. Proposals by civic organizations were automatically submitted to subcommittees, which were required to hold public hearings on them. Nevertheless, this extensive public debate did not lead to a constitution with a coherent vision for Brazil. The constitution remains a mixture of inconsistent and unnecessarily complicated provisions. Nevertheless, it is important to emphasize that partly due to the constitution-making process, Brazil has successfully transitioned to a democratic regime, although its political institutions are still weak.

**Constitution-making processes lacking transparency and adequate public participation produce constitutions, which will inevitably lack legitimacy.** In Cambodia, Ethiopia, East Timor and Fiji public participation was limited either due to the secrecy of the negotiations or due to the inadequate time dedicated to public deliberations. In these cases, the constitutions suffer from lack of legitimacy.

In Cambodia, the intensity of the violence up to the commencement of negotiations led to hesitation, as in the South African case, regarding the openness of the process to the public. Some observers note that, given the violent nature of the conflict and the delicate nature of the transition to peace, public participation needed to be balanced against the potential of instability resulting from unhindered deliberation. Nevertheless, unlike South Africa, in Cambodia there was never a point in the process where the public was allowed to participate. The public did not have access to the constitution drafting sessions and did not influence the text of the constitution. Most of the discussions were not open to the public. Critics of the secrecy of the Cambodian constitution-making process argue that the continuation of political violence does not justify the secrecy of the process. They further argue that Cambodia's constitution established a weak democratic structure.

Cambodia also suffered from a lack of any tradition of civil society, which posed a challenge to those who attempted to foster public participation. Nevertheless, Cambodian human rights organizations, with significant assistance from the UN Mission-UNTAC, engaged in civic education, since participation in the drafting of the constitution was not possible. They worked on raising public awareness of the significance of the constitution and its importance for the human rights of the population. Also, the Buddhist clergy was a particularly effective vehicle for reaching the public at large, especially in remote areas. NGOs held public workshops and workshops with elected members of the Constituent Assembly in an attempt to create open dialogue among Cambodians. Approximately 120,000 people were reached directly by the education and training efforts. The number of persons reached by the awareness-raising efforts is in the millions, if one considers the hundreds of thousands of leaflets, brochures, stickers, posters, and radio and television programs.

In Ethiopia, public participation began only after two years of transition. Nevertheless, observers note that the closed nature of the Ethiopian constitution-making process cannot be justified by the same factors as in the Cambodian and South African case. The lack of public participation came too late and contributed to the domination of the process by a single party. The closed nature of the process has detracted from the constitution's legitimacy. Additionally, there were a number of difficulties and obstacles constraining the development of meaningful grass roots participation in Ethiopia. Poverty, the lack of communication and transportation systems, and a political tradition that worked against political participation rendered participation in the constitution-making process difficult.

In East Timor, there were calls for a process, which would allow ample time for civic education and for popular consultation. Nevertheless, the model ultimately adopted prescribed a 90-day period of deliberation of the constitution by an elected body, the Assembly. The various committees of the elected Assembly invited members of civil society, international



organizations and the Church to prepare submissions. Nevertheless, these actors were not given adequate time to prepare their submissions. Furthermore, the general impression was that these submissions were rarely referred to in the deliberations of the Assembly. There were some attempts to inject transparency to the process. The plenary sessions of the Assembly and its Committee hearings were made available to the public. The Assembly also developed daily briefings and posted its agenda at the entrance of its building.

The East Timorese process has met significant criticism, because it attempted to conduct civic education and popular consultation in too short of a time period. These critics argue that the process did not emphasize the development of a constitution from the ground up. Overall, the public had little awareness of the contents of the constitutional draft. This was despite efforts at public participation taken by UNTAET. UNTAET organized public consultations in all of East Timor's districts. Also, thousands of drafts of the Constitution and a magazine summarizing the drafting process were printed. Nevertheless, the results of the process were totally ignored by the Assembly.

In Fiji, the Constitutional Commission did not present a draft for public discussion and did not undertake any form of civic education. The population was largely uninformed about the details of the constitutions, which had prevailed in the country, and about the available options. Before the enactment of the final document, the process was closed to the public and focused on satisfying the views of the two main parties. The public was presented with a *fait accompli*. The inadequate communication with the public continued after the enactment of the constitution, which was not translated into the two main local languages, Fijian and Hindi. The Fijian experience demonstrates that it is important for the public to be given some basic information about what a constitution might do, before they are asked for their opinions.

**In summary, experience demonstrates the vital importance of extensive public**

participation in the constitution-drafting process. In post-conflict countries, political leaders often hesitate to include the public in the debate over the future of the country. Nevertheless, as the examples of South Africa and Namibia demonstrate, public participation can be constructive after initial elite-based negotiations. It is crucial that political elites reach a consensus on key constitutional principles before opening the process to public debate.

## **6. HUMAN RIGHTS SAFEGUARDS**

When a society agrees to a constitution, it cannot abandon the obligations it subjected itself to under international law. Very importantly, societies should remain loyal to common principles of humanity. The majority of the constitutions adopted in the past ten to fifteen years by post-conflict societies have been deeply influenced by the centrality of human rights and universal principles in international law.

For example, the human rights provisions of the East Timorese constitution have been inspired by international law, since all the recognized civil and political rights and many of the economic, social and cultural rights have been included. Also, the Nicaraguan constitution explicitly acknowledged the importance of international law in the protection of human rights. The constitution incorporated, among other international documents, the Universal Declaration of Human Rights, the International Pact of Economic, Social and Cultural Rights, and the International Pact of Civil and Political Rights of the United Nations. The East Timorese and Nicaraguan examples are representative of the experiences of most post-conflict states.

## **7. THE IMPORTANCE OF EXPERTISE ON CONSTITUTIONAL ISSUES**

The participants of the constitution making process must have knowledge of what a constitution is and what its impact on the affairs of the state is. For this reason, trusted constitutional advisors and expert committees may contribute positively to the process.

In Namibia, the participants engaged in serious debate among themselves on the meaning and importance of democratic institutions. Many evening lectures, seminars, discussions, and workshops were held to study a wide range of topics pertaining to constitutions, systems of government, the role of political parties in a multiparty democracy, and the international protection of human rights.

In South Africa, the expertise of the parties and their ability to negotiate obviated the need for a pre-constitutional commission or group of experts. The constitutional specialists in the two main political parties grew to respect each other's expertise.

In East Timor, the Asia Foundation provided constitutional experts, who worked with the various committees of the elected Assembly drafting the constitution. The foundation emphasized its role in enhancing the capacity of the Constituent Assembly to draft the constitution, while responsibility for the preparation and implementation of the constitution remained with the people of East Timor. East Timorese participants of the constitution-making process frequently requested the services of the experts working for the foundation. Technical assistance was welcomed and the requests for advice and discussions increased as the process progressed.

In Nicaragua, also, political leaders sought insight from the experiences of other countries. They traveled to a number of countries to study their constitutions and participated in workshops and working groups with international experts. The input of international experts was helpful in pointing out problem areas in the organization of the public participation process.

Expertise contributes to a productive and efficient debate. Past experience demonstrates

that countries have been interested in benefiting from both domestic and international experts.

## CONCLUSIONS

The process of drafting a constitution in a post-conflict society is a complex one. The institutions and procedures chosen for the duration of the constitution-making process may make a difference in the legitimacy and longevity of the adopted constitution.

The paper has focused on the following themes.

First, there are benefits in **separating the termination of violent conflict and the signing of a peace agreement from the process of drafting the constitution**. The cases surveyed point out that, when these two processes are collapsed into one, long term concerns of institution building may be compromised. Therefore, constitution-makers should address security issues that may prevent an open constitution-making process from occurring and a consensus among key stakeholders from emerging. Security concerns should be ideally be resolved in order for extensive public participation to take place.

Second, it may be beneficial for purposes of conflict resolution **to broaden the number of key stakeholders participating in the constitution-making process**. Key groups should be included both for purposes of conflict resolution and for ensuring that a substantive consensus on key principles has been achieved. When dominant groups are excluded, the constitution adopted has few chances of success. Experience demonstrates that **an initial or interim agreement, which guarantees representation and decision-making power to all parties, is beneficial for the purposes of war termination**. However, ideally, such an agreement should develop into an arrangement, which does not guarantee specific powers or rights to each party, but rather relies on democratic

principles and processes to resolve inter-group disputes.

Third, **it is advisable that substantial preparatory work has been conducted before the election of a Constituent Assembly.** This work may be conducted through informal negotiations among key stakeholders or by an appointed Constitutional Commission. Furthermore, if possible, the rules governing the work of the Constituent Assembly should encourage compromise and coalition-building in order to avoid the Assembly's domination by one political force.

Fourth, **a process of consultations and negotiations among key stakeholders leading to a consensus on key constitutional principles is beneficial.** If constitution-making allows sufficient time for consultations, a genuine agreement among stakeholders may be reached. In this manner, constitution-making may contribute to peace-building and reconciliation. Some of the more successful post-conflict constitutions have resulted from lengthy political negotiations among political elites addressing key constitutional principles.

Fifth, **the participation of the public in the drafting of the constitution is a crucial component of the process.** Experience demonstrates that the constitution-making process may significantly contribute to nation-building. It assists the definition of a national identity and of common popular aspirations for the future. Finally, **constitution-making is an exercise in democratic empowerment.** When the population feels that its views are reflected in the constitution-drafting process phase, democratic participation is enhanced.

Sixth, **past experience demonstrates the importance of universal principles of human rights, including the right to participation, and democratic governance,** both in the process of drafting a constitution and in the content of the final constitution adopted. It is important that new constitutions are compatible with international law.

Seven, constitution-making process have benefited from the assistance provided by international and domestic experts as well as from the lessons derived from the experiences of other countries.