

The Constitution Reform Process: Comparative Perspectives

Presented by Yash Ghai

“Toward Inclusive and Participatory Constitution Making”

3-5 August, 2004, Kathmandu (Nagarkot)

[This paper analyses the role, and aspects, of constitution making as part of a peace process. It describes ways in which negotiations on constitution reform can help to resolve differences between the negotiating parties. It discusses the modes of adoption of a constitution (including the role of a constitution assembly) and ways in which the constitution making process can be made inclusive and the people engaged in the process. It concentrates on procedural aspects of constitution making and does not discuss specific constitutional reforms. It concludes with responses to a number of issues raised with the author.]

I

Constitution making as part of peace process

Amending or replacing the old constitution is generally a part of the peace process, of the kind that Nepal is engaged on now. Typical of the internal type of conflict in Nepal is the absence of a complete victory of one or the other side. Enduring peace can only be achieved through negotiations on the re-design of the state and the allocation of power – thus inevitably highlighting the status of the constitution.

Exactly when the constitution making stage of the process is reached depends on the context. In some cases constitution amending or making is the last stage, after the conflict has been more or less resolved and other measures to consolidate peace has been put in place (as in Namibia, Cambodia, East Timor and Afghanistan). In other cases, pre-occupation with a new constitutional settlement starts early, as in Sri Lanka, where the very genesis of the conflict lay in what was perceived by one party to be a faulty and unfair constitution. In the latter situation, the politics of the constitution play a critical role throughout the peace process. However, in both these scenarios, the sign of a successful peace process is a settlement on and adoption of a new constitutional dispensation.

Although it may be possible to distinguish the specific constitution making stage of the process from other stages, the fact is constitutional issues pervade all stages of the peace process. Some times peace talks can only start when there is a prior agreement that the constitution will be changed if necessary (as in Papua New Guinea/Bougainville conflict and in Sri Lanka). Some times the obstacles implicit in the existing constitutional structure to peace negotiations (e.g., excluding some key parties, usually the ‘rebels’, or the failure of legitimacy of state institutions) need to be overcome before the negotiations can start or be successfully concluded (of which South Africa is a prominent example). Even the broad understandings on the basis of which parties start negotiations or reach

soon after during negotiations have implications for constitution, as indicating the orientation of change.

It is for this reason that it is advisable for the legal advisers of the parties to become involved in these earlier stages rather than at later, more technical, phases of actually drafting constitutional changes, so that they acquire a full understanding of the intentions of the parties. Another reason for this early participation is that lawyers can often suggest common ground that does not compromise the essential positions of either side. There is flexibility in the organisation of state organs or divisions of powers (or the handling of 'non-negotiable' positions, such as even self-determination) that some times enables a way out of polarised positions of parties (as demonstrated by the resumption of talks between the LTTE and the Government in Sri Lanka). In South Africa progress towards a settlement in what looked like an impossible situation was greatly facilitated by legal advisers at early stages of negotiations. This also meant that there were relatively few sticking points when the final constitutional changes were negotiated and drafted (to some extent this was also the experience in Namibia, where constitutional issues had been identified and explored extensively before the convening of the Constituent Assembly).

II

The role of constitutions in conflict resolution

It is not unusual now to hear constitutions, more particularly constitution making, described as instruments for conflict resolution. This conclusion follows in part from the earlier observation that in many internal conflicts, there is no outright victor. If peace is desired, parties have to negotiate on structures of state and divisions of powers, matters which are the substance of constitutions. But the form of negotiations and outcome can take different forms.

Sometimes, also as indicated above, constitutional changes are seen as technical matters to be drafted when the process is more or less completed, 'when the conflict has ended'. In other cases, the engagement on the constitution takes place even before the conflict has ended, and negotiations on the details of reform became integral to peace making. In reality, there is no sharp distinction between 'conflict' and 'post-conflict' situations. The absence of actual fighting may not make a situation 'post-conflict' as the present situation in Afghanistan demonstrates. Difficulties which may arise in negotiations in what is perceived to be a 'post-conflict' situation may easily lead to breakdown of talks and the resumption of fighting. It is not fanciful to say that until the negotiations are successful and a new constitutional dispensation is in place and implemented, the situation remains a 'conflict' situation. If nothing else, it shows the importance of the constitutional making to the peace process.

Broadly speaking, one can say that constitution making serves conflict resolution in two principal ways – the procedural and the substantive. The first aspect helps to identify the parties for negotiations and provides opportunities for them to meet in somewhat structured contexts. It also defines the agenda or a framework for defining the agenda. The agenda may be a list of issues to be negotiated, or may additionally take the form of

goals to be achieved (e.g., democracy, autonomy, recognition of cultural diversity, power sharing). It sets the rules of procedure, including the method of decision-making, with some emphasis on consensus (consensus is more important at the more political stage of the negotiations than at the constitutional, by which stage parties have committed themselves to reaching an accord through detailed arrangements – necessitating decisions, where ultimately necessary, by voting). The procedural aspect also introduces an element of transparency and thus helps to bring public opinion to bear on the process – and the parties. It also facilitates the role of ‘experts’ so that some critical issues can be delegated to, and resolved at, the technical level. If fairly and successfully conducted, the process may suggest to the parties the values of dialogue and consensus.

The more substantive aspect concerns outcomes, principally through the resolution of differences. Agreement on national values, even national identity, and new institutions and procedures may not only consolidate peace but also provide for future co-existence and co-operation. Through the entrenchment of the settlement in a fundamental document not susceptible to easy amendment, it can bring an effective closure to the ‘conflict situation’. By giving to courts the ultimate power of interpretation, it distances the parties from direct influence on the settlement, and provides both a set of rules and an umpire for the resolution of new differences that may arise. The constitution can be said to be a success only if it provides for relatively autonomous arrangements for the exercise of power and the security of arrangements – out of the immediate control of previously warring parties.

I have said that post-conflict constitutions are negotiated settlements. Constitutions as negotiated settlements are double edged. They may bring fighting to an end, but they may not solve underlying causes, and they may not enjoy great legitimacy. If the negotiating parties are restricted to those who were actively engaged in warfare, the new constitution may only speak to their own concerns, not necessarily that of the general public or other specialised groups. Thus both the parties and the agenda can be narrow. A careful design of the procedure and the definition of agenda are both critical and difficult (as numerous peace processes demonstrate). What is possible in these matters is very dependent on the context, which includes the dominance and ‘autonomy’ of key negotiators and involvement of the external or international community. It is therefore necessary to be alert to the opportunities and constraints that are peculiar to constitution making in conflict or post-conflict situations. The constitution will not serve as constructive a role in post-conflict situations as it might unless the opportunities are maximised and constraints overcome. The next section deals with some functions of constitutions and the tasks in constitution making.

III

The constitution making process

The objectives of the process

The objectives and methods for constitution making depend on the context. Some constitutions are reviewed not out of a sense of crisis, but to ensure that the constitution has kept up with social, economic and technological changes – there is seldom high drama about such reviews. Sometimes (and this used to be the norm) a constitution is

used to transform the political and economic system (e.g., after revolution), imposing a system and values on the people, with little need for negotiations or concessions: constitution as an instrument for control and domination. The constitution can also be used for less dramatic change, often change essentially for continuity (with the royal constitution of Afghanistan in 1964, or as it alleged, the royal constitution of Nepal in 1990). In these instances some negotiations and even concessions may be necessary. A new form of constitution making has emerged in recent years, in international protectorates like Cambodia, Bosnia, East Timor, and Namibia where there is a high degree of external involvement, guidance and supervision. This instance can be seen as a species of the more general category of constitutions for conflict resolution: negotiated settlements for co-existence.

A critical choice is whether the primary method is negotiations between the contesting parties or, not ruling out some preliminary political negotiations, the conduct of a more participatory process, either by an independent, representative and expert commission or a constituent assembly, or a combination of both. The former may seem better adapted to quick term solutions; the latter more suitable for long term solutions.

Constitutions for post-conflict situations are often made by a small group of people, in secrecy. The real support they enjoy is not self-evident. The approach to the process may be determined by whether those responsible for constitution making see it as a necessity or an opportunity. If it is seen merely as a necessity, the tendency would be to adopt short term objectives – to conclude it speedily, minimise public participation, conduct negotiations in secrecy, exert tight executive control over the process and the outcome, and opt for a minimalist constitution. If it is seen as an opportunity, the tendency would be to have a relatively open ended process, encourage wide public participation, drawing in all key stake holders, broaden the agenda, and work towards a consensus. In the latter case the process would be used to develop or intensify a sense of national identity, to highlight and then resolve differences among the people, and aim for a consensual document broadly acceptable to all communities.

The process of constitution making can be used to change the role or orientation of the constitutional order. It can introduce ideas which determine the constitutional order: principles, values, institutions and procedure. It can enhance the capacity of the people to cope with the resulting constitutional order. The process of constitution making is crucial, although not decisive, for its success. A fundamental question which should govern the approach to constitution making is the conceptualisation of what the constitution and the process are about. A constitutional review, particularly in conflict situations, can achieve various purposes including the following:

- The most obvious is to make and adopt a constitution.
- Connected with the above, is to identify the underlying societal issues and define the agenda for reform (some times the agenda for reform is pre-determined by the parties).
- To develop a national consensus on the goals of the constitution, and occasionally, on how to achieve them.

- To settle outstanding national or regional issues and difficulties, and provide the basis for future governance (a key question is how broad/extensive should be the agenda – there is a danger of overloading the process, just as there is apprehension that by exclusion of a key, controversial topic, an opportunity will have been missed).
- To consolidate new power relationships and goals (frequently after a *coup*) (a process with this aim is seldom genuinely participatory; in fact is highly controlled, if the constitution is not actually imposed).
- There can be other reasons for restricting the scope of the process – particularly the fear that it could open ‘Pandora’s box’ where issues long considered settled, as well as new controversies, are raised, and there is no easy way to resolve them. This is a special problem in states with fragile national unity or consensus. Wide public participation tends to broaden the agenda for reform, especially in relation to social policies. On the other hand it avoids the dominance of political parties which generally pursue narrow and selfish interests.
- To promote national identity (a particular problem in multi-ethnic states).
- To legitimise the constitution and re-establish state organs.
- To educate the people in principles of democratic theory and to develop democratic practice.
- Through the participation of the people, to ensure wide public knowledge of the constitution, and to facilitate its implementation and protection.
- Negotiate entry into the international community (not so much a problem for Nepal).
- Start ‘transition’ to democracy, civilian rule, social justice, etc.

The tasks in constitution making

If it is desired to adopt a wide participatory process, it is necessary to plan carefully the different stages (including the following) so that the process achieves its objectives.

- The process and procedure for the debate on and the adoption of the constitution should be inclusive, bringing together political, religious, professional, and gender interests – this will put a limit to self-interested behaviour. Attempts should be made to facilitate the participation of all sectors of society – including even primary-school children, so that it becomes a truly national enterprise. Provision should be made for the use of local languages wherever necessary.
- The constitution making process has to be preceded by or accompanied by ‘civic education’, to increase people’s familiarity with constitutional issues and to enable them to engage actively in the process. A large proportion of the burden of providing civic education should be the responsibility of civic organizations.
- The views of the public – individuals as well as organisations – on the current constitutional arrangements and recommendations for reform have to be sought. In some countries public opinion is sought on the basis of a draft constitution prepared by a team of experts. The advantage of this is that public attention is clearly focussed on a set of constitutional propositions. The danger is that it may foreclose issues on which the public should be engaged, and which should be considered for inclusion in the constitution. Increasingly, public opinion is sought

before a draft is prepared, as was done in Uganda, Ethiopia, Thailand, Eritrea and Kenya, so that even if the agenda for reform has been identified in advance, it can be broadened by reference to the needs and aspirations expressed by the people. In any event, some guidance should be provided to the public on the issues on which public opinion would be welcome, possibly through a simple questionnaire. Moreover, civic education and consultation should not be one off process. The public should be given an opportunity to comment on the draft constitution before its adoption, even it was prepared after the initial consultations, just as civic education on the draft as well as the final constitution should be encouraged and facilitated.

- It is usual now to adopt a two-stage process for the making of the constitution. The first consists in the preparation of the draft, often by a body called the constitution commission, in one of the ways mentioned above. The second stage is debate on the draft, first by the general public for a specified period, and then more formally by a constituent assembly type body which adopts the constitution. The commission is normally a technical body, but some times its composition is intended to reflect a degree of societal diversity; whereas the assembly is democratic and representative, generally elected, but with scope for nomination by special interests, and constitutes the forum for political negotiations.
- Some countries have provided for a referendum after the constituent assembly or its equivalent has approved the constitution. The referendum serves well as a legitimising device, but also the consideration that at the end of the process the product of consultations and negotiations will be subject to the scrutiny of the people acts to keep the interests and aspirations of the people in front of the constitution makers. But, if the constituent assembly is fully representative, a referendum is not necessary (and can complicate matters and produce fresh divisions in society).
- Almost no arrangements for making constitutions find a place for civic education post-constitution. This is a critical task, so that people become familiar with the principles and details of the constitution, and learn not only of their rights but also how they can invoke and mobilise them. A knowledge among the people of their constitutional rights is an essential element in the observance of the constitution by authorities who might be tempted to take short cuts.
- Connected with the above point is the establishment of effective methods to implement and uphold the constitution. There is a clear division of responsibility between the state and civil society in these endeavours. A state organ should be established with the authority to oversee the implementation of the constitution. Civil society has to gear itself to the protection of the constitution, through civil education, lobbying, dissemination of analysis and information, research and litigation. Only through these myriad ways will the constitution become a reality in the life and governance of a nation.

Institutions for constitution making

For many of the tasks/stages listed above, there is no one formula. Traditionally political parties have played a key role. Today most countries acknowledge the role of civil society organisations, in disseminating information and providing education about the

process and issues, aggregating opinion and articulating views and recommendations; and indeed being part of the decision making process. A constitutional commission is frequently established to produce a draft constitution – either as a basis for public discussion and to solicit public views, or after education to and consultations with the public. In either case the draft constitution is considered and adopted by another body – the choice is between Parliament or a specially convened Constituent Assembly. Some countries which have chosen the Constituent Assembly have dispensed with the constitutional commission, giving all constitution making tasks to the Constituent Assembly. A referendum is some times used to adopt and legitimise the constitution.

Examples can be found of all these options, or a combination of them. South Africa, for example, did not have a commission – some of its usual tasks were performed by civil society (civic education), some by the political parties (developing an agenda and producing a draft constitution in the form of an interim constitution and principles for the final constitution). At its independence, India used the Legislative Assembly as the constituent assembly for all the tasks (little civic education was provided). Afghanistan and Nepal have used commissions to produce drafts as basis for (and prior to) public debate, while Uganda, Ethiopia, Eritrea, Thailand and Kenya have used them to draft the constitution after soliciting public views. Sri Lanka has tended to use Parliament to generate as well as enact proposals, thus severely restricting public participation. Some times there are pragmatic reasons for the choice – for example in the South African situation, with no legitimate state institutions, and a deeply fragmented political community, a commission was scarcely feasible.

The use of multiple institutions is justified on the basis of the different tasks involved in the review and making of constitutions. Civic education for and the engagement of the public cannot satisfactorily be done by state commissions alone; the role of civil society is critical. There is some advantage in having an independent, non-partisan and technical body to prepare a draft for debate by the public and consideration and negotiation by a politically and social representative body, the Constituent Assembly. Quite what institutions are used is important for what the process achieves (since the division of labour involved in the process is significant), but the consequences of the absence of specialised institutions can be mitigated if the institutions actually used can achieve the functional divisions internally (as South Africans were successfully able to do through the formal role of technical advisers through the political negotiating process).

Participatory Process

Importance of participation

Participation in constitution making is considered nowadays as fundamental. International human rights instruments require, as a manifestation of self-determination, that all the people and communities should participate in deciding on the constitutional and political system. The benefits of inclusiveness are mentioned in the preceding part of this paper.

Division of Labour

Most constitution making processes are divided into different phases; each phase may be marked by the dominant participation of different groups, balancing their contribution and skills, and recognising the division of labour, e.g., the role of the people in defining and elaborating agenda of reform, that of experts in translating recommendations into legal text, and representatives who make the final decisions. Participation thus takes different forms.

Securing participation

Participation can be secured, for example, through

- Representation on the constitution making institutions
 - The range of interests and groups represented (e.g., social, gender, regional, disadvantaged, religions, professional, political, business and trade union, other civic society groups/organisations)
 - The mode of choosing representatives (e.g., by umbrella bodies of women, Dalits, disabled, youth, etc.)
 - The method of decision making and voting (consensus)
- The ability of groups to engage in the process
 - Civic education to enhance general understanding of the process and reform issues (through production of special materials, role of constitutions and some basic concepts, national history of constitutional development, analysis of existing constitution, issues for reform, comparative experiences; and institutionally, through a special body set up for civic education, delegation to NGOs, Law Reform Commission, Human Rights Commission, etc., avoiding government institutions; a special website, links to other constitution websites; use of media, newsletters)
 - Facilities for individuals, groups and communities to debate constitutional issues (using local languages where possible for materials and debates, organising meetings of groups/communities to discuss issues; encouraging submissions through oral or written presentations at local meeting of the body set up for this purpose; submissions through various media)
 - Security for participation (safe environment, guarantees against victimisation for views expressed, establishment of an independent body for this task, minimising role of government agents, special provisions for particular groups, e.g., women for whom separate meetings might be held at times convenient for them)
- Procedure for consultation and other inputs into the process
 - Convening of specialist national conventions (e.g., of the disabled, women, minorities, professions, religious groups)
 - Dissemination of option papers and questionnaires
 - An independent and reliable method of analysis of public views and recommendations

- The forum/s for decision making (Parliament restricts groups who participate, prioritising interests of politicians, broadly composed constituent assemblies allow greater participation, use of national conferences for agenda setting)
- Mode of adoption of constitution (if the institution which adopts the constitution is restricted in its membership, the value of earlier stages of the process could be negated; referendum is often regarded as the manifestation of people's sovereignty but it is less effective than public participation at earlier stages; it can work against the interests of minorities and so upset negotiated settlements; if the voting requirements are high, no constitution may be adopted)
- Adequacy of resources (financial and human; a highly participatory process is likely to be expensive; independence of resources)

Handling diversity of views and recommendations

Wide participation inevitably tends to broaden the agenda of reform and introduce conflicting demands. It is therefore useful to have two devices to moderate the situation.

- The first device is to have a mechanism to analyse, co-ordinate and harmonise the recommendations submitted by individuals, groups and communities. This task can be easily biased in favour of particular positions. Therefore it should be entrusted to a competent and impartial body – something like an independent constitutional commission.
- The second is to have a deadlock-breaking mechanism. This can take several forms, including a special committee of the decision making body, or a committee of eminent nationals who are and are seen as above the fray.

Constituent Assembly (CA)

The role of the CA should be seen in the overall context and procedure for making a constitution. There is great variation in the composition and functions of CAs, as indicated in the preceding parts. Some countries rely entirely on special parliamentary procedures to change the constitution or adopt a new constitution. However, some times that option is not available (as for example in Uganda and Afghanistan where parliament had been dissolved or even the old constitution abrogated). In such situations, the CA provides a legitimate and appropriate method to adopt the constitution.

The advantage of a CA is that it represents the constituent power of the people.

Consequently:

- Its legitimacy is beyond dispute.
- Subsequent amendments of the constitution can be tightly regulated, since parliament's power will be seen as a form of delegation, and thus the scope and procedure for amendment can be circumscribed (as the Indian Supreme Court has established in its doctrine of 'essential features' of the constitution).
- All issues can be looked at afresh, unlike a parliamentary procedure which may impose limits on amendments.
- A wider representation can be provided than in parliament; all interest groups can participate, producing a true national compact (although in several countries, such

as India, Papua New Guinea, Namibia and South Africa, parliament also acted as the constituent assembly).

The disadvantages of a CA may be:

- The reform agenda may become too broad (even if the CA is given terms of reference in advance, they may not carry much moral authority in the face of arguments that the CA, as representing the sovereignty of the people, cannot be so bound).
- It may be difficult to find a compromise among the different views, often strongly held. This can result in a deadlock which may mean the end of the process.
- It may be hard even to agree on the terms of reference of the CA or the range of interests to be represented or the method of choosing representatives.
- The process may become long drawn; people may lose interest in it; the prospect of a speedy resolution of controversial issues may recede.

Role of time limits

For the last of the above points, it is useful to have a firm but realistic time limit. There is considerable value in a strict deadline, for the critical issues are easily and quickly identified and once having been identified, should be dealt with speedily. There are likely to be political or pecuniary reasons why some delegates or interest groups may want to drag on the process.

Tasks of the CA

Sometimes (as in India and to some extent South Africa) most of the tasks in institution making identified in the first part of this paper are performed by the CA. In others, as in Kenya, Uganda and Ethiopia, there are divided among several bodies, particularly a civic education institution to educate the people, a constitutional commission to receive and analyse recommendations and prepare a draft constitution, and a constituent assembly to adopt the draft. The second model seems preferable. But a lot will depend on the context and constraints of each case.

Cost of CA

Inevitably a CA process is likely to cost more than a parliamentary. More delegates will be involved. Greater education might be necessary to induct delegates not familiar with parliamentary procedure (often used in modified form in CAs) as constitutional issues. A special secretariat and research team will be necessary. The costs of documentation will be higher than in a purely parliamentary procedure.

Some of the costs can be cut by avoiding on overlarge membership (necessary also to ensure effective and participatory debates) and have firm deadlines.

How to get the process started and convene the CA

This depends on the context and the perception of what is wrong with the existing constitution, or even the eventuality that there is no existing constitution. Some countries kick-started the process by convening national conferences of all key national groups (the African 'model') or roundtables of political parties (the pre-independence Indian model

or the recent East European). Sometimes the legal decisions can be made by these bodies; at other times their decisions require formal enactment by parliament. What is critical is that there should be the broadest national consensus on the agenda of reform and the responsibilities and functions of the CA.