



*A Practical Guide to*

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*Constitution Building:*

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An Introduction

Winluck Wahiu

This paper appears as chapter 1 of International IDEA's publication *A Practical Guide to Constitution Building*. The full Guide is available in PDF and as an e-book at <http://www.idea.int> and includes a chapter on principles and cross-cutting themes in constitution building (chapter 2), building a culture of human rights (chapter 3), constitution building and the design of the executive branch, the legislature and the judiciary (chapters 4, 5 and 6), and decentralized forms of government in relation to constitution building (chapter 7).



International IDEA resources on Constitution Building

## *A Practical Guide to Constitution Building: An Introduction*

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## Foreword

The oldest constitutions in the world were framed in the 17th century and have been described as revolutionary pacts because they ushered in entirely new political systems. Between then and now, the world has seen different kinds of constitutions. Quite a number following the end of the cold war in 1989 have been described as reformatory because they aimed to improve the performance of democratic institutions.

One of the core functions of any constitution is to frame the institutions of government and to determine who exercises the power and authority of the state, how they do so and for what purpose. But constitutions neither fall from the sky nor grow naturally on the vine. Instead, they are human creations and products shaped by convention, historical context, choice, and political struggle.

In the democratic system, the citizen claims the right of original bearer of power. For him or her, the constitution embodies a social contract that limits the use of power by government to benefit the citizen in exchange for his or her allegiance and support. The term ‘constitutionalism’ sums up this idea of limited power.

At the same time, the core importance of constitutions today stretches beyond these basic functions. Constitutions come onto the public agenda when it is time to change to a better political system. People search for constitutions that will facilitate the resolution of modern problems of the state and of governance. Today, these problems are multifaceted and increasingly global—from corruption to severe financial crises, from environmental degradation to mass migration. It is understandable that people demand involvement in deciding on the terms of the constitution and insist upon processes of legitimizing constitutions that are inclusive and democratic. The term ‘new constitutionalism’ has entered the vocabulary of politics as further testament to this new importance of constitutions. Its challenge is to permit the voices of the greatest cross section of a society to be heard in constitution building, including women, young people, vulnerable groups and the hitherto marginalized.

Conflict still impugns constitutions. Older constitutions were the legacy of conflict with colonialism; newer constitutions have aimed to end violent internecine rivalry between groups with competing notions about the state and to whom it belongs. Certainly, these new constitutions are loaded with the expectation that they will herald a new era of peace and democracy, leaving behind authoritarianism, despotism or political upheaval.

Constitutions are now being framed in an age when the dispersal of norms and of the principles of good governance is fairly widespread in all the continents of the world. This would have taken longer without the role of international organizations, in particular the United Nations and others such as International IDEA. It is noteworthy that declining levels of violent conflict between states have also catalysed international dialogue on shared values, such as human rights, the rule of law, freedom, constitutionalism, justice, transparency and accountability—all of them important ingredients of any constitutional system. Shared values

permit organizations such as the African Union and the Organization of American States to be stakeholders of constitutional governance in their member states which may legitimately intervene when constitutions are not respected, for instance in the holding and transfer of power after free elections.

I encourage constitution builders to take advantage of the lessons and options that other countries and international agencies can offer. There is little need to reinvent the wheel to deal with issues such as incorporating human rights in constitutions, guaranteeing the independence of the judiciary, subsuming security forces under civilian democratic control, and guaranteeing each citizen the exercise of a free, fair and credible vote. The mistake is to believe that this superficial commonality justifies a blueprint approach to framing constitutions.

The idea of shared norms and values should not discount the fact that constitution builders have been learning by doing. Each instance of constitution building will present tough issues to be resolved, for instance, what to do with incumbents who refuse to leave power and use all means in order to rule. The concentration of power observed recently by Mikhail Gorbachev in his assessment of the world today, after the legacy of the 1990s, is indeed a real threat to constitutional democracy everywhere.

The world is changing at a rapid pace. The constitution builder today has an advantage lacked by his or her predecessor. National constitutions have become a world-wide resource for understanding shared global values and at the click of a button information technology permits an array of constitutional design options to be immediately accessed.

What this new Guide from International IDEA offers actors who are engaged in the constitution-building process is a call for more systematic ways for reviewing constitutions and an emphasis that there are neither inherently stable or superior constitutional systems nor one-size-fits-all formulas or models. The Guide highlights the fact that each country must find its own way in writing its own constitution. Furthermore, designing a constitution is not a purely academic exercise in which actors seek the best technical solution for their country. The drafters and negotiators of constitutions are political actors aiming to translate their political agendas into the text of the constitution. Thus, the constitutional documents that result are rarely the best technical option available, but the best constitutional compromise achievable.

The Guide aims to enhance debates in the search for a model that reflects the needs of a particular country as the result of a political compromise. Addressing constitution builders globally, it is best used at an early stage during a constitution-building process. It supplies information that enriches initial discussions on constitutional design options and will prove extremely useful as an introduction to the understanding of the complex area of constitution building.

The world may soon witness a regional wave of democratic constitution building as a result of the current dynamics in the Arab world. Thus, this Guide is published at a timely moment.

*Cassam Uteem,  
former President of Mauritius*

## Preface

In recent decades countries from all continents have reframed their constitutional arrangements—in the last five years alone Bolivia, Ecuador, Egypt, Iceland, Kenya, Myanmar, Nepal, Sri Lanka, Sudan, Thailand and Tunisia have all been involved in one stage or another in a constitution-building process. In the aftermath of the people-led uprisings in the Arab world in 2011, constitution building is set to play a fundamental role in creating sustainable democracy in the region.

Constitution building often takes place within broader political transitions. These may relate to peace building and state building, as well as to the need for reconciliation, inclusion, and equitable resource allocation in a post-crisis period. Many constitutions are no longer only about outlining the mechanics of government, but also about responding to these broader challenges in a way which is seen as legitimate and widely accepted. As the demands placed on constitutions have increased, they have often become complex and lengthy, and hence more challenging to design, as well as implement. As a result, those involved in shaping constitutions require access to broad, multidisciplinary and practical knowledge about constitution-building processes and options.

The sharing of comparative knowledge about constitution building is one of International IDEA's key areas of work, and this publication draws together this comparative knowledge and expertise for the first time in a *Practical Guide to Constitution Building*, which has been carefully compiled by expert authors.

This publication aims to respond to the knowledge gaps faced by politicians, policymakers and practitioners involved in contemporary constitution building. Its principal aim is to provide a first-class tool drawing on lessons from recent practice and trends in constitution building. It is divided into chapters which can be read as individual segments, while the use of a consistent analytical framework across each chapter provides a deeper understanding of the range of issues and forces at play in processes of constitutional development.

The *Practical Guide to Constitution Building* reflects how fundamental constitution building is to the creation of sustainable democracy. Constitution building is a long-term and historical process and is not confined to the period when a constitution is actually written. While focusing on constitutions as key documents in themselves, this publication stresses understanding constitutional systems as a whole, including the relevant principles (chapter 2) and the need to build a culture of human rights (chapter 3), as well as the provisions for institutional design (chapters 4 to 6) and decentralized forms of government (chapter 7). It does not offer a blueprint or model for constitutions, but draws lessons from recent practice and knowledge. Among those lessons is that constitutions may well say one thing on paper but work differently in practice.

I would like to express my sincere gratitude to the authors, to the practitioners who contributed insights derived from their experience, and to the government of Norway for its support. *A Practical Guide to Constitution Building* would not have become a reality without them.

Vidar Helgesen  
Secretary-General, International IDEA

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## Acronyms and abbreviations

IDEA	International Institute for Democracy and Electoral Assistance
UN	United Nations
USIP	United States Institute of Peace

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# 1. Introduction

## 1.1. The aim of this chapter

Constitution builders aim to ensure that the outcomes of constitution-building processes are legitimate and broadly accepted. Outcomes of constitution building are legitimate when they are broadly accepted and nationally owned. Yet constitution building is a long-term and historical political process that may be highly contentious, particularly given experiences of severe conflict and prolonged, embedded social divisions. The legitimacy of its outcomes in terms of process and substantive options may hinge significantly on the decisions that constitution builders take at the initial stages of constitution building. By looking at comparable experiences, this chapter aims to help constitution builders think about and plan for how to achieve a good start. It begins by underscoring that constitution building is a sovereign process, whose practice differs across regions and countries. It highlights the main challenges that have been faced by constitution builders in the context of conflicts. It takes the view that the legitimacy of constitution-building processes and outcomes can be improved through the design of inclusive and participatory processes of constitution building.

In getting started, constitution builders often have to make two kinds of decisions: those related to the *process* dimension, for example, the procedures, institutions, rules, timing and responsibilities for decision making; and, second, those related to *content*. In conflict-affected contexts, legitimacy often will hinge on these two decisions. This chapter emphasizes the importance of context as the key guide to constitution builders as they start a process of constitution building. It is structured as follows.

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- (a) First, the general observations and key assumptions that underlie the chapter are identified.
- (b) Second, based on a short overview of global constitution-building practice, general challenges likely to be found across contexts of conflict-affected constitution building are framed.

***Constitution building is defined as a long-term process. It is not an event and is not equated with the drafting of a constitution. It includes establishing institutions, procedures and rules for constitution making or drafting, giving legal effect to the constitution, and implementation.***

(c) Third follows discussion of aspects of the process dimension in relation to securing legitimate outcomes.

(d) Fourth, the discussion is connected to some of the content issues that flow or emerge from the process outlined above.

(e) Fifth, it introduces the Guide and how to use it and contains an overview of the other chapters that comprise the Guide.

## 1.2. General observations

1. *Constitution building is defined expansively as a long-term and historical process.* It is not an event and is not equated with constitution making—the period when a constitution is drafted. In this chapter, *constitution building entails several steps:* (a) agreeing on the need for constitutional change and its scope, which in practice often is one part of broader processes of historical change in a country; (b) under the relevant principles, establishing institutions, procedures and rules for inclusive and participatory constitution making or drafting, which may entail the use of interim measures; (c) giving legal effect to the constitution or ratification; and (d) the implementation stage, which is critical, particularly in the early years subsequent to ratification.
2. *Constitution building has often entailed ‘grand design’ and wholesale redrafting and implementation of a new constitution,* even though substantial revision and reform of an existing constitution is another option. This is particularly the case for constitution building in the period after 1990.
3. Constitution builders are engaged in the pursuit of legitimate constitutional outcomes, rather than only a constitutional text as such. *The legitimacy of a constitution is multidimensional.* It includes:
  - legal legitimacy—gained through conformity to relevant legal rules, principles and norms;
  - political legitimacy—reflected in the national ownership or sovereign independence of the people who adopt constitutions, a collective that may be composed of distinct plural groups; and
  - moral legitimacy—embodied by a close relationship between the constitution and the shared values that underlie the moral basis of the state; in addition, the constitution may aim at goals such as societal reconciliation, forgiveness after prolonged victimization, social inclusion and moral rejuvenation of the state.

4. The legitimacy of a constitution can be buttressed through the process by which it is built. It can also grow over time as a constitution is implemented, gains widespread respect and becomes embedded as a living instrument in the life of the state. Both the process by which a constitution is built and its substantive content are the two keys to legitimacy. Yet each faces unique challenges in contexts of conflict-affected constitution building. By overcoming these challenges and remaining responsive to the context, constitution builders are able to build more legitimate constitutions.

***Both the process by which a constitution is built and its substantive content are the keys to legitimacy.***

### 1.3. Key assumptions

Key assumptions underline the approach in the Guide and this chapter.

- *Context*, and particularly the *power dynamics within it, is supremely important.*
- The aim of constitution building in polarized and conflict-affected societies is to *support democratic outcomes.*
- Societal diversity, when it is polarized in identity politics, is a major challenge that needs to be overcome to build broad consensus on the purpose and application of constitutions.
- *The emergence of plural drivers of change within the state and outside the state is a key factor* for constitution-building processes.
- Constitution building *takes place in states that have previous experience of constitutions, constitutional transition and constitutional governance*; rarely does it start with a clean slate.
- Conflicted-affected states may be involved in domestic violent conflict or post-conflict (that is, the actual violence is over) dynamics of change. Most globally significant violent conflict could be taking place within states.
- Global trends and the movement towards globalized constitutionalism and democratization should be considered.

### 1.4. Overview of constitution-building practice

The practice of constitution building will vary within and between countries and regions. The practice of constitution building is older in the Latin American region than in Africa, Asia and even parts of Europe, considering that, for instance, Costa Rica and Bolivia first established constitutions in 1825<sup>1</sup> and 1826<sup>2</sup>. During the 1990s, South American constitutions were rewritten, for example in Colombia, Paraguay and Peru, or revised substantially, as in Argentina and Uruguay. Ecuador and Bolivia both underwent multiple constitutional redrafting exercises in slightly over a decade. The perceived failures of previous processes—including the quality of inclusion and participation of all social groups in constitutional decision making—justified newer ones. More recently, an unprecedented low in the level of public trust in political

institutions has characterized South American constitution building. The driving forces of constitution building have included social and political movements in opposition to largely democratic governments. By contrast, parliamentary majorities drove constitutional change in Eastern Europe in the late 1980s and 1990s, facilitating the transition to democracy and the full acceptance of European constitutional norms, such as the free market economy and private property<sup>3</sup>. In Hungary (amendments in 1989–90) and Bulgaria (1989–91), the constitutional process helped transform former ruling communists into democratic socialist parties. As discussed below, forces of conflict and armed insurgencies have prompted Africa's recent constitution-building experience, as demonstrated in Angola, Burundi, Chad, the Democratic Republic of the Congo, Ethiopia, Mozambique, Namibia, Niger, Nigeria, South Africa, Sudan and Uganda. On the other hand, in Kenya, Zambia and Zimbabwe, normative content has driven the constitution-building process towards democratization.

The circumstances immediately preceding constitutional change often determine the need and justification for a constitution. In reality, a constitution acting alone may

***A constitution alone may not accomplish desired goals such as peace, democracy or economic growth. Constitutions are not self-executing. Leaders and citizens must engage as the constitution contemplates. This commitment to engagement the Guide envisions as 'constitution building'.***

not accomplish desired goals such as peace, democracy or economic growth. Constitutions are not self-executing; to achieve desired outcomes, interest groups must vigilantly press for, bargain for and demand nearly all the positions already agreed in the constitution. A constitution will set out a framework for accomplishing particular objectives. Institutions matter, but

it also matters when leaders and citizens engage as the constitution contemplates.

It is this commitment to engagement that the Guide envisions as 'constitution building'. Many reformers take a long-term view of constitutional issues. But short-term partisan interests—such as re-election to office, enjoyment of resources, retention of privileges, and immunity from criminal prosecution—often preoccupy the constitutional process. In this sense, constitution building is political—there are real winners and losers. If there are strong conflicts of interest between short- and long-term requirements,

***From experience, constitution builders will not adopt most long-term provisions that oppose vital short-term interests. Many pragmatic practitioners therefore opt to frame constitutions for the short term while achieving long-term objectives only incrementally, through interim and transitional devices.***

constitution builders may have to adopt a 'veil of ignorance' and turn a blind eye to short-term interests. An altruistic outcome is perhaps politically unachievable. From empirical experience, constitution builders will not adopt most long-term provisions that oppose vital short-term interests. Many pragmatic practitioners therefore opt to frame constitutions for the short term while achieving long-term objectives only

incrementally, through interim and transitional devices.

## 2. General challenges faced by constitution builders

Two kinds of challenges that confront constitution builders in general are considered here:

- a) building a constitution in contexts of extensive violent conflict, resulting in very weak political and institutional capacity to support constitution building; and
- b) building a constitution in order to defuse conflict in the particular setting through democracy or democratization.

### 2.1. Challenges posed by violent conflict

The Guide treats conflict as a salient feature of every society, and assumes that constitutions attempt to manage conflicts of interest between societal groups and individuals by means of fair rules and neutral institutions. Accurately diagnosing the nature and type of conflict will help constitution builders to find a corresponding constitutional solution. Violent conflict is treated as a special category of conflict. Often constitution building must include actors who have engaged in violent conflict, perhaps without a clear military victor, or where peace agreements between governmental actors, opposition groups and armed rebels have required constitutional changes. Many internal conflicts spawn important regional dimensions in terms of political support, training, and the acquisition of armaments. To negotiate constitutional solutions to recent armed conflicts in Colombia, the Democratic Republic of the Congo, Nepal, Sri Lanka and Sudan, practitioners shifted from traditional bilateral talks to stakeholder negotiations with disparate groups, with the implication that the ensuing constitutional change processes became tied to concerns for security and stability as a priority.

***Often constitution building must include actors who have engaged in violent conflict, perhaps without a clear military victor, or where peace agreements have required constitutional changes.***

Violent conflict also strongly affects power relations along the concentration–

dispersal dimension. Post-conflict constitutional settlements in Angola, Colombia and Mozambique created governments that are executive-centred through the executive branch's command of the security forces and powers to declare states of emergency and make peace agreements. Gross violations of human rights during conflict have tested the credibility of reconciliation efforts. For instance, in the Cambodian and Rwandan genocides and subsequent reconciliation processes, deep suspicion of the political use of identity resulted in strong legal measures to protect citizenship.

Generally, if conflicts of interest are also addressed through both legal (detailed rights of minorities, autonomy) and political options, this tends to minimize or remove the 'winner-takes-all' factor of politics. Experience has shown the importance of building on pre-existing structures instead of utilizing conflict as a basis on which to start afresh constitutionally. The failure of new institutions can halt constitution building and cause the recurrence of conflict.

Extensive violence in society may enfeeble governmental and institutional capacity because conflict has dissipated resources or expelled qualified administrators. It may also result in a government which, while able to administer the country, nonetheless lacks functional legitimacy. Both cases can expose citizens to deprivation of basic needs, and make them vulnerable to shocks including natural disasters, leading to extreme poverty and fuelling cycles of violent conflict.

***It may be impossible to start the process of constitution building before a peace agreement or interim security pact is in place; but giving priority to achieving peace at all costs also poses risks to the constitution-building process, as the example of the Dayton Peace Agreement shows.***

Challenges will include the following:

- It may be impossible to start the process of constitution building inside a country before a peace agreement or interim security pact is in place to stop the violent conflict and allow constitution builders to begin their work. The peace-building work that precedes constitution building may take different forms but, in general, it can stipulate the process to be followed for constitution building, or even go as far as outlining some details to be included in the constitution. Constitution building in Afghanistan illustrates the former: the Bonn Accords of 2001 set out as a fourth step in a road map to peace a constitution-making process to re-establish permanent institutions of government. In Nepal, an Interim Constitution agreed between political parties in 2006 had already established specific targets for constitution builders, namely to frame a constitution for a democratic and federal republic. Mozambique may offer an exception to both situations, since the government in place had introduced a more democratic constitution in 1990 to pressure the rebels into peace and advance ongoing negotiations. In fact, the comprehensive peace protocols signed after 1991 were politically superior to the Constitution but later subordinated to it.
- Easy access to still widely distributed weaponry may lower the cost of violence and 'spoilers' may be able to stoke dissatisfaction over the constitution-building process.



- Giving priority to achieving peace at all costs also poses risks to the constitution-building process. For instance, prioritizing the management of violence and insecurity at the expense of building constitutional consensus may doom the entire process. Parties to the Dayton Peace Agreement of 1995 agreed to the Constitution of Bosnia and Herzegovina as an appendix to the peace agreement. In retrospect, this approach did not allow sufficient political deliberation among citizens and constitution drafters, and may reasonably be considered a causal factor in the subsequent difficulty of implementing the constitution there.
- Ascertaining the perspectives on a constitution of those who have suffered mass violations of human rights, and who understandably focus on resettlement and justice, may prove challenging. Many citizens may remain displaced internally or outside the country, raising the logistical and security costs of including them in the constitution-building process.
- While constitution building requires patience, the threat of violence may mean that particular issues have to be addressed quickly. Peace process time frames and milestones can override spreading awareness among the citizens and encouraging civic debate on constitutional solutions, as happened in Iraq (in the process leading up to the Constitution of 2005).
- Constitution builders who seek to address only the conflict dimension of state fragility will face significant challenges, including overemphasizing power sharing in order to appease armed groups or repressive rulers, which may sacrifice electoral accountability for the sake of stability. In addition, corruption and abuse of power may become stronger where the focus is skewed more towards reducing violence than towards constitution building for more accountable government.
- With all efforts focused on alleviating state fragility, constitution builders may have little time to establish a legal framework to guide the many other aspects of constitution building. By contrast, in some contexts, undertaking aspects of constitution building may constitute a condition precedent to minimizing state fragility.

***Constitution builders who seek to address only the conflict dimension of state fragility will face significant challenges, including overemphasizing power sharing in order to appease armed groups or repressive rulers. Where possible, peace building should be disconnected from constitution building.***

In the contexts of constitution building where violence is or has been present, constitution builders in the ‘getting started’ phase are therefore confronted with the challenges of ensuring that peace building, in the narrow context of stopping armed conflict, does not unduly dominate the final constitutional agreement. Different experiences have suggested some good practice in this situation.

### **Suggested good practice:**

- Design two-step processes of constitution building that: (i) use an interim or transitional constitutional plan, specifically addressing stability and concluding the peace process; and (ii) allow final constitutions to emerge with a stronger focus on a long-term vision of institutional design.
- Identify whether particular constitutional solutions that may succeed in preventing or stopping violence also effectively address other constitutional issues, such as corruption, accountable government and the mass abuse of human rights.
- Where viable, disconnect peace building from constitution building in order to prevent spillover and to permit the division of specialized labour so that all constitutional issues receive adequate and properly informed attention.
- Practitioners also should allow scope for power brokers to examine certain problems later.

## **2.2. The demand for democracy**

Democracy has been an important feature of a legitimate constitution and has been demanded during constitution building as a system that is needed in order to manage societal conflict. At a minimum level, democracy connotes equality between citizens and their effective engagement in governance, through representation and participation in governmental decision making. The *State of Democracy Assessment tool* developed by the International Institute for Democracy and Electoral Assistance (International IDEA) has a set of 14 questions that constitution builders can use to design constitutions bearing in mind its multiple dimensions.

Interactions between drivers of change and their institutional interests affect democratization. In India, proportional representation of minorities in the Constituent Assembly, which was completely dominated by the Indian National Congress, succeeded in enacting inclusive provisions in the Constitution of India (1949)—provisions that were later extended over time by social justice movements enabled by the same constitution. Thus, constitution building that includes and permits the participation of all legitimate groups, actors and stakeholders is more likely to result in institutional choices that strengthen rather than weaken democratization. Practitioners then can formulate criteria to gauge the quality or level of democratic constitution building, premised on inclusion and participation.

***Constitution building that includes and permits the participation of all legitimate groups, actors and stakeholders is more likely to result in institutional choices that strengthen democratization.***

There are some specific institutional designs and processes that are more likely to strengthen democratization, though much depends on context. Such designs and

processes include protections for human rights such as access to official information, the degree of political, administrative and economic concentration or decentralization, and power relations between the legislature and the executive branch, all of which the Guide covers in subsequent chapters. The challenges to designing these institutions at the initial stages often include the following:

- The absence of democratic institutions to initiate constitution building may be a problem.
- Frequently, a great deal of attention needs to be given to the type of electoral system which will determine representation in the constitution-building process. New conflicts may arise in connection to the choices made.
- A new legal framework may focus attention on the election of representatives to the main organs of constitution building; within these organs, however, less attention may have been given to the rules of procedure that will be required to sustain democratic decision making.
- In some cases, constitution building features bargains struck with the old guard in order to facilitate change. Yet these bargains may result in undemocratic features in otherwise democratic constitutions. If members of an autocratic old guard bargain to win positions in the new constitutional order, their role in new leadership positions often reduces the availability of recourse to redress for their victims. These deals may also contradict normative commitments, striking many as unprincipled or even unjust.
- In these contexts, the need for a constitution-making mandate from the electorate, or the treatment of elections as a priority following the adoption of a new constitution, may become associated with successful constitution building. The risk is that democratization is understood as an electoral feat with overall focus on the most obvious aspects of electoral competition. Democratization in constitution-building practice has actually proved to be a more complicated process, requiring a plurality of groups in order to be able to build consensus on political issues.
- Not all the actors demanding constitution building are committed to democracy as an outcome, even though they agree to participate in a democratic process of constitution building. They may reduce democratization to nothing more than a process for attaining power rather than a process aimed at ensuring popular control over government.
- Constitution builders also need to be aware that different political actors use constitution-building processes to entrench their interests in the new institutions of government. An emerging threat to democracy taking root is that new institutions are used to carve out constitutional zones of exclusive dominance, contributing

***In some cases, constitution building features bargains struck with the old guard in order to facilitate change, but these bargains may result in undemocratic features in otherwise democratic constitutions. Different political actors can use constitution-building processes to entrench their own interests.***

to more conflicts of interest.

- Finally, democratization may be sought even though the constitutional process is in practice dominated by a single political party or group. In some cases, the dominant party also has predetermined positions on the constitution and even possibly its own constitutional draft. The risk that emerges is that the entire process is then used to focus on the power and privilege that should be accorded to the dominant group rather than on other pressing constitutional dilemmas.

It is worth noting that the delivery side of democracy is equally important in constitution building. If constitution builders aim to tie democratization to economic advance, this raises the following question: does the constitution building aid the poor? The answer may depend on whether constitution building is sustaining the status quo or attempting new political, social and economic relations, for instance, by breaking up a feudal type

of rule or setting targets for the political inclusion of economically marginalized groups. If constitution building uses democracy to channel the root causes of grievance, this implicitly requires a long-term view, rather than merely responding to the current demands of a particular group. Serious inequities surviving from an old constitutional order may be a sign of constitutional failure.

***Treating elections as a priority following the adoption of a new constitution carries the risk that democratization is equated with electoral competition. Democratization in constitution-building practice is a more complicated process, requiring a plurality of groups in order to build consensus.***

# 3. Challenges in designing processes of constitution building

The period when constitution building is started is often loaded with promises of ‘new beginnings’. It is also a relatively rare period, when people have a historic opportunity to affirm the fundamentals and basic principles of government, going beyond ‘normal politics’. It is also observed that a constitution-building process has often been distinguished as a part of broader processes of conflict transformation or democratization, as seen above. Its starting point as a process may be contained in these larger processes.

To ensure the best outcome, the decisions taken during the initial stages of constitution building regarding both the process of constitutional change and the substantive issues to be framed are particularly critical. Some of the critical process questions are often the following:

- the scope of change;
- the use of interim and transitional devices;
- transitional justice issues;
- democratic representation during the process;
- popular participation; and
- the role of external actors.

***The decisions taken during the initial stages of constitution building, regarding both the process of constitutional change and the substantive issues, are particularly critical.***

## 3.1. The scope of change

Constitution builders may envisage a *grand design* which entails comprehensive constitutional change achieved by drafting a new constitution to replace a previous one. Acts of grand design establish a new constitutional order. In some contrasting cases, constitutional change by *graduated design* is sought by continually reforming the existing constitution. Incremental and progressive reforms may accumulate and ultimately reflect a new, or at least substantially different, constitutional order.

Experiences of conflict or authoritarianism may be adduced in order to demand a clean break from the past. South Africa's past of official segregation between races under apartheid or the official sanction of genocide in Cambodia and Rwanda offer some clear-cut examples of the immediate past being completely rejected and delegitimized.

***Constitutional change may be a process of grand design which entails drafting a new constitution to replace a previous one, perhaps where a complete break with the past is needed, or one of graduated design, continually reforming the existing constitution.***

In Iraq, the regime had been militarily completely defeated. Constitution building was expected also to symbolize, if not manifest, a clean break with the past. The scope of change in these contexts was essentially to re-establish institutions of state. Other countries faced similar ambition in the scope of change due to a history of state failure, for instance Afghanistan.

In contrast, there have also been contexts where constitution builders also faced a demand for change after authoritarianism or conflict that qualified the nature of change either to restore past traditions or to retain elements of an older constitutional order in the new constitution. Indonesia in the *reformasi* period reached back to the 1945 Constitution and its essential *pancasila* principles (see chapter 2), and amended the constitution several times, not completely throwing away the past but bringing in modifications.

The scope of change may therefore be seen in terms of grand designs or graduated change. It is dependent on what is viable in the particular context. In Afghanistan, deliberations in the Constitutional Loya Jirga or 'grand council' swung between 2003 and 2004, from initial support for a semi-presidential system with a president and prime minister towards favouring a presidential system by the end of the talks. Ostensibly this happened so as to guarantee executive action, even though many constitution builders suspected that a parliamentary system would be a stronger basis for longer-term governance. During inauguration of the Constitution, the President suggested that the scope of change in the immediate period was focused on state building and the imperatives of establishing a functional government, and suggested that perhaps after 10 years the issue could be reconsidered if the circumstances then justified the choice of a parliamentary system. Here, the questions of scope of change and over what duration were practically determined by immediate concerns in the prevailing environment rather than a long-term view of the needs of Afghanistan as underlined by a constitution. The context determined the scope of change because of the need for bargaining with elements of the older order, by virtue of a new dominant group emerging onto the scene and so on.

In the Kenyan case, it was agreed as early as 1997 that comprehensive constitutional change was needed. A commission was established to collate views and draft a constitution. In 2004 a National Convention was constituted comprising elected parliamentarians and representatives of diverse groups to deliberate on the draft. During this stage, a number of issues centring on the system of government in the draft emerged as contentious, resulting in a walkout by some of the parties. Subsequently, the governmental party made changes to the draft constitution, principally replacing a semi-presidential system with a

fully presidential system and limiting the extent of devolution, and submitted this draft to a referendum. In November 2005, the draft proposed was rejected in the referendum by 58 per cent of those voting. Following the election-related violence in 2008, a grand coalition government was formed to share power. In the agenda of reforms to be carried out to prevent more violence, completion of the constitutional change was the fourth item. A committee of experts was formed to reconcile the differences over the major contentious issues. It proposed, once again, a semi-presidential system, but this time round the parliamentary committee of the grand coalition substituted the proposal with a purely presidential system, but committed to extensive decentralization of institutions and services. The new constitution was adopted by means of a referendum in 2010 with nearly 70 per cent of those participating voting ‘yes’. In this case, it was clear that the scope of change was grand design but it was dependent on political agreement by all concerned about the demise of the old system. In Kenya, building this consensus in the political class took over a decade and was catalysed by the need to prevent further violence after the 2008 experience. In South Africa, consensus on the scope of change took six years to achieve, between 1990 and 1996, and went through two failed democratic conventions, an interim constitution and a government of national unity under an interim constitution. In Guatemala, the failure to involve all the military groups in talks essentially guaranteed that the process of change could not be successfully completed and the conflict in the society proved too resilient for the scope of change proposed in the constitutional talks. Hence, the question of whether a scope of change is achievable may also be tied to flexibility on the time that can reasonably be needed and to all key parties accepting constitutional transformation concerning new rules, institutions and procedures.

***The scope of change will depend on what is viable in the particular context. The question of whether a scope of change is achievable may also be tied to flexibility on the time needed and to all key parties accepting the new rules, institutions and procedures.***

In some cases, constitution builders have had the benefit of existing institutions and rules offering something to build on. This has been particularly useful where there has been an existing parliament with adequate legitimacy to drive the process to completion.

**Table 1. Constitutional processes between 1975 and 2002: the events or institutions that initiated them**

Type of process	% of total process
a. Executive-directed	23%
b. Peace negotiations/round tables	5.6%
c. National conference/transitional legislature	7.2%
d. Legislature or constitutional assembly	62.6%

Source: Jennifer Widner, Princeton University

Notably, parliaments may provide the only route to constitutional change. Their advantage is that constitution builders do not have to focus on establishing new institutions that would need to gain the political acceptance of new as well as current players. Existing parliaments can stabilize such transitional environments, and provide or maintain legality in addition to legitimacy. They have, however, three limitations. First, parliaments, like any other actor engaged in constitutional bargaining, have *institutional interests* that they seek to advance when controlling the constitution-building process, often but not always to the disadvantage of other institutional actors. The danger is that parliament will focus on consolidating its own authority. Second, parliament hosts political parties. In many contexts, these parties lack internal democratic structures and are dominated by a small leadership circle. Given the importance of constitution building, interested parties may object to a small and powerful clique deciding key issues, perhaps through horse-trading. Third, individual political parties in parliament are likely to support party designs and electoral systems that favour themselves in elections. Because party and electoral rules determine how parliament distributes power, such preferences may distort the constitutional framework to the detriment of democracy and stability, particularly if excluded actors return to armed conflict and violence.

Even entirely new bodies, created for the purpose of constitution building, can further their own institutional interest. For instance, elected constituent assemblies in India and Israel consolidated legislative power before converting into regular legislatures. Practitioners should therefore expect institutional interests to manipulate constitutional outcomes. Thus constitution builders should recognize their own self-interest in constitutional outcomes, which might influence the design of constitutional institutions and processes.

***Practitioners should expect institutional interests to manipulate constitutional outcomes. Existing parliaments, while they may give the process legality and legitimacy, have institutional interests that they seek to advance—as indeed will new bodies created for the purpose of constitution building.***

### 3.2. Interim arrangements

In conflict-affected constitution building or after prolonged crisis, the moment at which hostilities or crisis cease may not constitute the most opportune time to draft a constitution. The challenge here is to permit as much change as possible while demonstrating a clear break from the past. Interim arrangements can take many forms and are sometimes described as transitional measures.

Interim measures are short-term: they are intended to (a) allow constitution builders to work on the basis of new legal and political frameworks that take over from the older ones to allow change with less disruption, and (b) open up space for constitution building in stabilized conditions that improve the chances for successful completion of the development of a new constitution.

***The moment at which hostilities or crisis cease may not be the most opportune time to draft a constitution. Interim arrangements might facilitate the framing of a constitution between warring parties, but designing them will be challenging.***



Interim arrangements might succeed in facilitating the framing of a constitution between warring parties. Designing acceptable interim arrangements will prove challenging. Equally challenging will be agreeing on the mandate and duration of interim arrangements, including how to link them to long-term constitutional arrangements. They can bind final arrangements by stipulating the principles and norms that are to be embodied, or even include a greater level of compliance. The current Interim Constitution of Nepal (2007), negotiated to end a 10-year armed conflict, has also altered the governance structure from a unitary monarchy to a federal republic and directed the elected Constituent Assembly to draft a new Constitution to embed the change. In South Africa, the Interim Constitution articulated 34 principles to which the final Constitution had to adhere.

Context will determine the duration of interim arrangements. Nepal and South Africa established a two-year period for drafting of the constitution (in Nepal this original timeline has had to be extended). Other countries have enacted shorter and longer periods. While exigencies might dictate the time permitted for drafting a constitution, practitioners must include sufficient time for political deliberation, without which the chances of failure rise significantly.

Both the grand scale and the graduated design approaches may require an interval to ensure their completion. Sequencing is important to allow national actors a bridge to focus on the long term and on a broader consensus where the interests of many are brought under the constitutional umbrella. Many practitioners have tried to separate out stages in a sequence for this purpose, and their choices have had implications for the inclusion and exclusion of actors in different stages. These strategies are always problematic for this reason—the errors of the present committed in the interest of keeping the eye on the ball.

### 3.3. Transitional justice

Resolving transitional justice claims satisfactorily can complicate the already challenging task of establishing a constitutional culture after conflict or in the midst of deep division. Concerns may include the following: How should we deal with the past? How can we learn to coexist with former oppressors and perpetrators of crimes? How can we reconcile and forgive? After conflict, practitioners may have to heal divisions between former rulers, combatants, victims of human rights violations and their sympathizers, whether family, friends or civil society organizations. Such healing may require an outlet for mass anger and trauma, and a process to uncover the historical facts that have led to victimization, perhaps as a component of a larger process of reconciliation or of a substantive justice solution for crimes and violations. The practical challenge is to rehabilitate an entire society successfully without tearing the country apart, particularly when the conflict has stalemated, without a clear victor, forcing a negotiated settlement.

### 3.4. Inclusiveness and representation

Inclusive representation during constitution building has been an ideal. In theory, it is an important factor in the legitimacy of the process. Democratic constitution building has been associated with stability as well as broadly acceptable outcomes that imply that the constitution is likely to enjoy political will for its implementation, and hence its endurance.

Constitution builders focused on increasing democratic representation have also rejected the secret drafting and promulgation of constitutions. Instead, options have been considered to bring on board the broadest representation of all segments of society, as reflected in the current Constituent Assembly in Nepal. Democratic constitution building has also been viewed as a deliberative process, which needs adequate time and stable conditions.

The options that will expand democratic constitution building are institutional as well as procedural. Institutional devices considered have included the dialogue forums of *national conferences* used in parts of Africa. These were convened by the political authorities in Benin, Ghana, Kenya and Mali as devices to bring on board additional representatives of groups to join the ruling party in deliberations on constitutional change towards democracy. Where participation has been slanted and the conference opaque, conflicts have increased, for example, in Mali. The case of Benin, where the Constitutional Conference was more successful, illustrates greater successes in using the national conference to democratize governance.

***Inclusive representation during constitution building is important to the legitimacy of the process. Skewed representation carries the risk that deliberations will be dictated by the partisan interests of a dominant party or be distorted around the power and privileges enjoyed by a dominant group.***

The *constitutional convention* has also been considered. The convention is also a body of representatives which is convened either through election or by appointment with a single purpose—to draft, debate and agree on the constitution. It can be contrasted with *constituent assemblies*, which are elected bodies that have the purpose of constitution making but have also served as legislative assemblies with the usual legislative functions of oversight over the executive, accountability and law-making power. Countries influenced by the French constitution-making approach have usually adopted a constituent assembly, which has also been the traditional instrument of constitution making in Latin America. With two separate assemblies operating at once, the constituent assembly can adopt a long-term approach when addressing constitutional issues, not encumbered by legislative functions and ordinary politics. However, rivalry between the constituent assembly and the regular parliament can cause institutional and governmental paralysis, or even violent conflict. This has occurred in Latin America, where some constituent assemblies elected separately from legislative assemblies have sought to establish their supremacy over, and even to supervise, the legislative assemblies. On the other hand, an assembly that combines the functions of a constituent assembly with those of a legislature

may also face operational constraints. In Nepal, since the Constituent Assembly is also designated as the legislature, in the latter function it enables the formation of a government—a task complicated by practical problems of power sharing and decision making by consensus. Both functions also require ample time, as demonstrated by the extensions of the time frame for completion of the constitution drafting in Nepal.

The key problem with these deliberative forums involves the issue of representation. In some cases one party has effectively dominated representation and hence the deliberations—the Revolutionary Front for an Independent East Timor (Frente Revolucionária de Timor-Leste Independente, Fretilin) in Timor Leste, the Congress Party in India (1947–9), the Rwandan Patriotic Front in Rwanda and the Eritrean People’s Liberation Front (EPLF) in Ethiopia. Skewed representation carries the risk that deliberations will be dictated by the partisan interests of the dominant party or will be distorted around the power and privileges to be enjoyed by the dominant group. To deal with this problem, the *electoral system* used to elect the body becomes important. Electoral rules and procedures governing the election of constituent assembly men and women will usually specify the criteria for citizens to gain membership through membership of associational groups, or political parties, territorial linkages, or minority or other political identity criteria. Electoral system design has important implications for the membership composition of such a body, and to some extent its size as well. The Bolivian Constituent Assembly, elected in 2006, had 301 members while the Nepali Constituent Assembly, elected in 2008, had a total of 601 members. In South Africa, where it was clear that the African National Congress would dominate the Constituent Assembly after elections, the minority parties successfully insisted that the outcome of the Constituent Assembly also be certified by a newly set-up Constitutional Court.

### 3.5. Popular participation

The role of popular participation has increased. It is increasingly viewed as vesting popular legitimacy in the constitution-building process and its outcomes when people are consulted and their views taken into account. In South Africa, 2 million submissions were collated from the people.

#### *Benefits of popular participation*

- People may participate democratically in the framing of a constitution that will govern their relationship with government.
- A referendum enhances transparency and accountability by sharing information on the constitution and the constitution-making process with the public.
- People can educate and familiarize themselves on the content of constitutional issues prior to voting.

#### *Costs*

- Popular participation is very expensive, will absorb resources which may be scarce, and may not have any proven link to the subsequent legitimacy of a constitution.

- Power brokers can manipulate popular participation either through the framing of questions to be answered by the public or through partisan campaigns to influence voters.
- In societies that are divided along lines of political identity, popular participation crudely may allow an ethnic or religious majority simply to adopt or reject a constitutional proposition on their own terms.
- Popular participation can add legitimacy to populist measures that infringe or violate minority rights.

The quality of popular participation in countries emerging from conflict and where citizens have been excluded from governance for prolonged periods suggests a practical need for civic education. It has been suggested that civic education, for this reason, should precede the collation of views into the draft constitution at the drafting stages. The quality of popular participation may also be perceived as stronger where civic

***Popular participation is increasingly seen as giving legitimacy to the constitution-building process, but it may not have any proven link to the subsequent legitimacy of a constitution, and it is open to manipulation.***

education is undertaken by an independent body rather than by partisan actors in the constitutional process, including the government. In Bolivia, the Constituent Assembly organized public participation and then formed committees to collate the public input. In other cases, for example that of Uganda, an independent commission educated the public and collated views.

The role of the public is also gaining increasing visibility in the ratification stages. Some processes have allowed popular participation in popular referendums to ratify the constitution as well as in the collation of views, for example, in Afghanistan and Kenya, where previously ratification by parliament acting alone was usually adequate. However, the use of referendums in contexts of serious societal division would need more careful attention so that it does not polarize an already divided public.

Given the influence exercised by ruling groups in constitution building, achieving the objective of inclusive and broadly participatory constitutional negotiations will depend largely on the degree to which the political and legal framework provides meaningful opportunities for outsider groups to shape any resulting constitutional settlement. Even with open structures of political dialogue, ruling groups frequently retain inordinate control over constitutional negotiations. If the process does not permit open dialogue structures or public ratification, constitution building can amount to a small range of insider groups dividing power behind closed doors according to self-interest. While elite influence over constitution building is a political fact, experience also demonstrates that a more open dialogue, including a broader range of voices, can generate independent constitutional momentum and legitimacy. On the other hand, broadening the ‘tent’ can alter the balance and structure of real power and can lead to settlements that ruling groups neither intended nor desired.

Constitution builders cannot avoid the role of leaders; the question may be how to use senior leaders during constitution building without necessarily limiting the roles for those not in key positions. There may for example be principles that mean using leaders in some strategic moments and not in detailed working sessions. There may be examples of leaders facilitating breakthroughs or becoming bottlenecks. Moreover, leaders may be hostage to the demands of their groups of supporters; and there are various leaders who are influential during constitution building although they lack a political mandate, in particular tribal chiefs, religious leaders, warlords, heads of the media and corporate leaders. Constitution builders in each context may have to understand why some leaders promote constitution building and others resist or hinder or object to it and under what conditions trade-offs between leaders are secured to allow successful completion of constitution building.

### 3.6. The role of external actors

While stressing the principle of national ownership of constitution building, constitution builders can make meaningful use of the support offered by external actors. These actors are varied: they include donors who can offer financing assistance, for instance for public participation, civic education and effective study tours; specialists on particular issues who are invited to advise on specific options; multilateral and bilateral actors who can be trusted to offer mediation, neutral facilitation of sensitive talks, and security guarantees; international bodies of which states are members, which may have important principles and declarations of norms that can be used to bind national actors to certain courses of action; and international civil society organizations which can offer useful advocacy tools and independent monitoring. External actors have also been used to break specific deadlocks between national actors. In processes that are dominated by one party or group, external actors have been asked to examine options and offer alternatives or to help alternative views remain visible in the talks.

What is important is for constitution builders to understand that the roles of most external actors, if not all, are not value-free or neutral. On the one hand, the values represented by multilateral bodies such as the United Nations (UN), of which most states are members, may be useful to national constitution builders. This was the case when Namibian national actors negotiating with armed forces for self-determination decided to base their constitutional principles on a resolution of the UN Security Council. In this case, the history of UN engagement in Namibia prior to its independence in 1990 provided a basis for national actors without full control of their national situation to derive constitutional principles that drove the course of constitution building towards outcomes that would be legitimate both domestically and internationally. On the other hand, the same United Nations has used the commitment to international human rights as a crucial factor of legitimacy

***External actors can offer financing, expertise, mediation or neutral facilitation of talks, and security guarantees; but the roles of most are not value-free or neutral. In some cases, the values they espoused have been in conflict with the goals, ambitions or priorities of national constitution builders.***

in all cases of its involvement in constitution making, through the UN Secretary-General.

*Guidance note on the role of the United Nations in constitution making.*<sup>4</sup> In some cases, the values espoused by external actors are openly or covertly in conflict with the goals, ambitions or priorities of national constitution builders. For instance, external actors may be in a position to determine the timing and duration of the process of constitution building, while laying most emphasis on the drafting stage. In Cambodia, the Paris Peace Accord (1991) required drafting to be completed in 90 days, resulting in the Constitution of 1993. Many Cambodians could have argued that the time frame was limiting; at any rate, a coup d'état in 1997 is seen as proof of the accuracy of warnings that not all contentious actors had been included in the constitutional process. The decision on the timing and duration of the process is one that national constitution builders should insist on making.

In other cases, constitution builders have incorporated substantive options into constitutions under pressure from or the influence of external actors. This may become a legitimacy issue, but the immediate practical effect may be non-implementation or failure due to misfit with the context. To forestall this, external actors are normally warned to avoid conspicuous roles when it comes to choice of options or to operate under the cover of seemingly transparent principles and normative frameworks. The responsibility also lies with national constitution builders to design constitution building in such a way as to deliver legitimate processes and substantive outcomes. Where feasible, a good start is to define national priorities and goals and embed any external actor role within this framework. It is however simplistic to react by politicizing the roles of external actors as a 'protectionist' measure, since this may not deal with the real problem and may jeopardize other useful contributions of external actors to the constitution-building process.

## 4. Substantive options issues

Many interest groups are often uncertain exactly on which side they come down on an issue. This type of uncertainty propels concern about achieving the broadest consensus on constitutional content. The greater the degree of consensus needed, the more time practitioners are likely to need to spend to reach decisions and the higher the costs of decision making. In addition, many groups with different interests and backgrounds will calculate how to maximize their own benefits from the institutional choices made during constitution building.

A constitution may not settle every material issue. Constitution builders have debated what issues to include in the constitution and at what level of detail. In a nationally driven process, they are of course free to design constitutions according to local judgement. As issues become controversial and intractable, the risk of *spoilers* grows. These are the actors who can cause the non implementation of a constitutional provisions that they object to or are growing resistant to. In choosing their substantive options, constitution builders have often needed time to manage potential spoilers through bargains or persuasion so that the constitution enters into force with the trust of a wider range of actors, in order to permit consolidation in public institutions and government. At the same time, constitution builders may need to manage expectations, particularly those of the marginalized.

***A constitution may not settle every material issue.***

Some issues have been more controversial and more debated than others. In general, some of the areas where constitution builders have often sought guidance or taken much time to settle substantive options have been related to the schemes of power—who has it, how much of it and for what purpose—as well as the question of rights, particularly in view of contradictory but widespread beliefs or customs, the plurality of political actors and stakeholders, including their diversity, and the subjection of political action to an effective legal framework in order to prevent abuse of office and check impunity. Challenges in resolving conflicts concerning these issues are highlighted below.

## 4.1. Institutional design

Constitution builders often deliberate at length on what institutional design to adopt in response to conflict. Institutional design in constitutions is often theorized from existing constitutional practice, which however is not consistent; particularly because of conflict, practice is extremely context-sensitive. This Guide also theorizes design on the basis of recent practice and trends in constitution building. Its primary theoretical lenses are (a) the dynamics that concentrate or disperse ‘power’ and (b) the dynamics that legalize issues in constitutions compared to those that seek to make more room for politics. In addition, the relationship between a constitutional text and its broader purposes beyond embodying the supreme law is also highlighted.

### 4.1.1. The constitutional architecture

Constitutional architecture is a term that connects constitutional texts to underlying functions and intentions. The elements included in a constitution are closely related to the purposes it is intended to serve. Later, in the implementation stages of a constitution, understanding the constitutional architecture is a useful guide for interpretation of the constitution’s text. One architectural option is to consider the constitution as a ‘framework’ instrument. By design, the text includes only those normative and substantive issues and principles for which a consensus exists. The framework constitution may assign a large number of issues, on which currently there is no consensus, for future legislative deal-making, although it may stipulate the general principles that will guide legislation. If constitution builders in Nepal’s current process had agreed in 2010 to adopt a framework constitution containing a legislative agenda, they might have avoided a delay to the two-year calendar of the Constituent Assembly. The cost would have been deferring other loaded issues, such as the conclusion of the peace process.

The ‘basic structure’ approach offers an option whereby constitution builders stress key government functions and prioritizes establishing institutions that will exercise governmental authority, such as the three branches of government—the legislature, the executive and the judiciary. The basic structures approach may include decentralized

levels as well. A presumption exists that government has legal authority to act unless a limitation appears within the constitution or another law. Different governmental structures may exert dominance in particular areas, thus limiting and checking governmental authority, safeguarding individual freedoms, and creating a political equilibrium.

***The elements included in a constitution are closely related to the purposes it is intended to serve. One option is to consider it as a ‘framework’ instrument that includes only those normative and substantive issues and principles on which a consensus exists.***

A ‘rights-based’ approach may also be mentioned. Modelled mainly on the French Revolution of 1789, this approach considers the rationale of the state as the protection of the rights and welfare of citizens. The government is established to give effect to these rights as its priority. The option may emphasize a legal constitutional culture and articulate



options for the legal and administrative enforcement of rights. This approach has seeped into constitutions that predominantly use the language of rights to signify dramatic change. Constitution builders emphasize the approach through placing rights in pride of place, up front in the text of the constitution. The first article of the Constitution of Guatemala (1985) states that the Constitution is the basis for the formation of the Guatemalan government whose responsibility is to protect the person and the family. This particular constitution closed one of Central America's bloodiest civil wars, between 1962 and 1985, but this architectural form and styling, emphasizing rights, actually accords with constitutional tradition in the Spanish Americas. The approach may also signify the level of commitment to rights. As an example, the Constitution of South Africa (1996) used the approach to provide for the legal enforcement of economic, social and cultural rights and the application of the Bill of Rights 'horizontally' in relations between private citizens, and it recognized a right of members of military forces to strike. Each of these is striking in itself, and the inclusion of both is usually part of the reason why this constitution is considered the most rights-friendly.

***Another option is the 'rights-based' approach, emphasizing a legal constitutional culture, articulating options for the legal and administrative enforcement of rights, and signifying the level of commitment to rights.***

#### 4.1.2. 'Legal' and 'political' constitutions

The 'legal constitution' emphasizes the supreme aspect of constitutional law, placing the constitution above all other forms of law, imposing legal obligations, and subject to judicial adjudication. A 'political constitution', on the other hand, elevates the settlement of issues through political processes and within a larger political framework, typically under the authority of a political institution such as a legislature or state council.

***A 'legal constitution' emphasizes the supremacy of the constitution and makes it subject to judicial adjudication. Protections should prevent transient majorities from easily altering fundamental principles. A 'political constitution', on the other hand, elevates the settlement of issues through political processes and within a larger political framework.***

Legal and political constitutions arise from the strategies of interested actors. Supporters of legal constitutions prefer legal certainty to protect their interests from future political bargains. Opting to address disputes as legal could also allow actors to avoid a real or perceived political backlash. For example, South African delegates in the Constituent Assembly (1994–6) specifically deferred a decision on the abolition of the death penalty, popular among voters, to the newly created Constitutional Court. Notwithstanding that popular support, the Court declared the death penalty unconstitutional, premising its decision on the entrenchment of human rights in the Interim Constitution (1994–6). This Guide refers to the approach of addressing legal disputes as 'legalization'.

Practitioners opting for legalization often argue that:

- The ruling regime does not equate with a democratic majority (it could be a minority government or one with only a bare majority), so the constitution should always impose legal controls on rulers and politicians.
- Any fundamental change requires the greatest consensus, which is rarely present outside of constitution building. Once agreed in constitutions, protections should prevent transient majorities from easily altering fundamental principles.
- In deeply divided societies, those advocating a political view of the constitution can often secure electoral wins and thus domination of political institutions—legislatures, the executive branch, and political parties—for the benefit of their power base; legalization is more egalitarian.
- Greater clarity in the constitution can bolster the accountability of officials. For instance, a clause that requires police to charge a person within 48 hours of arrest defines when an infringement will occur and identifies the perpetrator; because life and liberty are at stake, clarity is necessary. Minority groups may demand greater detail in the establishment of minority rights in order to reduce the future scope for legislative intervention.

Few constitutions in contexts of deep division still subject decisions to purely political majority rule. To offer real protections, their checks and balances must be practical and workable. The constitutional principle that the power of any majority is limited is extremely important in multicultural or plural nation states. In such contexts, the understanding that the constitution is the supreme law gains considerable importance.

At the same time, constitutions express ideas and arrangements as political bargains, reflecting the balance of power when they are agreed. Not infrequently, these agreements have been the only adequate and politically viable way to make the transition from the old to the new. Advancing a political view inherently opposes legalization and the aggrandizement of the judicial branch. Incumbent leaders and parties often claim an entitlement, or even a duty, to interpret the constitution on the basis of their electoral mandate. Proponents of the political approach prefer the government or executive to benefit from a strong presumption of the constitutionality of political action. Moreover, they ask that limitations to government authority appear not only in the constitution but also in legislation, which alternating groups in power can amend. The constitution even might

state that elected representatives exercise sovereignty. The Constitution of the Federal Democratic Republic of Ethiopia (1995) recognizes the supremacy of the Constitution, but when disputes requiring interpretation of the Constitution arise, the Council of Constitutional Inquiry must investigate and recommend further action to the House of Representatives, which is the only body that can decide constitutional disputes.

***Constitutions express ideas and arrangements as political bargains, reflecting the balance of power when they are agreed. A constitution might reflect general principles, leaving political convention and customary practice to fill unwritten gaps. This, the political, approach emphasizes dialogue over adjudication of constitutional problems.***

Supporters of a political approach have argued that:

- Instead of legal detail, the constitution ought to reflect general principles and permit greater ambiguity, so that political convention and customary practice can fill unwritten gaps, for example, the convention that states cannot secede from a federal union (the United States) or that the presidency rotates between the northern and southern parts of the country (Nigeria).
- Only removable public officials should decide constitutional issues with finality. Amendment should follow from direct democracy and public initiative in such a way that the constitution should develop primarily through political contests.
- A constitutional democracy resolves the vast majority of disputes by political deliberation and voting.
- Judiciaries will often lack the information needed to arrive at informed decisions. For instance, what consequences follow from judges invalidating a peace agreement between an elected government and armed rebels because it infringes a constitutional provision requiring the indivisibility of a unitary state? Or what if the judiciary finds that an elected government should resign because members of the ruling political party have committed electoral fraud? Unlike legislators taking a similarly contentious decision, judges will not face the electoral consequences of their decision. Even if it is assigned to a constitutional court, the nature of a political problem will require the court to make a political decision.
- The legal culture may be too weak to support the legal enforcement of highly contentious issues.

The political approach emphasizes dialogue over adjudication of constitutional problems. From this perspective, consultation mechanisms are scattered in constitutions, taking the form of constitutional councils, security councils, mandatory bipartisan parliamentary committees, dual-head executives, constitutionally-mandated power sharing, electorally-mandated power sharing, upper chambers of parliament with distinct roles, economic councils and the like. In addition, there are ample references to the ‘how’ of making decisions not only in terms of placing rules for legislative processes in the constitution, but requiring executive decisions to take certain forms. Exhortations for consensus and cooperative government may be included. All these are in essence dialogue-sustaining options.

It is emphasized that legal and political constitutions are interrelated. Upon closer examination, many constitution builders adopt both legal and political constitution approaches. One approach may be dominant to deal with certain problems (e.g. human rights, constitutional interpretation) and the other for other kinds of problems (e.g. foreign relations, economic governance). Current constitutional trends however favour legalization, manifested by the increasing detail in constitutions, the extension of judicial supremacy over a growing number of issues, and the establishment of new constitutional courts, for example, most recently in Indonesia, Mongolia and Thailand.

**Table 2. Legal constitutions and political constitutions**

<b>Legal constitution</b>	<b>Political constitution</b>
<ul style="list-style-type: none"><li>• Emphasis on boundaries around governmental action</li><li>• Judicial review of the constitutionality of government action</li><li>• Idea of judicial supremacy; the constitutional court is the independent custodian of the constitution</li><li>• More prominent independent constitutional watchdogs</li><li>• More issues capable of judicial adjudication; greater jurisdiction of courts over constitutional issues</li><li>• Clarity, details placed in constitution for ease of legal enforcement</li><li>• Expanded bills of rights and greater legal enforcement</li><li>• Rights-focused constitutions, hence lengthier constitutions</li><li>• Constitution and courts resolve an increasing number of issues rather than deferring to politics</li><li>• Strict rules for amendment of the constitution; referendums used to toughen amendment procedures</li></ul>	<ul style="list-style-type: none"><li>• Strong presumption of the constitutionality of governmental action</li><li>• Idea of legislative supremacy</li><li>• Fewer external or independent constitutional watchdogs</li><li>• Political contestation over issues rather than judicial adjudication</li><li>• General principles rather than details in constitution; ambiguous language</li><li>• Enforcement of rights distinguishes fundamental freedoms from claims needing policy measures</li><li>• Short, compact constitutions, including framework constitutions and basic structure constitutional approaches</li><li>• Direct democracy and popular initiatives also resolve constitutional questions</li></ul>

#### 4.1.3. 'Aggregation' and 'dispersal' of power

On the one hand, democracy needs pluralism in political ideas and checks and balances in relations between the institutions of government. What undermines it is the concentration of power in the hands of a few. The institutional design logic in a democratic system should then support the establishment of multiple power centres at the national level, and even vertically, between a national and sub-national level.

***Current trends favour the legal approach, manifested by the increasing detail in constitutions, the extension of judicial supremacy over a growing number of issues, and the establishment of new constitutional courts.***

*Dispersal* of power is a term used to describe the effect of assigning exclusive authority to make certain constitutional decisions to multiple autonomous constitutional organs or offices. If the design needs to disperse power, this can be done through horizontal (separation of powers, a higher number of constitutional watchdogs) and vertical (forms of decentralization from devolution to federalism) options. It is possible to disperse power and still create strong national institutions since the dispersal takes place at the national level, where strong executives, legislatures and judiciaries and other watchdogs check each other. Power can be dispersed within the executive, so that it is shared between a president and a prime minister and cabinet, and through constitutional councils that can coerce the executive.

On the other hand, a country which was initially democratic may move towards concentration of power in the hands of an executive due to conflict or persistent national crises, for instance through accretion from prolonged use of state-of-emergency powers. Successful pacification may be needed before power can be de-concentrated from the executive where it had accumulated. *Aggregation* is the term used to describe the effect of reducing the number of autonomous actors or offices that have exclusive power to take constitutional decisions. It can also be seen in the effect of allowing particular constitutional offices to take unilateral action without serious opposition from any other quarter.

Constitution builders may also elevate the goal of maximizing the use of power for the general welfare in contexts of deep division. The constitutional options chosen should then be able to give the government adequate power and the mandate to act. Aggregating power can be seen in terms of scope and within particular institutions and groups. Its net effect is that the institutions at the top have greater scope for action in relation to a number of problems, and that powers are vested in narrowed-down groups which have more power in fusion than they have alone.

The British Westminster Parliament offers an example of great accumulation of power. In terms of group, power is narrowed down to a single political actor, and in terms of scope the Parliament, which is made up of the monarch, Cabinet and legislature, is supreme in all areas. There are drivers of constitutional change who argue that modern states are confronted by problems that require a government with a greater capacity to respond to deal with complex, internationalized and technical problems. This will include the issues mentioned above in relation to constitutional design for democratization—to create equality between groups, to provide mechanisms that offer compensation for redress, and to ensure that no important power relations are insulated from constitutional politics. Lay people mostly want government power to sort out the major post-conflict problems, which may include rampant criminality, restarting a schooling system, lack of telecommunications and transport infrastructure, state officials who are not restrained by law and so on, and in such cases the governmental capacity will require enabling.

Aggregation becomes more conceivable when connections among people are social, economic and cultural with some form of collective identity, so that even distinct groups

in the society—women, and racial and religious minorities—who are concerned with equal treatment within the system seek fair opportunity in it, not outside it. Aggregation then emerges as a possibility because focused power is not only more effective at driving a reform agenda through in favour of the general welfare for all, but it also does so according to rational calculations, with more efficiency. Options that aim to aggregate power when the ties that bind are not strong therefore carry a risk of hegemony of some over others using power for the benefit of those steering the controls at the expense of others.

Aggregation may also be pushed or demanded by constitution builders who are grappling to clarify why the government exists in the first place, usually where political consciousness and citizen awareness are low. It could also be a way to direct capacity building in the state, by identifying the measures to be adopted in policy to improve the

***Democracy needs pluralism in political ideas and checks and balances in relations between the institutions of government. What undermines it is the concentration of power in the hands of a few.***

capacity of the state to satisfy the needs of its citizens. Politicians tend to be attracted to more powerful and prestigious offices. They frequently cite conflict as the reason first to shape constitutional aggregation of state power and second to empower government to survive crisis and be a better risk manager.

Aggregation and dispersal represent a dynamic; they are not static. There is a trend in some states with rich but peaceful or tolerant diversity, such as Spain, to recognize this fact in constitutional systems that disperse power. The experience of conflict or severe national crises in other diversity-rich states, such as Ecuador, has recently pushed the trend towards concentration of power in the executive. Globalization of the terms of inclusion and exclusion has promoted a reflex to adopt power-dispersing designs. Dual citizenship arrangements materialize this factor at the personal level. At the same time, the spin-off from globalization is that the state is weaker but power concentration is a reality, except that power is concentrating in private hands—economic groupings, wealthy families, religious groups and the global media. In response, the trend in some states is to push power back into public politics and to make it effective, leading to the aggregation side. This is a dynamic cycle.

## **4.2. The system of government**

During constitution building, a common approach that has emerged in the last few decades is the establishment of governments of national unity or grand coalitions to oversee the process. In this approach, representation in the executive is not based on a simple majority; rather there is a recognition that national unity requires that differing interests be taken into account. The result is that the executive has consisted of the different parties with a sharing of responsibilities. Whilst this approach has been very popular because it provides key spaces for the most senior leaders, its success is very limited according to empirical studies. If sustained in the design of a system of government in a constitution, the result may be that the executive can become a contested terrain and space for continuing political battles that could undermine good government.

In an alternative approach, the majority of the national leadership has been accommodated in deliberately enlarged legislative bodies. If the legislative body in this form drives the constitution-building process, a result may be that the political agreement is translated into a parliamentary system that elevates the broadest representation. Proportional representation may then be mandated to allow parties to enter the assembly with a low threshold. The risk however is that representation of parties in the assembly undermines the ability and capacity of the legislative assembly to perform its core functions, including making law. In this system, the executive may become hostage to fractional party politics in the assembly.

***A common approach that has emerged in the last few decades is the establishment of governments of national unity or grand coalitions to oversee the process of constitution building. This approach has had very limited success.***

Constitution builders may also need to note the consequences of designing systems of government in relation to size of government, and therefore its cost. The most obvious consequence is that a bigger government is a more costly government. However, a bigger government also means that new vested interests are created.

### 4.3. The role of human rights

Democracy as a normative framework requires constitution builders to support and guarantee civil and political rights. Since rights are indivisible, there are many rights recognized as economic, social, cultural or collective whose recognition completes political rights and makes it possible to realize them. In the context of diversity described below, effective constitutional protection that is broad and equal across all categories of people is not possible except on the basis of a right to equality and non-discrimination. Human rights allow the constitutional dismantling of unjustifiable inequality. The human rights of women, children and people living with disabilities are examples of rights that cut across cultures and identity groups, and which should be guaranteed because of the vulnerabilities faced by these groups, which are sharpened by violent conflict and deep division.

***The recognition of economic, social, cultural or collective rights completes political rights and makes it possible to realize them.***

### 4.4. The recognition of diversity

A legitimate constitution in a deeply divided and diverse society cannot be made without the full participation and inclusion of the potentially contentious groups in the country. It is also accepted that even minority groups have a right to be represented and included in constitution building. Planning for the inclusion of diversity at the initial stages is therefore part of the good start. Constitution builders have considered electoral options when bodies to deliberate the constitution are composed; there are also nomination options in relation to groups that may be under-represented once these

bodies are composed. It is particularly important to ensure diversity in the group that will carry out the actual drafting, which may be a committee or commission rather than an entire plenary of an assembly, convention or conference.

Democratic consent requires procedures to ascertain the general will. Yet nothing is more challenging than ensuring that democratic methods in conflict-affected and polarized states will decide the general will, particularly when it is reduced to an electoral or legislative majority. In contexts where political identities are embedded and not easily changed, elections in themselves will hardly embody a general will and their outcomes

are constantly contested. Decisions made by the majority may be illegitimate if they infringe upon constitutional guarantees; yet agreeing on these guarantees requires the broadest consent which takes time to obtain in contexts of deep division. India, the world's largest democracy, is also one of the most diverse states. So far India has addressed its diversity challenges through liberal individual rights while constitutionally defining special minority status, on the understanding that all rights are derived from the constitution itself.

***Nothing is more challenging than ensuring that democratic methods in conflict-affected and polarized states will decide the general will, particularly when it is reduced to an electoral or legislative majority. In a deeply divided and diverse society a legitimate constitution cannot be made without the full participation and inclusion of the potentially contentious groups in the country.***

Ethnicity, nationality, caste, and other identity-based groups often oscillate in their support for democratization and constitution building depending on what they stand to substantively gain or lose. Recognition in the constitution of principles related to diversity is a starting point. However, to really ensure that official action of the right sort is taken to protect diversity, substantive options will need to guarantee entitlements. Human rights may be one gateway to offer real protection to diversity and are particularly well developed by now in relation to minorities and indigenous people. The recognition of legal or judicial pluralism is also useful, although constitution builders will need to

think about how to resolve conflicts between legal systems. Addressing the representation of diverse groups at the national and other levels of government may require electoral rules and power-sharing arrangements, usually pegged to numerical formulae. The institutional design for substantive options therefore involves several options for consideration.

***To ensure that official action of the right sort is taken to protect diversity, entitlements must be guaranteed. Human rights may be one gateway to offer real protection to diversity and are particularly well developed in relation to minorities and indigenous people.***

Ultimately, the key question underlying the selection of options depends on the goal: whether to recognize diversity in terms of developing a common basis of identity and official action with all groups in one mainstream or, alternatively, to recognize diversity in terms of measures such as reservations and autonomy guarantees, which preserve different spaces in which different diversity groups can operate. Democracy in contexts



of polarization along embedded identity lines is both a solution to problems and a source of other, new problems. Constitution builders in such contexts may need to pay attention to the principles, rules and institutions that deserve to be elevated and protected from normal majoritarian politics in diversity-rich societies. On the whole, practice shows that common proposals to assign religious, ethnic, racial and other well-organized social categories their own distinctive niches, including territorial niches, within national constitutional regimes, are a formidable barrier to problem resolution because they will impede constitutional coordination and not offer incentives for collective action. Bottom-up social movements and the formation of political parties have happened around citizenship identities held in common, not in embedded ethnic identities. Second, political party coalitions and self-interest associations that will deal with widespread inequalities through public politics are more likely to flourish when they are premised on citizenship, not on tribe and native authority.

***Diversity can be recognized in terms of developing a common basis of identity with all groups in one mainstream or by recognizing diversity in measures such as reservations and autonomy guarantees. Democracy in contexts of polarization along embedded identity lines is both a solution to problems and a source of other, new problems.***

#### 4.5. The rule of law

Ultimately, a primary purpose of constitution building is to codify agreements into a legal text that courts will enforce as the supreme law. This is part of constructing a rule of law. The rule of law is important to ensure that constitution building is not ultimately only about sharing the spoils among different political actors. The rule of law will have to be upheld in order to impose necessary limits on political actions. If the process of framing the constitution is driven only by the political interests of the political groups in it, there may be nothing subsequently to constrain their power. It is therefore important that some form of legality is established up front to ensure that even the constitution-building process is bound within a predictable framework of legal rules. In implementation, this helps ensure that the playing field is level for all players who play by the rules that are applicable for everyone.

In terms of substantive outcomes, the rule of law is predicated on the supremacy of a constitution in all spheres of public life. Essentially, each state has a legal framework or system that determines how a constitution becomes supreme law. If still in force, that framework can be used to influence the procedures that negotiators will use to effect constitutional change. If it is weak or non-existent, an alternative legal framework, such as an interim constitution or a previous constitution, may need to be established urgently. The pre-existing legal framework may permit interested parties or new players to question the legality or validity of proposed constitutional changes, hence reducing monopolization of the process by political forces.

Constitution builders could opt for a sovereign body with a legal mandate to frame the constitution, such as the constituent assemblies of Nepal and South Africa. Since the assembly acts from an original and sovereign mandate, the option implies that the

constitution flowing from the body is sanctioned by an original power and is the supreme law. This is the case unless the constitution itself also embodies the supremacy of other laws, as seen in the discussion on building a culture of human rights. In other cases, constitution builders have used a popular referendum to manifest the sovereign will by voting to endorse a new constitution as the supreme law. In Kenya, the referendum was used despite the lack of a precedent in the country once it was popularly accepted that an incumbent executive and legislature, being themselves creations of a pre-existing constitution, lacked the legal mandate to replace the Constitution in its totality. Only the people could do this by virtue of the idea that sovereignty was vested in the people. This option would also be used to substantiate amendments to parts of constitutions that are entrenched.

One question is what should happen where the new constitution excludes the possibility of legal continuity of existing laws. One challenge is whether to revoke all the existing laws immediately, for instance so as to install an entirely new legal order. If some laws must be retained, which ones and for how long? In South Africa one of the earliest implementation problems centred on the issue of legal continuity or its absence. The new Constitution had discontinued local government but the new institutions had not had time to institute new rules for the operation of local government. In the event, President Nelson Mandela invoked executive power to decree new rules to allow local government to operate. This executive action quickly became the subject of a judicial challenge to its constitutionality, principally because the Constitution recognized the separation of powers as a fundamental principle, which was also taken to mean that the legislature could not delegate its law-making power. As though to forestall such a possibility, some constitutions expressly recognize the mandate of the executive to enact by decree bridging laws which last until the legislature enacts legislation under its proper power to deal with the issue. In cases where the old law is defunct, there may be no other option than to allow a temporary remedial action through decree. In cases where the constitution itself revokes the pre-existing law, constitution builders may have to consider transitional options such as the famous *sunset* and *sunrise* clauses from South Africa (see the glossary).

Invalidating old laws has consequences: societal order may depend on legal decisions taken under the old regime. For the sake of good governance and for normative rule-of-law reasons, the constitution may negate all previous laws yet still uphold particular decisions taken in their name. Constitution builders can appoint a special committee or court to examine the validity of such decisions, mandating a case-by-case approach rather than applying sweeping general principles.

Even where constitutions are ushering in an entirely new legal order, there will always be some legal continuity in some areas. For example, new constitutions usually provide for the continuation of citizenship rights accrued in the previous legal order. Most legal systems create rights that constitution builders should not dismiss arbitrarily, particularly if they are protected by other regional or international agreements that precede the new constitution. While constitution drafters can rewrite substantive law, for institutional and rule-of-law reasons they should retain familiar procedural forms

and frameworks, such as tribunal hearings determining the status of accrued rights. By reforming only substantive law, institutional actors such as judges and military staff can continue to apply particular competencies, even if the new constitution will modify their institutions as needed.



# 5. Using this Guide

## 5.1. Goals of the Guide

This Guide is intended for a target audience of people who are involved in building constitutions in their country. It is a tool developed with the benefit of a recent history of widespread constitution building, during which a majority of countries in the world have experienced a constitution-building process. Its goal is to share a growing understanding of constitution building among its practitioners.

The Guide is important first because it is one of only a few tools of this nature that are available to practitioners. Second, it handles issues by emphasizing the importance of contextual learning rather than a one-size-fits-all approach. Its importance will be seen in the way knowledgeable practitioners use it to search for more answers.

## 5.2. The approach of the Guide

The Guide underscores the importance of context in determining constitution-building processes and their outcomes. It is not a blueprint for constitution-building options or a one-size-fits-all manual to be consulted by constitution builders; rather it aims to highlight some of the options that constitution builders have considered and may consider regarding some of the familiar substantive constitutional issues in the context of conflict-affected constitution building.

While the focus of the Guide is on constitutions as key documents in a political system, the approach stresses understanding the constitutional system as a whole. The Guide encourages constitution builders to distinguish between what constitutions say or imply and how they actually work. Examples are often given from constitutions from around the world. These examples should not be taken as endorsements of any given constitution or the provisions being presented. Instead, constitution builders are encouraged to use the examples to think through options that are available and suitable to their own context of constitution building.

Since constitutional issues are interconnected, the meaning of one article may be altered by another article in a constitution. To facilitate this comprehensive view of constitutions, each chapter while dealing with a specific institution approaches it holistically. Therefore each chapter is also self-standing; it allows the target audience to use it according to needs.

The Guide is a tool. It is supported by additional expertise available from International IDEA through direct assistance, training and a dedicated website.

## **5.3. Chapter overviews**

### **5.3.1. Chapter 1: An Introduction**

In getting started, constitution builders often have to make two kinds of decisions: those related to the process dimension—for example, the procedures, institutions, rules, timing and responsibilities for decision making—and, second, those related to content. In conflict-affected contexts, legitimacy often will hinge on these two decisions. This chapter emphasizes the importance of context as the key guide to constitution builders as they start a process of constitution building. It is structured as follows.

- First, the general observations and key assumptions that underline the chapter are identified.
- Second, based on a short overview of global constitution-building practice, general challenges likely to be found across contexts of conflict-affected constitution building are framed.
- Third follows a discussion of aspects of the process dimension in relation to securing legitimate outcomes.
- Fourth, the discussion is connected to some of the content issues that flow or emerge from the process.
- Fifth, chapter 1 introduces the Guide and how to use it and gives an overview of the other chapters that comprise the Guide.

### **5.3.2. Chapter 2: Principles and Cross-cutting Themes**

Constitutions play a role in establishing and elevating certain principles that are central to creating a sense of unity and shared values. Their meaning is more than merely symbolic, however. Principles have the capacity to cast light on a constitution's meaning and operation. This chapter explores how constitutional principles develop, whether through negotiation and explicit incorporation into the constitution, or by subsequent emergence from the text, structure, and implementation of the constitution. It also explores the role that constitutional principles play within government—whether they provide support for certain constitutional interpretations or give guidelines to policymakers. This chapter also explores how the embracing of constitutional principles relates to cross-cutting themes addressed in a constitution. It discusses selected themes—the rule of law, the management of diversity, gender equality, religion, and international relations—and how a constitution may address them, through its language or through

specific provisions. The chapter explores how contextual forces and trends within a country can shape the form and meaning of constitutional principles and provisions related to these themes.

**Table 3. Issues highlighted in chapter 2**

Issues	Questions
<b>1. Different roles that constitutional principles can play</b>	<ul style="list-style-type: none"> <li>• What purposes can the expression of broad principles serve in a constitution?</li> <li>• How do constitutional principles represent the values, aims and purposes of a government and a nation?</li> <li>• What value do principles have as symbolic, educational, or legitimizing elements of constitutions?</li> <li>• How do constitutional principles help to create agreement among divided groups?</li> <li>• How do principles inform the meaning of the constitution?</li> </ul>
<b>2. Enshrining and enforcing constitutional principles</b>	<ul style="list-style-type: none"> <li>• Where are constitutional principles found in constitutions?</li> <li>• What are founding provisions?</li> <li>• What is a preamble?</li> <li>• What are directive principles?</li> <li>• Are some principles unwritten? Can principles be derived from a constitution?</li> <li>• Do constitutional principles provide guidance to governments?</li> <li>• Are constitutional principles enforced by courts?</li> </ul>
<b>3. Democratic governance</b>	<ul style="list-style-type: none"> <li>• How do constitutions commit countries to democratic governance?</li> <li>• Does the form of government express a commitment to democratic governance?</li> <li>• What legal safeguards are there to protect this principle?</li> <li>• What political safeguards are there to protect this principle?</li> </ul>
<b>4. Rule of law</b>	<ul style="list-style-type: none"> <li>• How do constitutions promote the rule of law?</li> <li>• What legal safeguards are there to protect this principle?</li> <li>• What political safeguards are there to protect this principle?</li> </ul>

<b>5. Principles related to diversity</b>	<ul style="list-style-type: none"> <li>• How can constitutional principles contribute to the management of diversity?</li> <li>• What legal safeguards are there to protect principles related to diversity?</li> <li>• What political safeguards are there to protect principles related to diversity?</li> </ul>
<b>6. Principles related to gender</b>	<ul style="list-style-type: none"> <li>• How do constitutional principles contribute to promoting gender equality?</li> <li>• How does the language of the constitution reflect a commitment to gender equality?</li> <li>• How can systems of representation contribute to gender equality?</li> <li>• How can rights provisions contribute to gender equality?</li> <li>• What legal safeguards are there to protect this principle?</li> <li>• What political safeguards are there to protect this principle?</li> </ul>
<b>7. A constitution's relationship to religion</b>	<ul style="list-style-type: none"> <li>• How does a constitution express the state's relationship to religion?</li> <li>• How can a constitution maintain a commitment to freedom of religion?</li> </ul>
<b>8. Principles related to international law</b>	<ul style="list-style-type: none"> <li>• How do constitutions incorporate a commitment to international law?</li> <li>• How are international obligations incorporated into a state's internal legal order?</li> </ul>

### 5.3.3. Chapter 3: Building a Culture of Human Rights

There are several reasons for having *human rights* in a constitution; they indicate restrictions on governmental power, they are a building block for democracy, they establish a foundation for building a human rights culture, and they are integral to the legitimacy of the constitution. A *human rights culture* gives individuals and groups space to organize and aggregate their interests. It permits ordinary people to challenge public officials and state institutions. It is about how human rights 'work' and therefore goes beyond the constitution and touches on other complex dimensions of society. In terms of international law, human rights are universal, inalienable and indivisible. Yet the reason for including and protecting some rights in the constitution has become as contested as the nature and purpose of the constitution itself. A key challenge is not only to agree on a bill of rights, but to use human rights protections to contribute to the peaceful coexistence of socially diverse and conflict-affected groups. This goal is not tension-free, as can be seen from the sometimes intractable debates on human rights issues between



different segments of society during constitution building. Minority group rights to benefit from special measures, economic rights that touch on claims on national resources, and the rights of women to equality in family relations are among these. Another challenge is to implement rights, which clearly needs institutional guarantees to be in place. While the legal enforcement of fundamental rights is comparatively pervasive across legal traditions, constitution builders have also sought out dynamic implementation frameworks that also give room for politics to evolve broader consensus on human rights.

**Table 4. Issues highlighted in chapter 3**

Issues	Questions
<b>1. Defining your human rights culture</b>	<ul style="list-style-type: none"> <li>• Why should human rights be included in a constitution?</li> <li>• Which rights will be included in a constitution?</li> <li>• How does the experience of conflict and the contextual situation determine which rights will be included or excluded in the constitution?</li> <li>• How does thinking in terms of a human rights culture rather than focusing only on human rights options in constitutions assist constitution builders to approach rights more holistically or comprehensively?</li> </ul>
<b>2. Constitution-building processes and human rights culture</b>	<ul style="list-style-type: none"> <li>• How does the process used to frame a constitution relate to what it ultimately contains concerning human rights?</li> <li>• How do the nature or rationale of a constitution and the kind of political system it establishes provide a textual framework to shape the scope of human rights?</li> </ul>
<b>3. Human rights culture in a conflict context</b>	<ul style="list-style-type: none"> <li>• How should constitution builders treat a past culture of gross violation of human rights in order to build a new constitutional culture of human rights?</li> <li>• How does the system of allocating power in the light of societal conflict shape the constitutional human rights culture?</li> <li>• Does it matter for the implementation of human rights if a constitution elevates political dialogue or (alternatively) treats judicial or legal approaches as more preferred processes for the resolution of serious social disputes?</li> <li>• How do conflicts between domestic laws and international human rights law affect a human rights culture?</li> </ul>

<p><b>4. Deciding on human rights options in constitutions</b></p>	<ul style="list-style-type: none"> <li>• What criteria do constitution builders generally consider before deciding on what human rights options to place in a constitution?</li> <li>• What implications do distinctions between individuals, groups and people have for the human rights language in a constitution?</li> </ul>
<p><b>5. Enforcement of human rights</b></p>	<ul style="list-style-type: none"> <li>• Why is it critically important that constitution builders think carefully about enforcement up front when framing human rights options in a constitution?</li> <li>• What issues concerning enforcement will generally arise?</li> </ul>
<p><b>5. Human rights as factors of social tension</b></p>	<ul style="list-style-type: none"> <li>• Can constitutional guarantees for human rights risk increasing conflicts in societies, instead of mitigating them?</li> <li>• What kinds of tensions arise in the discussion of human rights during constitution building?</li> <li>• Which issues are likely to draw greater tensions during constitution building in diverse contexts?</li> <li>• What risks accompany constitutional implementation when it comes to guarantees for rights that are highly contested, and how can these be minimized?</li> </ul>
<p><b>6. Consensus on human rights culture amidst divisiveness of specific rights</b></p>	<ul style="list-style-type: none"> <li>• Are there rights that are more likely to spark divisiveness than others?</li> <li>• What tensions do guarantees of minority rights give rise to and how can constitution builders increase consensus on these rights?</li> <li>• What tensions do guarantees of the rights of women give rise to and how can constitution builders increase consensus on these rights?</li> <li>• What tensions do guarantees of economic, social and cultural rights give rise to and how can constitution builders increase consensus on these rights?</li> </ul>
<p><b>7. Conclusion</b></p>	<ul style="list-style-type: none"> <li>• When it comes to using a constitution-building process to build a culture of human rights, what is it important for constitution builders to be aware of?</li> </ul>

### 5.3.4. Chapter 4: The Design of the Executive Branch

According to textbooks, the executive branch represents one of the three potential branches of government, traditionally with a distinct objective—to enforce or implement the law as drafted by the legislature and interpreted by the judiciary. Practically, the executive branch can play a uniquely powerful role and is often viewed as the natural

leader or ruler of a country, personifying the country's image nationally and globally. Unsurprisingly, then, the election of the chief executive is an important event that can sow great disharmony, particularly in post-conflict societies with pronounced ethnic identification. Indeed, many internal conflicts start or re-emerge as part of a struggle about keeping, aggregating and/or extending executive power, be it within or beyond the constitutional framework.

The process of drafting a constitution is not a purely academic exercise in which actors seek the best technical solution available for their country. The drafters and negotiators of a constitution are also political actors/parties aiming to translate their own political agendas into the text of the constitution. Thus, constitutional design often represents a compromise between various actors with different interests and expectations.

By offering constitutional options in a comparative, structured and coherent manner, the chapter on the executive branch attempts to support relevant actors to translate their agendas into a constitutional format as well as to facilitate the accommodation of various competing interests towards a viable constitutional compromise. The chapter predominately focuses on constitutional options to de-concentrate executive powers. Without ignoring the potential benefits of a strong national executive in specific cases, the chapter presumes that many violent conflicts are at least in part caused or sustained by an overly centralized executive, concentrating powers on a few and marginalizing many. The bottom line of de-concentrating executive powers is to allow more actors to be involved in decision-making processes, be it within the executive or as part of institutional checks and balances vis-à-vis other branches of government.

Table 5 highlights the questions addressed in the chapter on the executive branch and might help constitution builders to identify the issues relevant in their specific context and their country.

**Table 5. Issues of the executive branch and related key questions as reflected in chapter 4**

Issues	Key questions
<b>1. System of government</b>	<ul style="list-style-type: none"> <li>• Shall the head of government be directly elected by the people for a fixed term or shall s/he derive his/her legitimacy from the legislature, making his/her origin and survival dependent on the legislature?</li> <li>• Shall the head of state also be the head of government? If so, shall s/he be elected by the people (presidential system) or by the legislature (South Africa, Botswana)?</li> <li>• Shall there be a dual executive with a directly elected head of state and a head of government that is selected by both the head of state and the legislature?</li> </ul>

<p><b>2. Designing the executive branch at the national level</b></p>	<ul style="list-style-type: none"> <li>• Shall the position of head of government (and head of state) be exercised by one single person or rather by a collegial executive, where the presidency is composed of several members?</li> <li>• If the latter, shall all members of the presidency have the same powers or shall they have weighted powers, requiring the presidency to decide collectively only on important issues?</li> <li>• In the case of a dual executive, shall the head of state have the power to appoint/select/dismiss the head of government?</li> <li>• In a dual executive, shall the head of state be involved in appointing and/or dismissing cabinet members or shall this power vest exclusively in the head of government?</li> </ul>
<p><b>3. Presidential term limits</b></p>	<ul style="list-style-type: none"> <li>• Shall there be term limits for a directly elected president? How can term limits be protected against easy amendment?</li> </ul>
<p><b>4. Decentralization of executive powers</b></p>	<ul style="list-style-type: none"> <li>• From a vertical perspective, shall there be various levels of administration or levels of government in the country?</li> <li>• If the latter, shall the respective head of administration be elected by the people of that unit or shall s/he be appointed by the national executive?</li> <li>• Shall the head of administration/government implement national policies only or shall s/he be empowered to determine the policies with regard to specific issues autonomously (either by himself/herself or through a legislative assembly at that level) and represent that level of government?</li> <li>• Shall the level of government be able to raise its own revenues?</li> </ul>
<p><b>5. Institutional powers of the executive</b></p>	<ul style="list-style-type: none"> <li>• Shall the head of the executive have the power to dissolve the legislature? If yes, under which circumstances?</li> </ul>
<p><b>6. Institutional checks on the executive</b></p>	<ul style="list-style-type: none"> <li>• Shall the head of the executive have exclusive control over the cabinet or shall the control be shared with the legislature?</li> <li>• Shall there be provision for a political vote of no confidence by the legislature against the head of government?</li> <li>• Who shall be involved in an impeachment procedure against the head of state/head of government?</li> <li>• Shall there be the opportunity for citizens to recall the head of state under specific circumstances?</li> </ul>

### 7. Substantive powers of the executive

- Shall the executive have exclusive control over declaring a state of emergency or should other actors (e.g. the legislature) be involved as well?
- Shall the executive have exclusive control over declaring war or should other actors (e.g. the legislature) be involved as well?
- Shall the executive have exclusive control over granting pardons/amnesty or should other actors (e.g. the legislature) be involved as well?
- Shall the executive be involved in the law-making process? If so, shall there be the possibility for the executive to legislate by decree and what kind of limitations shall apply?
- Shall the executive have the right to initiate legislation, in some areas even exclusively?
- Shall the executive have the right to veto bills? If so, shall it be a purely suspensive veto or shall a super-majority of the legislature be required to overcome the presidential veto, or shall there even be an absolute veto in some areas?
- Shall the executive have the right to question the constitutionality of a bill before it becomes law?

#### 5.3.5. Chapter 5: The Design of the Legislature

The three basic functions of the legislature are representation, law-making, and oversight. As the most representative institution in politics, at its best, the legislature represents the political arena at which society's divergent opinions compete. In a post-conflict setting, previously warring groups struggle to replace violence and hatred with politics. Legislative design in such a setting can facilitate this evolution, by constructing a forum for the expression, consideration and accommodation of different opinions.

More pragmatically, constitutional design often represents a compromise between various actors with different interests and expectations. Several post-conflict stakeholders, including spoilers and perpetrators of violence, will demand accommodation. Thus, constitution builders may not be able to achieve the best technical constitution possible but may succeed by securing the best constitutional compromise available. Because political parties predominantly provide the members of the legislature, their interests—in addition to the visions of their leaders—often dominate the process of designing the legislature. Dominant parties might negotiate a 'winner-takes-all' model not only concerning the electoral system, but also concerning the entire legislative design—aggregating legislative power by permitting a simple majority to exercise far-reaching authority. Parties representing a minority group, be it religious or cultural, might prefer a different design.

Often there are high expectations of the legislature and its role in the governmental

structure. Especially in scenarios where people have suffered from authoritarian rulers running a country on the basis of a strongly centralized executive branch, relief is awaited from a viable legislature. Adherents of democracy might not find anything problematic about a potent legislature that aggregates considerable powers. The legislature is perceived as a deliberative branch in which bargaining and compromise, followed by elections, are the order of the day.

However, designing a legislative branch of government also comes with challenges: constitution builders may consider that untrammelled legislative power under simple majority rule can also pose a threat of tyranny for minority groups that are not sufficiently represented.

The chapter on the legislature examines a variety of constitutional options for a legislative design. It organizes this variety along the three basic functions: representation, oversight, and lawmaking. It adds two further elements: the degree of the autonomy of the legislature and additional substantive tasks of the legislature next to law-making. Table 6 highlights the questions addressed in the chapter on the legislature and might help constitution builders to identify the issues relevant in their specific context and their country.

**Table 6. Issues of the legislature and related key questions as reflected in chapter 5**

Issues	Key questions
<p><b>1. System of government</b></p>	<ul style="list-style-type: none"> <li>• Shall the choice and the survival of the head of government depend on the legislature?</li> <li>• Or, if the functions of a head of state and head of government are held by one person, shall that person depend on the will of the legislature (South Africa, Botswana)?</li> <li>• Or, in a dual executive, where substantive executive powers are shared between a directly elected head of state and a head of government, what role shall the legislature have in the selection/dismissal of the head of government? Shall the legislature be involved in the selection procedure? Shall the right of dismissal fall within the exclusive competence of the legislature?</li> <li>• Or shall the head of the executive (being the head of state and the head of government) be separated from the legislature and directly elected by the people?</li> </ul>

<p><b>2. Designing the composition of the legislature: electoral systems, reserved seats, candidate quotas, external appointments</b></p>	<ul style="list-style-type: none"> <li>• According to which electoral system shall the legislature be composed? Shall there be a simple plurality system or a proportional representation system or a mixture of the two?</li> <li>• In the case of proportional representation systems, shall there be a minimum threshold for representation?</li> <li>• Shall there be reserved seats for minorities and women, and if so, how should those seats be filled?</li> <li>• Shall there be candidate quotas for women?</li> <li>• Shall the legislature be exclusively elected by the people or shall some seats be filled through appointments (in a unicameral legislature)?</li> </ul>
<p><b>3. Designing the voting procedure</b></p>	<ul style="list-style-type: none"> <li>• Shall all laws in the legislature be passed by a simple/absolute majority of members or shall there be a double majority voting system with regard to some sensitive issues in order to protect minorities?</li> </ul>
<p><b>4. Second legislative chamber</b></p>	<ul style="list-style-type: none"> <li>• Shall the national legislature be composed of one or two chambers? If there is a second legislative chamber, who shall be represented in it? Territorial units or chiefs and elders, or interest groups, or a mixture of the three?</li> <li>• How should members of the second chamber be selected? Shall they be elected by the respective groups or from the people in the territorial units or shall they be appointed by the national government or a mixture of both?</li> <li>• If the second chamber represents territorial units, shall all units be represented equally (e.g. two members per region regardless of the size and population of the regions)?</li> <li>• What are the powers of the second chamber in relation to the first chamber?</li> <li>• With regard to the legislative process, shall both chambers have equal powers (absolute veto of the second chamber)? Or shall the second chamber only be able to delay the process? Or shall it be determined depending on the subject?</li> </ul>
<p><b>5. Decentralization of legislative powers</b></p>	<ul style="list-style-type: none"> <li>• From a vertical perspective, shall there be legislatures at various levels of government in the country?</li> <li>• If so, what kind of powers shall be transferred to the lower levels of governments?</li> </ul>

	<ul style="list-style-type: none"> <li>• How shall legislative powers be shared? Shall there be exclusive powers for the regional level or even the local level of government? Or shall there be concurrent powers, or shared powers? Which regulation prevails in the case when both the national level and the regions regulate?</li> <li>• What powers are of special importance for the lower levels of government, e.g. for the protection of their identity?</li> </ul>
<p><b>6. Institutional powers of the legislature</b></p>	<ul style="list-style-type: none"> <li>• Shall the legislature have the power to dismiss the head of government for political reasons?</li> <li>• Shall the legislature have the exclusive power to dismiss the head of the executive for legal wrongdoings (impeachment)? Or shall it at least be involved in the impeachment process?</li> <li>• Shall the legislature have the power to summons members of the executive or even start investigations?</li> <li>• Shall the legislature have some immediate control with regard to the composition of the cabinet?</li> </ul>
<p><b>7. Institutional checks on the legislature</b></p>	<ul style="list-style-type: none"> <li>• Shall the legislature be subject to dissolution before the end of its term?</li> <li>• If yes, shall the dissolution be based on prior legislative (in)action or shall it be at the full discretion of the head of the executive?</li> <li>• Shall there be the opportunity for citizens to recall members of the legislature under specific circumstances?</li> </ul>
<p><b>8. Law-making powers of the legislature</b></p>	<ul style="list-style-type: none"> <li>• Shall the legislature be the sole law-maker or should there be the opportunity for the executive to legislate by decree in certain areas?</li> <li>• Shall the legislature be the only relevant actor in the legislative process? Or shall the executive have the right to veto bills? If so, shall it be a purely suspensive veto or shall a super-majority of the legislature be required to overcome the presidential veto, or shall there even be an absolute veto in some areas?</li> <li>• Shall the executive have the right to question the constitutionality of a bill before it becomes law?</li> </ul>
<p><b>9. Other legislative involvement</b></p>	<ul style="list-style-type: none"> <li>• Shall the legislature be involved in declaring a state of emergency?</li> <li>• Shall the legislature be involved in declaring war?</li> <li>• Shall the legislature be involved in granting pardons/amnesty?</li> </ul>



### 5.3.6. Chapter 6: The Design of the Judiciary

Constitutions assign to the judicial branch the responsibility for settling disputes and interpreting the law. Most constitutions also provide the judiciary with the power of constitutional review as a safeguard to ensure that legislation and government action conform to the requirements of the constitution. The powers and procedures of constitutional review vary greatly among constitutions. A number of options related to the design of constitutional review are explored in this chapter. Additionally, the chapter discusses the balance of power between the judiciary and other branches. While securing judicial independence is vital, accountability and transparency in legal rulings are also essential. Finally, the chapter explores one element of the internal structure of the judiciary that is especially interesting in contexts of division: legal pluralism and the possibilities for the harmonious coexistence of multiple legal systems under a single constitution.

**Table 7. Issues relating to the judiciary highlighted in chapter 6**

Issues	Questions
<b>1. Role of the judiciary</b>	<ul style="list-style-type: none"> <li>• What is the role of the judicial branch?</li> <li>• How does the judiciary contribute to ensuring the rule of law?</li> <li>• What checks and balances exist between the judiciary and other branches?</li> </ul>
<b>2. Constitutional review</b>	<ul style="list-style-type: none"> <li>• What is the role of the judicial branch in enforcing the guarantees of the constitution?</li> <li>• What laws and decisions can be reviewed in a process of constitutional review?</li> <li>• Which courts can exercise judicial review?</li> <li>• What are the circumstances under which review can take place?</li> <li>• When does constitutional review take place?</li> </ul>
<b>3. Judicial powers</b>	<ul style="list-style-type: none"> <li>• What is the role of the judiciary in law-making?</li> <li>• What is the role of the judiciary in amending the constitution?</li> <li>• What checks may the judiciary exercise over other branches?</li> <li>• How is the judiciary involved in the administration of elections and political parties?</li> </ul>
<b>4. Judicial independence and accountability</b>	<ul style="list-style-type: none"> <li>• Why is judicial independence important?</li> <li>• What mechanisms exist to ensure accountability of the judiciary?</li> <li>• How are judges selected? Who selects them? Under which criteria?</li> </ul>

	<ul style="list-style-type: none"> <li>• How long might judges serve?</li> <li>• How are judges removed?</li> </ul>
<b>5. Legal pluralism</b>	<ul style="list-style-type: none"> <li>• How can a constitution bring together multiple legal systems?</li> <li>• How does legal pluralism contribute to the legitimacy of legal systems?</li> <li>• What happens when legal systems existing under a constitutional conflict?</li> </ul>

### 5.3.7. Chapter 7: Decentralized Forms of Government

Decentralization generally occurs for two reasons: (a) to locate the delivery of services closer to the people, for efficiency and accountability reasons; and (b) to promote harmony among diverse groups within a country, permitting a certain degree of self-governance. Particularly in societies fragmented by violent conflict, decentralization may support the peaceful coexistence of diverse groups, cultures and religions.

Decentralization includes a formal and a substantive element. Whereas the formal element addresses the structural configuration of government, the substantive element concerns the actual depth of decentralization, perhaps best measured in terms of administrative, political and fiscal decentralization. Table 8 highlights the questions addressed in the chapter on decentralization and might help constitution builders to identify the issues relevant in their specific context and their country.

**Table 8. Issues of decentralization and related key questions as reflected in chapter 7\***

Issues	Key questions
<b>1. Levels of government</b>	<ul style="list-style-type: none"> <li>• How many levels of government shall there be and why? Just the national level and the regions or shall there be additional levels of government (e.g. local government)?</li> <li>• How many levels of administration shall there be to facilitate the implementation of governmental policies?</li> <li>• Shall a level of government be introduced symmetrically throughout the country or asymmetrically in some areas only?</li> <li>• If there are more than two levels of government (national level and regions), shall all levels of government be established and regulated directly in the constitution?</li> </ul>

	<ul style="list-style-type: none"> <li>• Or shall the regional level have the power to decide on additional lower levels of government or administration, define their boundaries, transfer competencies and/or transfer resources?</li> <li>• Or shall there be a middle way—some basic mandatory or optional organizational rules in the constitution as well as certain flexibilities for the regions?</li> </ul>
<p><b>2. Delimitation of regional boundaries</b></p>	<ul style="list-style-type: none"> <li>• What criteria shall be used (ethnic, linguistic, religious, geographic, historical, economic, pre-existing administrative units, conflict potentials, others, combinations of these)?</li> <li>• Shall there be minimum requirements (minimum number of regions, minimum size of population, minimum level of resources?)</li> <li>• Shall regional boundaries be defined in the constitution or shall only criteria be included in the constitution?</li> <li>• Shall the population of prospective provinces have a say in the delimitation process? Shall minorities within prospective regions have a say in the delimitation process?</li> <li>• Shall there be timelines in the constitution (transitory provisions) for deciding on establishing provinces?</li> <li>• Shall the constitution include a procedure for changing regional boundaries, for establishing new regions, or for merging regions?</li> <li>• If yes, by whom and how can boundary change be initiated?</li> <li>• Who shall have a say in the procedure—the national level, the regions concerned, minorities within concerned regions, or all of these?</li> <li>• Shall there be specific criteria, e.g. minimum size of population, economic viability, to limit boundary changes?</li> <li>• Shall there be special majority requirements, consultation procedures, referendums?</li> </ul>
<p><b>3. Depth of decentralization</b></p>	<ul style="list-style-type: none"> <li>• What degree of administrative decentralization is envisaged for the subunits?</li> <li>• Shall issues be delegated to lower levels of administration to facilitate implementation of policies?</li> <li>• Or shall subunits have the power to decide on how to address the issue?</li> </ul>

	<ul style="list-style-type: none"> <li>• Shall the degree of administrative decentralization be symmetrical throughout the country or asymmetric, considering the existence of minorities in some areas?</li> <li>• What degree of political decentralization is envisaged for the subunits?</li> <li>• Shall the subunit be able to elect those responsible for implementing national policies?</li> <li>• Or shall the subunits also elect a legislative assembly to enact relevant laws with regard to the issue devolved (requires devolution as well as administrative decentralization)?</li> <li>• What degree of fiscal decentralization is envisaged for the subunits?</li> <li>• What minimum resources do the respective levels of government need in order to exercise their powers?</li> <li>• What sources of revenue shall be allocated to the different levels of government?</li> <li>• Shall revenue bases be shared or attributed exclusively to one level only?</li> <li>• Who will tax the income of persons and companies, sales, services, land, vehicles, among other things?</li> <li>• How and by whom shall rates for taxes, duties and royalties be set?</li> <li>• Shall there be fiscal competition between subunits and different financial burdens for citizens?</li> <li>• How shall revenues be distributed? Who shall be in charge of revenue distribution? Shall there be conditional and non-conditional grants? Shall the rules/quotas for distribution be regulated in the constitution? Are there regular review mechanisms to readjust the attribution of revenues?</li> <li>• How shall differences in the financial capacity and service provision costs of provinces be addressed? Shall there be equalization mechanisms? How shall equalization take place? To what level? By whom? Who decides?</li> </ul>
<p><b>4. Organization of decentralization</b></p>	<ul style="list-style-type: none"> <li>• If subunits have the right to self-organization, will the constitution provide an interim organization until provinces can decide on their own organization?</li> <li>• Or shall the internal organization of subunits be defined in the constitution (and national laws)?</li> </ul>

- Or shall the constitution establish standards and guidelines for the subunits on how to organize themselves or provide different forms of organization for the subunits to choose from?
- What kind of exclusive powers shall the national level/ regional level or even local level have?
- What kinds of powers shall be concurrent? Which regulation prevails in the case when both the national level and the regions regulate?
- Shall there be shared powers, e.g. the national level defines the policy or standards, while the regional level administers and enacts bylaws?
- What criteria shall be applied for the distribution of powers? Who decides?
- What powers are of special importance for the lower levels of government, e.g. for the protection of their identity?
- Shall all subunits have the same amount of powers or shall asymmetries be possible?
- Who shall have the residual power (the power to decide when the constitution is mute), the centre or the provinces?
- How shall powers be listed in the constitution, e.g. in schedules?
- Shall all powers be shared in such a way that the national legislature has the power to draft a law, whereas it is within the competence of the subunit's executive to implement that law?
- Shall there be a judiciary at the level of subunits?
- If so, how shall it be organized? What is the relationship of the regional judiciary to the national judiciary (almost separate or all established under national law, or lower-level courts set up by the provinces and higher-level courts by the centre)?
- How far shall the national level have the possibility to delegate powers to the subunits? Shall the national level have the possibility to delegate powers only to some selected regions? How far shall subunits have the possibility to delegate powers to the centre or to lower levels of government?

<p><b>5. Legal safeguards for the decentralization package</b></p>	<ul style="list-style-type: none"> <li>• Shall there be a mechanism established that requires the regions' consent if the decentralization package is to be altered?</li> <li>• If there are substantive powers transferred to the local level, shall their consent be required as well for the alteration of that transfer?</li> </ul>
<p><b>6. Conflict resolution mechanisms for the decentralization package</b></p>	<ul style="list-style-type: none"> <li>• What kind of dispute resolution mechanisms shall be foreseen? Shall there be special courts, regular courts, direct jurisdiction of the supreme court for specific disputes?</li> </ul>

\* This is an adjusted and redesigned template informed by the 'road map to federalism' in Töpperwien, Nicole, 'Input Papers on Federalism prepared for the Nepali Swiss Forum on Federalism' (no publisher, no date), available at <[http://www.swiss-cooperation.admin.ch/nepal/en/Home/.../resource\\_en\\_178456.pdf](http://www.swiss-cooperation.admin.ch/nepal/en/Home/.../resource_en_178456.pdf)> (accessed 28 May 2011).

## 6. Conclusion

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Constitution building is a political process that is vulnerable to prevailing circumstances. While constitution builders attempt to design processes and substantive outcomes that will be legitimate and respond to short- and long-term problems, the future remains uncertain. The success of constitution building may depend on factors beyond the constitution itself. However, constitution builders can influence how a process is designed and in particular its inclusiveness and the reduction of political monopolization by a few groups. Getting the start right can give a major impetus to the successful completion of constitution building, leading to implementation of a constitution that functions the way it was meant to.

In getting started at constitution building, practitioners must anticipate a number of challenges, which can take multiple forms. These challenges will be context-specific, rooted in a state's history or in the immediate circumstances prompting the constitution-building process, and others will emerge as the process progresses. Constitution builders can identify general and particular challenges and plan to overcome these from the start.

Processes of constitution building that include all legitimate groups, actors and stakeholders for the sake of democratic inclusion are more likely to result in institutional choices that strengthen the constitution-building process in addition to democratization. Knowing this, constitution builders may then be in a position to set criteria to gauge the quality or level of their democratic constitution building, premised on inclusion and participation.

A constitution may not settle every material issue. Practitioners may debate what issues to include in the constitution and at what level of detail. Practitioners of course are free to design constitutions according to local judgement. Constitution builders may need to manage spoilers so that the constitution enters into force with the trust of a wider range of actors, to permit entrenchment in public institutions and government. Finally, constitution builders may need to manage expectations, particularly of the marginalized:

while attaining their support may require expanding official safety nets, drawing them into the mainstream may take time.

**Practitioner quote**

‘Constitution-drafting is an exercise for historians, sociologists, anthropologists, philosophers, writers and poets—for all the men and women who have suffered injustice throughout generations and have mastered the courage to bare their souls and put them into binding words; to leave it to professional politicians is to invite in a moral hydra; to leave it to jurists alone is to invite in the soulless abstraction of normativism. History can hardly teach a more painful lesson.’

*Torquato Jardim, former Minister and constitutional advisor to the Constitutional Commission, Brazil*



# Notes

<sup>1</sup> These are some of dates that illustrate the process of constitutional building since the independence of Costa Rica:

- Independence from Spain 1821;
- Member of the Federal Republic of Central America from 1823 to 1840;
- Constitution of 1825, Ley fundamental del estado libre de Costa Rica;
- Constitution of 1844, Constitución Política del Estado Libre y Soberano de Costa Rica;
- Constitution of 1847, Constitución Política de Costa Rica;
- Constitution of 1848, also called the ‘reformed constitution’; and
- later constitutions: 1859, 1869, 1871, 1917, 1949.

Universidad de Costa Rica, *Constituciones políticas de Costa Rica 1821–2010* (2010), <[http://esociales.fcs.ucr.ac.cr/index.php?option=com\\_content&view=article&id=46&Itemid=193](http://esociales.fcs.ucr.ac.cr/index.php?option=com_content&view=article&id=46&Itemid=193)>; Obregón Quesada, Clotilde, *Colección: Las constituciones de Costa Rica* (5 vols) (2009).

<sup>2</sup> The first Constitution of Bolivia was approved on 19 November 1826 by the Constituent Assembly (Congreso General Constituyente de la República Boliviana). Later constitutions are those of 1831, 1834, 1839, 1843, 1851, 1861, 1868, 1871, 1875, etc. See <<http://www.constituyentesoberana.org/info/?q=historia-constituciones-bolivia>> and <<http://www.cervantesvirtual.com/portal/constituciones/constituciones.shtml>>.

<sup>3</sup> East European countries have also been increasingly active in constitution building and many states have adopted new constitutions in the last two decades, such as Belarus, Bulgaria, the Czech Republic, Estonia, Kazakhstan, Kyrgyzstan, Lithuania, Romania, Russia, and Slovenia. Ludwikowski, Rett R., *Constitution-Making in the Region of Former Soviet Dominance* (Durham, NC: Duke University Press, 1996).

<sup>4</sup> United Nations, ‘United Nations Assistance to Constitution-making Processes’, Guidance Note of the Secretary-General (April 2009; no document number), available at <[http://www.unrol.org/doc.aspx?n=Guidance\\_Note\\_United\\_Nations\\_Assistance\\_to\\_Constitution-making\\_Processes\\_FINAL.pdf](http://www.unrol.org/doc.aspx?n=Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf)>.

## Key words

Interim arrangements, Role of international actors, External actors, Fragile states, State fragility, Transitional justice, Government of national unity, Enactment, Referendum, Promulgation, Participation, Constituent assembly.

# Additional resources

Many institutions are engaged in researching and publicly providing knowledge options for discussion. Some of these actors specialize in a particular policy area or work only in particular regions. Other resources that can support practitioners' work include the following.

- **UNDP Crisis Prevention and Recovery Programme**

<<http://www.undp.org/cpr/>>

The United Nations Development Programme (UNDP)'s Crisis Prevention and Recovery Programme works to aid countries struggling with conflict and violence by providing risk reduction, prevention, and recovery support. The website has programmes and resources concerning early crisis recovery, gender equality, the rule of law, and state building. It also has a 'Practical Guide' to needs assessment in a post-conflict situation.

- **USIP Center for Post-conflict Peace and Stability Operations**

<<http://www.usip.org/programs/centers/center-post-conflict-peace-and-stability-operations>>

The United States Institute of Peace (USIP), an independent organization funded by the US Congress, created the Center for Post-Conflict Peace and Stability Operations to conduct research, identify best practices, support training and education efforts, and develop tools for post-conflict and peace stability operations. The USIP also has programmes and publications on peace building, the rule of law, and constitution building to promote stability in conflict-affected areas of the world.

- **ConstitutionNet**

<<http://www.constitutionnet.org>>

ConstitutionNet, a global online resource, was established as a joint initiative of International IDEA and Interpeace and is maintained by International IDEA with funding from the government of Norway. It aims to service the knowledge needs of an expanding group of those involved in constitution building. The site provides an online edition of this Guide, as well as access to and information about other knowledge tools, including a training curriculum, discussion papers and a virtual library of materials compiled from selected processes globally.

- **International Institute for Democracy and Electoral Assistance**

<<http://www.idea.int>>

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization that supports sustainable democracy worldwide. Its mission is to support sustainable democratic change by providing comparative knowledge, assisting in democratic reform, and influencing policies and politics. IDEA's website provides information on regional constitution-building processes, interviews with national practitioners, and the State of Democracy tool which practitioners may use to gauge citizens' perceptions of democracy deficits, including from a constitutional angle.

- **ConstitutionMaking.org**

<<http://www.constitutionmaking.org/>>

ConstitutionMaking.org is a joint project of the Comparative Constitutions Project (CCP) and the USIP. Its goal is to provide designers with systematic information on design options and constitutional text. The organization's website compiles resources, drafts reports on constitution-making trends, and provides a forum for discussion of a range of constitutional issues, as well as a database of constitutions. It also has a blog on constitutional developments around the world.

- **Venice Commission**

<[http://www.venice.coe.int/site/main/Presentation\\_E.asp](http://www.venice.coe.int/site/main/Presentation_E.asp)>

The European Commission for Democracy through the Law is an independent legal think tank that deals with crisis management, conflict prevention and constitution building. It is dedicated to promoting European legal ideals, including democracy, human rights and the rule of law, by advising nations on constitutional matters. The website offers country-specific opinions and comparative studies on European constitution-building processes.

- **University of Richmond**

<<http://confinder.richmond.edu/>>

The University of Richmond, located in Richmond, Virginia, is the home of the Constitution Finder tool. This search-powered database of constitutions, charters, amendments and other relevant documents provides links to official postings of national documents.

## Glossary

Aggregation	The effect of concentrating or centralizing power, usually creating hierarchies
Basic structure approach	An approach to constitution building which stresses key government functions and prioritizes establishing institutions that will exercise governmental authority
Constituent Assembly	A body composed of representatives, usually elected, for the purpose of drafting or adopting a constitution. It may also have secondary legislative functions for practical reasons of avoiding the existence of two concurrent assemblies. (See also Constitutional Convention)
Constitution building	Processes that entail negotiating, consulting on, drafting or framing, implementing and amending constitutions

Constitutional Convention	A formal meeting of representatives or delegates that is convened for purposes of framing or amending a constitution and which, unlike a constituent assembly, is not self-governing or sovereign or legally autonomous, but works with a specified mandate or instruction from another body or group.
Democracy	A system of government by and for the people. Literally means 'rule by the people'. At a minimum democracy requires: (a) universal adult suffrage; (b) recurring free, competitive and fair elections; (c) more than one serious political party; and (d) alternative sources of information. It is a system or form of government in which citizens are able to hold public officials to account.
Disaggregation	The effect of dispersing power, usually among multiple branches, actors, or levels of government.
Dispersal of power	The effect of assigning or distributing power or authority to distinct and multiple constitutional institutions, offices or territorial levels, each more or less autonomous of others, in order to foster multiple levers of power and avoid its concentration
Diversity	The existence of distinct political, economical, social, cultural and demographic groups within a society
Government of national unity	A governing coalition of parties, usually in transitional democracies or emergency situations, formed to maintain national stability
Graduated design	An approach to framing constitutional changes through a series of procedures that may be stretched over time in order to deal with single issues at a time, usually involving incremental or iterative reform
Grand design	An approach to constitution building that entails framing a constitution as comprehensively as possible in one major procedure rather than in multiple, separate reforms stretched over time
Human rights	Entitlements or claims that individuals have and enjoy on the basis of their humanity or human dignity and individual freedom

Institutional interests	Interests held by specific sections of the government which they seek to advance during the constitution-building process. Often, this manifests itself in a government body or other actor attempting to maximize or protect its own power.
Interim constitution	A constitution that is considered to be in force for a limited and usually fixed period and which is commonly used to facilitate the framing of a permanent constitution
Legal constitution	A constitution that is emphasized as a supreme law binding on all other laws and authorities, imposing legal obligations, and is subject to judicial enforcement
Legal legitimacy	The attribute or quality of government or authority being accepted as legitimate mainly because of conformity to the law or legal process
Moral legitimacy	The attribute or quality of government or authority being accepted as legitimate mainly because it enjoys moral, religious or customary allegiance of the people
Political constitution	A constitution that is emphasized as a political settlement subject to enforcement by the institution that has the greatest political power, usually a legislature or parliament
Political legitimacy	The attribute of or quality of government or authority being accepted as legitimate mainly because it retains the support of a majority
Popular participation	The involvement of people in the constitution-building process, through mechanisms such as consultation meetings, public hearings and referendums
Promulgation	The legal procedure, usually a formal declaration, of effecting or bringing into operational force, a new constitution or law
Referendum	A process by which people vote in favour of or against a proposal to introduce a change in the constitution or other law. The result of a referendum may be either binding or optional. Also known as a plebiscite

Rights-based approach	An approach to constitution building which embraces the rationale of the state as the protection of rights and the welfare of citizens and prioritizes giving effect to these rights in the design of the government and constitution
Rule of law	A state of affairs whereby, or a doctrine that holds that, no individual or government is above the law and everyone regardless of their social status is equal before law. It is a condition in which every member of society including its ruler accepts the authority of the law.
Spoilers	Actors who work against or hinder potential agreements, including constitutional provisions
Transitional justice	Legal and other remedies or measures to redress grievances and wrongs, such as violations of human rights or acts of corruption, that were committed in the past and which are typically only used during periods of major political change as a means to mark a break with the past

## About the author

Winluck Wahiu joined International IDEA in 2006. In 2008, he was acting Head of Mission for IDEA in Nepal, where he helped to establish a programme in support of a participatory process of constitution building in the country. He was also involved in the process leading to the framing of Kenya's new Constitution in 2004–2005, primarily as a legal adviser to the Ministry of Justice and the Parliamentary Select Committee responsible for the process. He has also advised the umbrella human rights organization in Uganda (2004) and the Law Society of Swaziland (2004) on the process of constitutional change in those countries. Between 2001 and 2005, Winluck coordinated the African Human Rights and Access to Justice Programme, a joint initiative of the Kenyan and Swedish sections of the International Commission of Jurists together with its Secretariat in Geneva, supporting the national implementation of human rights norms through constitutional litigation in 16 sub-Saharan countries. He is a constitutional practitioner and a graduate of the University of Nairobi, and has been honoured by a commendation (2005) of the Law Society of Kenya for his role in the country's constitutional process.

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# International IDEA at a glance

## **What is International IDEA?**

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization that supports sustainable democracy worldwide. International IDEA's mission is to support sustainable democratic change by providing comparative knowledge, and assisting in democratic reform, and influencing policies and politics.

## **What does International IDEA do?**

In the field of elections, constitution building, political parties, women's political empowerment, democracy self-assessments, and democracy and development, IDEA undertakes its work through three activity areas:

- providing comparative knowledge derived from practical experience on democracy-building processes from diverse contexts around the world;
- assisting political actors in reforming democratic institutions and processes, and engaging in political processes when invited to do so; and
- influencing democracy-building policies through the provision of our comparative knowledge resources and assistance to political actors.

## **Where does International IDEA work?**

International IDEA works worldwide. Based in Stockholm, Sweden, it has offices in Africa, Asia and Latin America.



