

# CONSTITUTION BUILDING IN SUPPORT OF PEACE DEMOCRACY

Dr Kirsti Samuels

January 2009

## EXECUTIVE SUMMARY

This paper explores 13 cases of constitution building<sup>1</sup> that were undertaken during times of transition from civil conflict or authoritarian rule during the last fifteen years.<sup>2</sup> The cases are diverse in context, constitution building approaches, constitutional culture, and outcomes. The article provides a *tour d'horizon* of the constitutional building processes and the discussion seeks to draw out common themes from the cases and elucidate some of the ways that constitution building processes have impacted on the content of the constitution, on the broader democratization process in the state, and on any return to violent conflict.

The cases explored in this study illustrate the complexity of constitution building processes and the wide variety of factors that affect their outcome. They also support the proposition that how constitutions are made, particularly following civil conflict or authoritarian rule, will impact on the resulting state and its transition to democracy.

It is important to keep reasonable expectations of what can be achieved through participatory processes in highly politicized and often divisive environments. The mere fact of a participatory process will not necessarily result in an inclusive or democratic constitution, nor will it ensure peace or prosperity in the state, or prevent unconstitutional conduct by power brokers. However, the cases do suggest that participatory and representative constitution building process can provide a forum for the negotiation of solutions to the divisive or contested issues that led to violence, or for a negotiated transition from an authoritarian regime. The participatory nature of a process can also play a reconciliation and healing role through societal dialogue, and can support sustainable peace by forging a consensus vision of the future of the state. At the same time, the failure to adopt or implement a constitution built through a participatory process can result in an increase in dissatisfaction and societal tensions, and even a return to conflict.

The cases also show that more representative processes resulted in constitutions that tended not to include provisions that undermine the quality of democracy, and broadened the reform agenda. Participatory processes were perceived as more legitimate and hence received greater popular support. Moreover, participatory processes provided an opportunity for the democratic education of the population, and thus their empowerment.

While it may be premature to evaluate the outcome of the case studies that have not yet reached the 10 year mark, in all cases where the process was inclusive and representative or representative and participatory, the constitution building process has led to incremental democratization in the state.

Nonetheless, there may be instances where it is necessary to rely on elite compromises and to avoid societal dialogue. A non-participatory process did allow in some instances a transition to a stable democracy, whereas in others, the failure to sufficiently include the population in discussions led to divisive issues resurfacing later in an extreme way without the opportunity for balanced discussion. At the same time, a difficult challenge arises of avoiding an overly elite dominated process, which may degenerate into a division of spoils between the powerful players, while still achieving sufficient buy-in by the established power structures, which will otherwise react by undermining the constitutions, amending them, preventing their adoption, or preventing their enforcement.

---

<sup>1</sup> This paper uses the term constitution making to refer to the process of making a constitution which begins with the decision to review or renew a constitution and includes dialogues and consultations, the negotiation of the provisions, the drafting, and the adoption of the constitution. Constitution building is used to refer to a broader timeframe that includes the pre-constitution making phase (setting the scene), and the post-constitution making phase (implementation and enforcement).

<sup>2</sup> The 12 case studies that form the basis of this analysis were prepared for International IDEA by the following experts. I am grateful to the case authors for their analysis of the constitution building processes in their respective cases. Factual descriptions are derived from their cases, although I take responsibility for the implications I draw from them. Afghanistan case study: Carolyn McCool; Bahrain case study: Mohamoud Awil; Chile case study: Esteban Montes and Tomás Vial; Colombia case study: Iván Marulanda; East Timor case study: Randall Garrison; Fiji case study: Jill Cottrell and Yash Ghai; Guatemala case study: Roddy Brett and Antonio Delgado; Hungary case study: Andrea Mezei; Indonesia case study: Edward Schaefer; Kenya case study: Jill Cottrell and Yash Ghai; Nigeria case study: John Simpkins; Rwanda case study: Priscilla Ankut. The analysis of South Africa is based on a paper prepared for an expert meeting in Ecuador by Hassen Ebrahim, entitled Role of Process in Constitution Building (on file with the author).

## INTRODUCTION

It is increasingly recognized that *how* constitutions are made, particularly following civil conflict or authoritarian rule, impacts on the resulting state and its transition to democracy. ‘New Constitutionalism’ emphasizes that constitution making must be understood as “the site of contest rather than a documentation of outcomes”.<sup>3</sup> Therefore<sup>4</sup>, both the constitution building process and the design of the constitution can play an important role in political and governance transitions. In this light, constitution making is seen as a process and a forum for negotiation in environments of conflict, and can play a major role in constructing the political transition.

This article explores 13 cases of constitution building that were undertaken during times of transition from civil conflict or authoritarian rule during the last fifteen years. The cases are diverse in context, constitution building approach, constitutional culture, and outcome. The article provides a *tour d’horizon* of the constitutional building processes and the discussion seeks to draw out common themes from the cases and elucidate some of the ways that constitution building processes have impacted on the content of the constitution, on the broader democratization process in the state, and on any return to violent conflict.

In this article, constitution making refers to the process of making a constitution which begins with the decision to review or renew a constitution and includes dialogues and consultations, the negotiation of the provisions, the drafting, and the adoption of the constitution. Constitution building is used to refer to a broader timeframe that includes the pre-constitution making phase (setting the scene), and the post-constitution making phase (implementation and enforcement).

### Categorizing the cases

The cases are distinguished in this article according to two important features: i) The environment that existed in the country prior to the constitution building process; and ii) The key features of the constitution building process.

#### *i) Pre-transition environment*

Broadly, five cases are categorised as taking place during a transition from violent conflict (Afghanistan, Colombia, Guatemala, East Timor, and Rwanda). Ten cases are categorized as taking place during a transition from some form of authoritarian regime<sup>5</sup> (Afghanistan, Bahrain, Chile, East Timor, Fiji, Hungary, Indonesia, Kenya, Nigeria, and South Africa). Afghanistan and East Timor transitioned both from violent conflict and authoritarian regime.

#### *ii) The process*

The process adopted was analyzed according to four criteria: whether the constitution was negotiated or imposed, the extent to which the body negotiating the constitution was inclusive (small elite body or broad inclusive body), representative (representing all the major interests in society), and participatory (involving broader public in the process, either through a process of consultation or dialogue). In addition, it is useful to note whether the process adopted a grand design or an incremental process.

In all cases the categorization will be a matter of degree. For instance, questions of how the consultation was undertaken, what information and education was provided, who was consulted, and how the views were incorporated will affect the participatory nature of the process. The degree of inclusiveness, representativeness and participatory nature of the process will also depend on a combination of the processes across different phases: preliminary phase (or interim constitution process which may take the form of a peace negotiation), the main constitution building process, and the adoption phase. It is also

---

<sup>3</sup> Hart “Constitution making and the Transformation of Conflict” (2001) 26 Peace and Change 153 at 154.

<sup>4</sup> For a discussion of why these two criteria were adopted for this discussion see appendix.

<sup>5</sup> For the purpose of this analysis I have not differentiated between military and other authoritarian regimes.

useful to distinguish between who is able to contribute to the discussion and how makes the final decision.

Table 1 below identifies how the cases were categorised according to the pre-transition environment and whether they adopted incremental or grand design processes of constitution building. Some cases have adopted both incremental and grand design approaches during their constitutional history.

**Table 1**

<b>Constitution Building Processes</b>	<b>Grand design</b>	<b>Incremental</b>
<b>Following or during authoritarian, military or communist rule</b>	Afghanistan Bahrain East Timor Fiji Hungary (followed by further reforms but initial reform was grand design) Kenya Nigeria South Africa	Chile Indonesia
<b>Following or during violent conflict</b>	Afghanistan Colombia East Timor Guatemala Rwanda	

## **A REVIEW OF THE CONSTITUTION BUILDING PROCESSES**

The twelve case studies represent a wide variety of constitution building processes, in different contexts, and with different outcomes. For the purpose of this review, they were organized under loose headings meant to highlight the prominent elements of the constitution building processes investigated. See Appendix for a summary of the processes.

### **Participatory processes**

South Africa, Colombia, Guatemala, Kenya and Rwanda are examples of highly participatory processes with differing outcomes depending on the degree of inclusivity of who ultimately shaped the constitution, and the overall context. In South Africa and Colombia, a highly representative body was elected specifically to draft the constitution. In Afghanistan, a broadly representative body was also elected for the task. However, it entirely excluded the Taliban who were considered to have lost the war. In Kenya and Guatemala, a representative body drafted the constitution but the parliament had the final say, and amended the draft. In Rwanda, the body was appointed and did not include members of the Hutu parties.

#### *South Africa*

The South African constitution building process was one of the most inclusive and participatory processes ever undertaken and is one of the most successful comparatively peaceful transitions from autocratic oppressive rule to democracy. It remains an example of best practice for constitution building.

## The Process

The constitution-building process was agreed as part of the peace negotiations between 1991 and 1994. This began with the National Peace Accord of September 1991, and ended with an agreement on an interim constitution (1993), which set out 34 principles on which the constitution would be based.

The process adopted was that the constitution was to be drafted by an elected Constituent Assembly that would solicit the view of the people. The draft was then to be considered by the Court to ensure that it was consistent with the 34 principles. The final draft was to be adopted by a 2/3 majority in the Assembly, or it would go to referendum and require 60 % support for adoption.

An office was created to facilitate the work of the assembly and its various technical teams, and to solicit input from the citizenry at large and interest groups and sectors, and undertake public education about the constitution and the constitution making process. A variety of technical working groups then established the interim (1993) transitional constitution under which South Africa would be governed until the constitution was completed by the constituent assembly.

The Constitutional Assembly consisted of both houses of the Parliament newly elected in September 1994. Its 490 members were drawn from seven political parties, represented proportionally in accordance with their share of the vote. To prevent indefinite delays, there were numerous deadlock breaking measures and delegates had to finalize a draft within two years.

A massive public information campaign and educational effort was undertaken from December 1994. The educational effort included a media and advertising campaign using newspapers, radio and television, billboards, and the sides of buses; an assembly newspaper; cartoons; a Web site; and public meetings; together these efforts reached an estimated 73 percent of the population.

The South African Commission received 250,000 submissions in one phase alone of the constitution-making process. From 1994 through 1996, the Constitutional Assembly received two million submissions from individuals, advocacy groups, professional associations, and other interests. The submissions were collated into reports, noting the convergence of ideas and agreements as well as contentious issues and ideas for addressing them.

A final text was produced in May 1996, sent for review the Constitutional Court, which returned the text to the assembly for amendments. After amendment, the Constitutional Assembly approved by near consensus, with one vote against, the amended Constitution for re-submission to the Court.

## Outcome

The high level of participation and inclusion is considered a key reason for the success of the transition to democracy in South Africa. In circumstances that could have easily resulted in civil war, the process achieved a remarkable level of consensus, despite the disparity in the proportion of seats held by the parties (with the African National Congress (ANC) at almost 64 per cent, the National Party (NP) a little over 20 per cent) and the deep divisions in the country. The Constitutional Assembly was still able to crystallize a consensual approach, and ensure the people felt included in the process. This seems to have been based on the flexibility of the major players who were committed to seeking 'win-win' agreements, the design of the negotiating structures that generated workable proposals, and a commitment to a participatory and inclusive approach.

The process is considered a success, and the Constitution retains a high degree of legitimacy and is referred to frequently in political debates and has been regularly relied upon as the source of legal rights in the courts.

## *Colombia*<sup>6</sup>

The 1991 constitution building process in Colombia was a representative and participatory negotiated process. It was initiated in the midst of a seemingly irresolvable 40 year civil conflict in response to public demand for a negotiated solution.

### The Process

The 1991 process was initiated by students and youth who demonstrated in the streets demanding the convening of a constitutional assembly to address the ongoing conflict. A near unanimous positive response to the special ballot offering such an option set the process in motion.

Elections were held for 70 delegates to a constituent assembly on a nation wide basis. Sitting members of congress could not run. The resulting Assembly was representative and inclusive. There were delegates from professional parties, ex guerilla fighters, Indian leaders, businessmen, social leaders, labor leaders, peasants and journalists, clerics and academics. Four delegates from insurgent groups that negotiated their return to civil life were added. The constitutional assembly was formed not only of political parties but also of citizens' constituencies. It was the first time that Indians were represented. The government did decide to exclude members of the armed insurgency.

The process was participatory as well. Citizen's working groups took place all through the country and widespread public discussion took place. The conclusions of these working groups were sent to the Constitutional Assembly. The constitution was adopted by the Constituent Assembly in a spirit of cooperation and consensus.

However, the implementation of the constitution required action by the elites in congress, who had not been members of the constituent assembly, and who sought to undermine the process.

### Outcome

The constitution building process took place in the midst of a civil conflict where neither side had won. It represented a hopeful time of social consensus which sought to find a way out of the crisis and conflict of nearly a half a century. The constitution has substantial popular support and continues to play an important role in the protection of human rights with hundreds of thousands of suits, popular actions and petitions being lodged under it. Moreover, since the constitutional assembly Indians gained the rights they demanded and have increased their participation in political life.

However, despite the progress since the 1991 constitution building process, Colombia remains a weak democracy where most of the decisions, opportunities, and power belong to an exclusionary elite. Since its adoption, the constitution has faced ongoing attempts by the traditional elite to undermine it, for instance by congress failing to implement key aspects (e.g. decentralization provisions).

Colombia continues to be in a state of armed conflict despite the participatory constitution building process. Some part of the continued conflict may be due to the failure to implement the social pact in the constitution which was negotiated to end the civil conflict. However, the nature of the conflict also seems to have changed somewhat and to be perpetuated increasingly by criminal interests who benefit from maintaining the state of chaos and violence. The conflict in Colombia has become increasingly criminalized and is now dangerously enmeshed with the interests of drug dealers.

---

<sup>6</sup> This analysis is drawn from the case study prepared by Iván Marulanda for International IDEA.

## *Guatemala*<sup>7</sup>

In Guatemala, the 1989-1998 constitutional building process emerged out of an attempt to negotiate an end to the ongoing civil conflict. Extensive peace accords were negotiated between elites in consultation with civil society. These were to form the basis of the constitutional reform package.

### The Process

The peace negotiations, which determined the constitutional reform agenda, emerged out of a participatory process initiated by the government in response to intense pressure from the public and the Catholic Church. The Grand National Dialogue convened in 1989 allowed civil society to express their views on the war and raised many of the issues which were later addressed in the peace agreements. This dialogue process raised the possibility of a political rather than military solution to the conflict.

The following year, the National Reconciliation Council (a government body) held talks with the insurgency groups' umbrella network. In 1994, a Civil Society Assembly was established to discuss substantive issues on the agenda and advise the negotiators. A series of meetings were then held with five sectoral groupings of civil society. These all paved the way for official negotiations between the insurgents and the government.

The 1996 official peace agreements included 6 substantive and 5 operational accords (human rights, a truth and reconciliation commission, indigenous rights, constitutional reform etc). Constitutional amendment was required to entrench the accords and give the government a legal basis for reforming the judiciary and army and implementing many provisions from the indigenous accords.

A Commission was created to interpret the accords and facilitate their implementation and a set of sub-commission were formed to advise on required constitutional reforms. Although these were appointed, they were relatively representative and included persons with special expertise and drawn from civil society and government. They agreed on a package of 13 reforms which was sent to Congress.

The process of adoption required a 2/3 vote in Congress and a referendum. However, once the process was handed over to the politicians, who do not seem to be representative of the interests of the people (most political parties are anti-left and military led, and are largely personalistic and clientilistic), it became mired in controversy. A drawn out and opaque process of negotiation began which resulted in the addition of 37 new provisions, largely on matters of partisan advantage.

The fundamental failure, however, took place at the referendum stage. A strong 'no' campaign was orchestrated by those that stood to lose power, and there had been no general public education campaign on the substance of the reforms. The international community supported 'pro-yes' campaign backfired when the conservatives appealed to sovereignty concerns. The reform package was defeated at referendum.

### Outcome

This case highlights that the failure of reforms that are agreed to in a participatory fashion can have a negative impact. It has reduced political participation, strengthened the military, stopped judicial reform, consolidated economic elites control over the state, and discredited the peace accords. The 1999 elections were won by the far right anti-reform party. Civil society seems to have lost its coherence and the peace accord implementation Commission has lost all status.

A long history of power accumulation and influence is not easily changed in a short period of time. The social conditions benefited the empowered elite groups which fought to protect their privileges.

---

<sup>7</sup> This analysis is drawn from the case study prepared by Roddy Brett and Antonio Delgado for International IDEA.

Nonetheless, while the reforms did not change power structures, they did give experience to new political actors. Since then, members of civil society have been agitating for legislation implementing the accords.

### *Kenya*<sup>8</sup>

The constitution building process that began in Kenya in 1997 has so far failed to result in a new constitution. However the process incorporated substantial consultation and participation. The current deadlock results from growing schism between civil society and the politicians, who have final authority to shape and adopt the constitution.

#### The process

Elite political party negotiations between President Moi and the opposition resulted in an agreement on a limited number of reforms before the 1997 elections (Independence of electoral commission, repeal of laws restricting political and civil rights, and annulment of offence of sedition) and a wide ranging review after the elections. Following popular pressure and a series of national conferences, an act was adopted which set out the process of constitutional reform (The Constitution of Kenya Review Act (1997)). The draft constitution was to be prepared by a review committee through a participatory process, then to be debated and voted on in a National Constitutional Assembly, and ultimately to be adopted by the legislature.

This complicated multi-step process provided many opportunities for those that opposed reform to stall the process, and the process was characterized by controversy from the start. First the political parties were not able to agree on how to nominate the members of the review committee. Then, after civil society began their own constitutional review process, the government appointed a review committee without the agreement of the opposition. This inauspicious beginning was ameliorated by Yash Ghai, the chair of the new committee, who negotiated a more inclusive committee.

The process adopted by this committee was genuinely participatory. It undertook an extensive education (from July 2001) and consultation process (March – July 2002), and even set up a coordinator and a small library in each of the 74 districts. The draft was prepared by September 2002. It was followed by an extensive public discussion during which over 37 000 submissions were received and processed.

However, once the draft reached the National Constitutional Assembly, the elite political class, which felt threatened by the substantial reforms, became obstructive. The National Constitutional Assembly itself was a representative body, of all the members of the legislature, 3 delegates elected from each district, 42 representatives of political parties and 125 representatives of religious women and youth groups. However, where the new constitution impacted on the interests of the members of the legislature or related institutions, the assembly became highly divided. Certain politicians played the ethnic card to cause divisions in a way that had not arisen in the broader public participation process. Ultimately, the National Constitutional Assembly was able to pass its draft only after modifying its voting rules.

The difficulties continued, however, as the National Assembly that was to then vote on the draft was constituted of many of those that had already rejected the draft. The process was further undermined by various court challenges. The government finally determined that it would add an extra step of adoption by putting the draft constitution to referendum. That referendum failed and the new constitution was rejected.

#### Outcome

This process emphasized the nature of a constitution as a compact among the people and with their government. The process aimed to encourage habits of genuine rational debate, to heal divisions and to

---

<sup>8</sup> This analysis is drawn from the case study prepared by Jill Cottrell and Yash Ghai for International IDEA.

settle differences by negotiation and discussion. It educated the people about the political process and gave them incentives to study and understand the constitution and the available options. It also had the effect of broadening the reform agenda, especially with respect to social issues.

However, the resulting constitution seems to have become a threat to the elite political class, whose zeal for reform disappeared once they replaced Moi in power. The elite political class reacted by amending the draft, and this modified draft was rejected at referendum.

### *Afghanistan*<sup>9</sup>

The process in Afghanistan was a multi-stage process that increased in representativeness in an incremental fashion. By the time the constitutional Loya Jirga was reached, the process was inclusive, other than with respect to the Taliban.

#### The Process

The Bonn convention was initiated in December 2001 and resulted in an agreement setting out the process for the transition to democracy, as agreed between the various factions that had benefited from the US led coalition attack on the Taliban.

A Constitutional Drafting Commission of 9 experts was appointed by President Harmid Karzai (elected interim President by the Emergency Loya Jirga) in October 2002. He also appointed a Constitutional Review Commission in April 2003, which was to conduct research and raise public awareness and consult with the people. This body was formed of experts, tribal elders, religious scholars, and community leaders. The draft was subject to final review by the review commission and the national security council, formed of the powerful members of cabinet. The Review Commission was not truly independent, however, and influenced by both the President and members of the cabinet.

The participatory aspect was somewhat limited although a public education campaign began in May 2003 and the Afghan Civil Society Forum also ran a separate civic education campaign. Public consultation took place in June and July. No draft of the constitution was circulated at this stage however and hence many of the meetings were unfocused. Nonetheless, about 523 meetings were held and 80 000 questionnaires were completed. There was concern that the public participation process would be targeted as a forum for extremist elements, however it took place smoothly in the end.

The Constitutional Loya Jirga was elected on two stage basis. The election sought to overcome the difficulties of achieving a representative body in a state emerging from many years of civil conflict and authoritarian rule. Local elections resulted in 20 000 representatives who then elected the members of the Constitutional Loya Jirga (as they had done for the Emergency Loya Jirga). There were quotas for certain disadvantaged groups, including women and refugees. These were appointed through a different mechanism which sought to ensure their representativeness (women's groups voted for the women representatives and refugees voted for the refugee representatives). The adoption of the constitution required 2/3 vote by the constitutional Loya Jirga, and it was adopted by consensus on 4 January 2004 following intense negotiation and compromise between the key players in the Loya Jirga.

#### Outcome

The constitution is a negotiated document that represents a compromise between various winners of the conflict in a highly divided environment. The electoral process ensured a relatively representative constituent assembly. Nonetheless, the process was in broad terms dominated by those that won the war against the Taliban and their international supporters. The armed conflict in Afghanistan was

---

<sup>9</sup> This analysis is drawn from the case study prepared by Carolyn McCool for International IDEA.

longstanding and the group that is currently in power reflects the coalition of factions that were supported by the international community.

Afghanistan does not have a democratic history and is an ethnically and religiously divided nation emerging from decades of violent conflict. Ultimately, there remains a high level of violence in Afghanistan, perhaps because of one faction's exclusion from the process, and the democracy is very fragile and weak, as epitomized by a lack of rule of law. Nonetheless, the constitutional process was integral in achieving what stability and democracy is present. It acted as a peace agreement, a negotiation over which factions would hold power, a staged process of increasing inclusivity and representativeness, and at the same time provided an opportunity for dialogue between the people and the military and political elites.

### *Rwanda<sup>10</sup>*

The process in Rwanda between 2002 and 2004 was a participatory process initiated and controlled by the Rwandese Patriotic Front (RPF), the party that won the war and stopped the genocide.

#### The Process

The process was initiated by the government which set up a Legal and Judicial and Constitutional Commission to consult widely with the population and then to prepare a new constitution and revise the laws. The government effectively appointed the commissioners (twelve commissioners were elected by the National Assembly from a list of 15 candidates). It was not a representative body as it only included allies of the RPF.

The process of consultation itself was participatory, however. The commission undertook an extensive education and training campaign on the role of the constitution and then spent six months in the provinces undertaking public consultations through public meetings and questionnaires.

A draft was produced and then submitted to the legislature where it was debated and then amended. The transitional legislature is not a representative or democratically elected body, but an appointed one: the 8 political parties that had not participated in the genocide each received 13 seats and 6 seats were allocated to the army. The constitution was finally adopted with strong support in a referendum.

#### Outcome

There is concern that the constitution favors RPF interests and includes too many limitations on freedom of expression and political parties. The constitution was negotiated in an atmosphere of restricted political freedom which has reigned since 1994 when the RPF entered Kigali and stopped the genocide. The RPF had control of the political sphere during the transition period from 1999-2003 and it implemented strict limitations on the activities of political parties, the media and civil society, especially any form of Hutu politics following the genocide.

Nonetheless, the constitution building process was a distinct break with past approaches and the first time that the people were consulted, which has, so far at least, ensured strong support for it. In the aftermath of horrific genocide, in a highly divided society, the participatory constitutional process seems to have helped to restore a sense common of vision, instituted a governance framework, and begun a process of dialogue and reconciliation.

Rwanda does not have a democratic history, and there are concerns that the current regime has authoritarian tendencies. It is possible that in the longer term the restrictions on democracy in the

---

<sup>10</sup> This analysis is drawn from the case study prepared by Priscilla Ankut for International IDEA.

constitution will result in renewed instability and violence. Nonetheless, the inclusive and participatory process has so far resulted in a high level of public support for the constitution.

### **Not Participatory, Elite Negotiated**

Hungary, Fiji, Chile and Indonesia and East Timor are examples of elite party negotiated constitution building processes with little public debate or participation. Hungary, Fiji and East Timor adopted a grand design process, while Chile and Indonesia adopted an incremental process.

#### *Hungary<sup>11</sup>*

Hungary's 1989 transition from communist rule is a good example of an elite negotiated, representative, but non-participatory constitution building process. The constitution was negotiated through a roundtable process. The constitutional amendments legislated for a transition from an authoritarian communist state to multi-party democracy.

#### The Process

The publication in the late 1980s of a series of reform papers calling for radical policy and legal reforms set in train widespread public discussion and criticism of the system in professional groups and civil society. Growing public pressure resulted in the government agreeing to a series of roundtable negotiations on the way forward between the government, the Opposition Roundtable (a coalition of different pro-democracy groups), and a Third Negotiator (formed of seven leftists non-governmental groups such as the trade unions). These were known as the National Roundtable Negotiations (13 June to 18 September 1989). The government bound itself to pass any amendments and bills agreed to in the Roundtable through the legislature, and all parties bound themselves to accept the outcome of free elections.

The national roundtable seems to have been representative of most of the political views in society (despite the opposition parties having been banned from 1949-1989, they appear to have maintained solid public support). The process was not consultative or participatory. Demonstrations during the negotiations did seem to indicate that the people were supportive of change, although 40 per cent of the adult citizens did not know that the roundtable was taking place. The one exception was a referendum on the timing of the President elections. The referendum returned a "yes" on the issue of whether the President should be elected after the Parliamentary elections. This was a tactical move by some of the parties to upset a secret deal being made for a directly elected President, and they were successful as the balance of power was in their favor after the elections for the legislature.

#### Outcome

The outcome of the Roundtable was widely welcomed. There was strong support for the opposition parties in the elections in 1990, and enthusiastic response to the new institutions created by the constitutional amendments (for instance the new constitution court received 500 motions in their first 4 months of operation before the elections for the new legislature).

Although the process can be considered a 'pact transition' negotiated between elites, the constitution did not result in special deals protecting the Party (as happened for instance in Poland). This is thought to reflect the power, representativeness and good leadership of the opposition groups. The compromises made by the government were a pragmatic response to rising pressure for change within the Party, among the elites outside of the Party, and within the broader public, and reflected a world where communism was beginning to crumble. The agreements set out a road map for the transition and the future state. They acted both as the interim structure and the final constitution, and achieved a relatively smooth transition

---

<sup>11</sup> This analysis is drawn from the case study prepared by Andrea Mezei for International IDEA.

with minimal violence. The constitution has been largely implemented and enforced and it continues to play an important role in the political debate.

Between 1995 and 1998 a further constitution building process was undertaken within the legislature, included all the political parties and a possibility of public participation, through written submissions. This process was still predominantly an elite process as there was no public education campaign, systematic consultation or consensus building elements. However, there is little enthusiasm and a new text has not been drafted. The Hungarian public seems increasingly disillusioned with politics and politicians and disappointed with the lack of economic benefits which it expected from the transition. In the fifteen years since the new constitution came into force, no government has been re-elected for a second term.

## *Fiji*<sup>12</sup>

Fiji's 1993-1997 constitution building process involved an independent constitutional commission which undertook a degree of consultation with the public. However, the constitution was drafted and passed by the parliament through political bargaining. The legislature had been elected under the 1990 constitution (drafted by the military coup leaders who toppled the first Indo-Fijian government), which sought to entrench the dominance of the indigenous Fijian population in power.<sup>13</sup>

### The Process

In 1993, the nominally civilian government, which had been installed by the Indigenous Fijian military after the coup, set up a cabinet committee (including the two main opposition leaders) to examine constitutional reform. After two years, this committee agreed that an independent commission would be set up to consult with the population and draft a constitution. The draft would then be debated and passed by the legislature elected under the 1990 imposed constitution.

The Reeves commission (comprising of one Indo-Fijian, one indigenous Fijian and an international chair) represented the main political divisions but not other interests in society (eg those of women). There was little public participation. Some believed that a public enquiry would revive old hostilities and politicize the review and that secrecy was essential for concessions and deals. However, the commission did recognize the need for public input and did consult as extensively as it could, but it was limited by the fact that it was only a three member body with few resources.

It undertook a series of public hearings and individual meetings (July-September 1995). However, the process did not involve public education and did not seek to begin a dialogue in society about the future of the state. The report was only published in English and was not presented back to the public in any official fashion. Only a few NGO's tried to inform the public of its content.

The primary constitutional negotiations took place in the Joint Parliamentary Select Committee between the main political parties and were controlled by the party leaders. The constitutional bill was passed by the legislature despite indigenous Fijian opposition because of the will of the party leaders.

### Outcome

The constitution adopted was a compromise solution negotiated from a position of entrenched power by the Indigenous Fijians, but also seemingly involving some idealism and hope for a new start and a less ethnically divided nation. The resulting constitution was a combination of the approach advocated by the Reeves commission, aiming to consolidate inter-ethnic agreement (particularly through the adoption of an alternative vote electoral model), and that of the political parties, who advocated a proportional electoral

---

<sup>12</sup> This analysis is drawn from the case study prepared by Jill Cottrell and Yash Ghai for International IDEA.

<sup>13</sup> According to Article 41(1) of the 1990 Constitution, the 70 members of the legislature were to be allocated 37 indigenous Fijian members and 27 to Indo-Fijian members, which meant that the indigenous Fijian members would always retain control.

model and power sharing in government. The constitution reduced, but retained, provisions ensuring the overrepresentation of Indigenous Fijians in power.

There had been little public education on the constitution and its aims were not widely understood. Moreover the electoral model was unfamiliar. In any event, the first elections brought to power a mixed Indo-Fijian - indigenous Fijian party, which was rejected by the indigenous Fijian elite and was soon toppled in a further coup. The Constitutional Court mandated new elections which brought a more radical indigenous ethnic group, backed by the military, to power. Political party deals channeled votes from the more moderate parties to the more extreme ones.

In addition, the constitution has been repeatedly contested in the courts, and key provisions have not been applied (for instance the power-sharing requirement). The more extreme Indigenous Fijian parties have denounced the constitution and repeatedly played on ethnic fears. Rather than building consensus for a more consensual and moderate form of governance, the constitution seems to be leading to increased instability and ethnic extremism.

#### *East Timor<sup>14</sup>*

In East Timor, the constitutional process was undertaken at the end of violent conflict where the pro-independence movement one and separation from Indonesia was effected. The constitutional process was the symbol of independence after 25 years of Indonesian rule. It was undertaken while East Timor was under international administration, but was elite driven and dominated by one winning faction. It was not participatory.

#### The Process

The East Timorese constitution building process was negotiated between the local National Council (dominated by Fretilin, the former independence party) and the UN. The process adopted was of an elected constituent assembly. The NGO forum sought an alternative model where a representative commission would consult and then draft a constitution. The National Council rejected this, as it did other attempts to render the process more consultative and participatory.

The Constituent Assembly was elected through a mixed parallel proportional representative system and Fretilin won a sufficient majority that it was not required to compromise or negotiate. Fretilin had already prepared a draft constitution in Melbourne in 1998 and this was used as the basis for discussion. Little of substance was changed from this draft.

The UN did attempt to render the process more participatory by creating a constitutional commission in each district to conduct civic education and gather input for the constitution. More than 200 meetings were held. However, the reports were ignored by Fretilin. Only a 10 day period was used for consultations by the Constituent Assembly once the draft was prepared. Even these consultations were mainly about providing information about the draft rather than hearing input (there was no education campaign and few people had access to the draft before the meeting).

The draft was then adopted by the constitutional assembly by a 2/3 vote. The Constituent Assembly also voted to turn itself into the first legislature. The process was criticized at the time for being dominated by Fretilin which imposed the draft on the other members rather than develop one through a process of negotiation or deliberation. The constitution vote was opposed by a number of parties, particularly the PD which represented the youth resistance movement that had fought the occupation from within East Timor and felt sidelined by the exile dominated Fretilin.

---

<sup>14</sup> This analysis is drawn from the case study prepared by Randall Garrison for International IDEA.

## Outcome

The process adopted in East Timor did not encourage the creation of a national consensus over the future of the state, or reconcile differences between the various interests, be it the decommissioned fighters, the excluded youth or the former opponents in the 1975 civil conflict. It was dominated by one faction among those who won. The short time frame, encouraged by the international community, also reinforced this dynamic as it restricted the opportunity for adequate consultation and participation. The constitution is considered to be a Fretilin constitution, and there is ongoing political tension between those excluded and those in power, including a return to violence. This case suggests that for a constitution to have domestic legitimacy, it requires the support of all interests in society rather than simply that of the dominant political party.

## *Chile<sup>15</sup>*

The constitution building process in Chile, which began in 1989 and is ongoing, has taken the form of an incremental elite negotiated process. It is a relatively representative process and has incrementally amended the constitutional provisions entrenching the authoritarian regime. It has not been a participatory process.

## The Process

The 1989 negotiations on the constitution took place between three actors: the democratic opposition, Pinochet's autocratic government, and political parties that represented the military government. The negotiations did not include women or any native Chilean representation. They resulted in a compromise package formed of a set of minimal reforms to the 1980 military constitution (which had aimed to institutionalize authoritarian anti-communist and neo-liberal ideology).

The 1989 agreement represented the first agreement between opposing sides since the coup in 1973 and represented the beginning of a non-violent approach towards resolving ideological and political divisions. These negotiations took place in a political environment controlled by an autocratic government and dominated by the military, but during a period where it was under intense economic, social and political pressure, both internally with opposition coordinated popular resistance, and from the international community. Moreover, they began 16 years after the coup, in an environment where some political negotiation was a possibility, as there had been time for political interests to change and positions to depolarize.

The negotiators in Chile are considered to have been representative. The opposition parties had credibility and legitimacy in the eyes of the population and the amendments were supported in the resulting plebiscite. Political limitations, and fear of a violent response by the military, militated against an inclusive and participatory process in 1989. It was considered that in order to reach successful agreement, it was necessary to undertake the reforms in a limited forum.

In August 2005, after many years of unsuccessful attempted reform, the Chilean Congress finally approved a set of Constitutional reforms that removed all appointed and life-time senators, eliminated the political role that the constitution gave to the military, and increased the power of congress versus the Executive (by adding new powers of control and accountability) and strengthening judicial review.

## Outcome

Since 1989 Chile has had multiple elections under the modified constitution and incrementally the constitution has been reformed to dismantle the autocratic protections. Until recently, the constitution still favored the military and contained restriction on democratic elections. Ongoing reforms were sought in the legislature. However, the right successfully vetoed any reform until this year. Since 2005, reform has

---

<sup>15</sup> This analysis is drawn from the case study prepared by Esteban Montes and Tomás Vial for International IDEA.

finally become possible, primarily because the entrenched provisions had begun to favor the leftist government in power.

The incremental elite negotiated process in Chile has ensured a slow regime change, incremental reduction of authoritarian institutions and rules, and a slow consolidation of democracy. It has taken place largely without violence. Nonetheless, it has taken over sixteen years and the central autocratic elements of the constitution remained until 2005.

The extent to which the fact that the reform has not been participatory will undermine the legitimacy of the constitution is unclear. It seems that the people have not felt that the constitution represents their views. In 2003, only 12% of the population said that the constitution contained ideas that belonged to all Chileans, 18% considered that represented the majority and 39% thought it represented the military and the political right. It remains to be seen how the latest reforms have affected this impression.

In evaluating how appropriate such a process might be to other environments, it is important to keep in mind that Chile had a long history of peaceful democratic rule, and retained an institutionalized and deeply rooted culture of rule of law, and a largely uncorrupt and professional judiciary, police and public auditor. The military dictatorship presented a major break in this, but even the military regime sought to operate through rules and constitutional legitimation.

### *Indonesia*<sup>16</sup>

In Indonesia, an incremental elite negotiated constitutional reform process has begun. The reform began in 1998 after forty years of authoritarian rule, when President Suharto was toppled by a loose coalition of pro-reform political groups (the *reformasi*), following increasing popular pressure and a major economic crisis. Vice President Habibie, who replaced Suharto, agreed to call new multi-party elections in 1999, and the new legislature initiated a process of reform.

#### The Process

The constitutional reform process began in 1999 after the newly elected members of the MPR (the People's Consultative Assembly) passed a series of laws reforming the governance structures, particularly creating an independent election commission and limiting the president's emergency powers. The MPR then passed the first constitutional amendment which increased the DPR (House of Representatives) authority to enact legislation and created an *ad hoc* committee on constitutional change. Since then the MPR has passed a number of constitutional amendments, and the DPR has reformed governance structures through statute reform. The electoral laws were also reformed. In 2000, the DPR was turned into a fully elected body and most of the Declaration on Human Rights was incorporated into the Constitution. Further amendments removed military, police and functional group representatives from the MPR, approved popular election for the presidency, and created a constitutional court.

This process has been largely elite driven and elite negotiated without public participation, although there have been a few public meetings on constitutional reform. Similarly to Fiji, some believed that the compromises required to maintain stability would be difficult to achieve in a more participatory process. This is partly a result of the experience with the divisive and controversial issue of shari'a law, which contributed to the failure of the 1955 constitutional reform commission process.

#### Outcome

Similarly to Chile, the early stages of the process took place in an atmosphere where there was concern over possible military response. However, this process of reform is taking place in a very different historical and state institution context to that in Chile. Since independence, Indonesia has largely been governed by executive centered, quasi-military regimes operating under emergency powers. There has

---

<sup>16</sup> This analysis is drawn from the case study prepared by Edward Schneier for International IDEA.

been little legislative capacity developed in the legislature, or culture of rule of law. Civil society and government institutions are weak. It has so far resulted in limited democracy.

It is too early to tell how these reforms will play out in the medium term. There is a risk that given Indonesia's extremely weak state apparatus and rule of law tradition, reform of the legislation and constitution will not result in strong democratic governance unless the reforms lead to deep institutional changes and are backed up by strong public demand or support.

## **Imposed Constitutions**

Nigeria and Bahrain both represent grand design constitutional processes that were imposed from the top by the authoritarian body in power.

### *Nigeria<sup>17</sup>*

Constitution building in Nigeria has generally been initiated by military regimes as part of a transition to civilian government. The 1979 and 1999 constitutions were top-down processes and the military government had the ultimate say on the content of the constitution. The processes adopted were quite different however.

#### 1979 process

The initial draft was prepared by a commission appointed by the military government, formed of two representatives of each state and a number of scholars. Its brief was to develop a constitution that was to create viable institutions that ensure maximum participation and consensus, eliminate cut throat political competition based on a system of winner-takes-all, develop consensus politics, and eliminate the over-centralization of power. The draft and report was provided to the military government and it was subjected to a period of intense public debate. For 12 months various groups all over the country discussed the draft. Nonetheless, substantive input came primarily from the military government.

In December 1976 local elections were held. A Constitutional Assembly was selected the following year (203 members selected by local government councils and 20 appointed by the Supreme Military Council). This produced a relatively representative body which then debated the constitutional draft for 9 months. Very heated and divided positions were adopted in relation to certain issues such as Shari'a law. The work of the constituent Assembly was reviewed and amended by the Supreme Military Council that then enacted the 1979 constitution by decree.<sup>18</sup>

The constitution was made in an environment of public debate and through a process of deliberation in a Constitutional Assembly. The public was not formally consulted however, and the process was under the tight control of the military which stepped in to amend any provisions it considered unacceptable.

The constitution did not resolve the conflicts and divisions in Nigeria although it did raise hope. This was dashed after the first elections when a candidate supported by the military took power as the president in a contested electoral result, this led to increased tensions and ultimately a return to military control. Between 1993-1998 there were increasingly brutal efforts to suppress dissent and opposition.

#### The 1999 process

The 1999 constitution was not negotiated or debated, but was simply imposed by the military. The military government appointed a committee of 25 men to draft a new constitution, which was signed into

---

<sup>17</sup> This analysis is drawn from the case study prepared by John Simpkins for International IDEA.

<sup>18</sup> Constitution Building and the Struggle for Resource Control in Nigeria, By Otiye Igbuzor igbuzor@cddnig.org, <http://www.dawodu.com/igbuzor1.htm> (Secretary, Citizens Forum for Constitutional Reform).

law in May 1999. Even when it did canvass public opinion the government ignored the public's recommendations.

## Outcome

This 1999 constitution has been rejected by the people. It is perceived as the product of the military regime rather than the people and in substance it does not address calls from women, Muslims and ethnic groups for greater inclusion in the governing framework.

In theory at least, the constitution did reduce military participation in government through carefully drafted clauses subordinating the military to civilian leadership. However, the military retains control through the close ties between civilian leaders and the military (underscoring the power of practice over laws). The current civilian head of state, Olesegun Obasanjo, for instance, headed the military regime in 1976-1979. Moreover, the constitution also gives government control over the judiciary and the police, thus undermining any system of democratic checks and balances. The 1999 constitution has also failed to provide resolution of the main divisions in society. Tensions among and between states and with the central government remain, and ethnic and religious violence continues.

There is widespread public demand for meaningful constitutional reform based on public consultation. The Citizens Forum for Constitutional Reform, a coalition formed of over 100 civil society associations, has undertaken a guided dialogue and public participation process which resulted in the drafting of a model constitution in 2002. The government appointed review committee (October 1999), has been perceived as an attempt to control the process and bring it within the domain of politicians, and has yet to produce a draft constitution.

## *Bahrain*<sup>19</sup>

The 1999-2002 constitution reform process in Bahrain was a top down imposed constitution process. It gained public support through its early participatory phase, but remains under the tight control of the Emir, now King. The reforms represent a significant step towards constitutional governance in a state where the legislature and the constitution have been suspended since 1975, but they have resulted in only limited democratization. The initial constitution building process was undertaken through grand-design constitutional reform, it may continue in a more incremental way.

## The Process

The constitution building process involved two stages. The initial National Action Charter, which set out basic principles, was developed in a relatively inclusive fashion. The initial draft was produced by the government alone, when the Islamist opposition and independent intellectuals resigned. However, the Emir instructed the Charter Committee to organize workshops and open meetings to explain the document and seek feedback, and acted on the results of the consultations. In particular, the Emir freed certain political prisoners and promised elections and a limited freedom of speech and association. The Charter was adopted with strong support at a referendum.

In 2002 the principles in the Charter were developed into a constitution. However, this constitution was drafted by the executive branch of the government without consultation of the opposition or the people. The government claimed that the referendum on the Charter gave them the authority to proceed without further consultation.

## Outcome

It is believed that the Emir initiated the reform process to regain personal power abdicated by his father to his cousin, as well as in response to popular pressure. The drafting of the national action charter and the

---

<sup>19</sup> This analysis is drawn from the case study prepared by Mohamoud Awil for International IDEA.

popular referendum did help heal divisions in society. It diminished violent social tensions and brought political stability and limited political participation to the public. However, the imposition of the constitution without consultation or participation has increased tensions, caused resentment and appears to be leading to a constitutional crisis.

Many political parties boycotted the national legislative elections in October 2002. The opposition rejects the constitution on the basis that it accords even less power to the legislature than the one dissolved in 1975. The new constitution divides the legislature into 2 chambers with equal powers, the one directly elected and the other appointed by the king. The king also has final word in any legislative dispute. They also contest the government gerrymandering to reduce the electoral power of the Shiite majority.

The reform process has only resulted in limited democratization. A by product of even the limited electoral freedom has been the rise in power of a radical Islamist opposition, with damaging impacts on the rights of women (eg the first law the Islamists passed in the legislature forced women to wear a veil while driving).

## **DISCUSSION**

The review of constitutional processes undertaken above explored the main elements of the processes adopted (see also Appendix for a tabulated description) and how the constitution building process evolved. Although the impact of process will only be one factor in a complex situation involving domestic and international political forces, historical and institutional restrictions, and questions of strategy, leadership, and timing, it is useful to draw out some tentative conclusions.

The following discussion reviews the way outcomes were affected by the constitutional building processes. The potential outcomes considered include building peace, impact on the substance of the constitution and democracy, impact on perceived legitimacy and public support for the constitution, democratic education and empowerment, divisiveness and threats to established power structures.

### **i) Building peace**

#### *Participation*

The cases show that a participatory representative constitution building process can provide a forum for the negotiation of solutions to the divisive or contested issues that lead to violence, or for a negotiated transition from an authoritarian regime. In South Africa, Guatemala and Colombia, the process was used to search for a way to bring an end to longstanding conflicts. In order to do so, a consultative and inclusive process was required that reflected the fact that injustice and exclusion and a demand for more equal access to power and state resources were driving forces in the conflicts. In those cases, the draft constitutions that came out of the consultation process addressed some of the key fault lines in society for the first time. These processes also encouraged armed groups to seek reform through political means. The constitutional negotiations were considered to have been successful at the time. In South Africa the constitution continues to play an important role in the reform of the state. In Colombia and Guatemala, the constitutions were later undermined by the political elites' failure to adopt or implement the agreements. In Guatemala the conflict effectively ended in 1996 but a degree of structural violence remains. In Colombia, an armed conflict continues, although the nature of the conflict has evolved substantially, increasingly driven by a growing criminal element benefiting from the state of chaos.

Also where there is a need for reconciliation in society, particularly in states emerging from civil conflict, the participatory component of the process can play a reconciliation and healing role through societal dialogue, and support sustainable peace by forging a consensus vision of the future of the state. In Rwanda, a traumatized society, the need for some form of reconciliation was pressing and the extensively participatory process seems to have given all Rwandans a sense of ownership of the constitutional framework for their state.

Some transitions from authoritarian rule or conflict have been secured successfully through representative, although un-participatory, negotiated constitutions. In Chile, Hungary and Indonesia, a negotiated representative constitution building process was successfully used to avoid violence during a regime transition.

### *Representativeness*

In contrast, an unrepresentative or imposed constitution can create or aggravate dissent and tensions in the population (see East Timor, Afghanistan, Fiji, Bahrain, and Nigeria). It can even undermine a reasonably participatory process, as was seen in Afghanistan where the wholesale exclusion of the Taliban has had ongoing repercussions, although it is evident that some elements of extremely ideological groups are unlikely to willingly participate in such processes. In East Timor and Fiji, the domination of the process by one political elite faction, resulted in dissatisfaction with the constitution, and political tension with those that feel that their voice was not heard in the deliberations.

In Bahrain, a clear contrast exists between the first stage of the constitutional reform process, which was participatory, and which reduced the level of tension in society, and the later imposition of the constitution without any participation, which led to escalated tension and seems to have engendered a constitutional crisis. Similarly, in Nigeria, the imposed nature of the 1979 constitution has increased societal tensions, and created strong demands by the people for genuine involvement in the reform process.

### *Failure to adopt or implement*

The failure to adopt or implement a constitution developed by a participatory process has also resulted in increased dissatisfaction and societal tensions. The undermining of the constitutions of Kenya (amended by the political elite leading to a failed referendum), Guatemala (a successful no campaign at the referendum stage) and Colombia (failure to implement) have resulted in increased dissatisfaction and entrenched opposition positions. It has contributed to an undermining of the peace accords and a loss of confidence in politicians and the political process in Guatemala, and ongoing armed conflict in Colombia.

## **ii) Substance of the constitution and quality of the democracy**

The quality of the democracy is affected by the substance of the constitution. Free and fair elections, social justice and political freedoms, and accountability mechanisms are some of the elements that determine the quality of democracy.<sup>20</sup> Provisions that aim to ensure that a minority or particular group retain executive or legislative power undermine a basic requirement of democracy, namely the right to choose the government through free and fair elections. Participation in the selection of leaders and policies through free and fair elections, is a basic element of democracy<sup>21</sup>

### *Participation*

The cases of South Africa, Kenya, Guatemala and Colombia show that a participatory process can have a substantial impact on the content of the document produced. The broad participatory process in South Africa and Kenya resulted in the inclusion of provisions addressing issues of social and economic justice, corruption and possible abuse of power by political elites to act responsibly. In Colombia and Guatemala the participatory and inclusive process resulted in reforming constitutions which expressly provided rights to those groups who had not up to then gained political protection or recognition. In Fiji, the commissioners documented how the consultation process had affected their perception of the main issues facing society and in particular de-emphasized the relevance of ethnicity. In Bahrain, as well, the consultative process during the adoption of the Charter led to the inclusion of clauses providing for (limited) freedom of speech and the release of political prisoners.

---

<sup>20</sup> Diamond and Morlino "The Quality of Democracy: An Overview" (2004) 15(4) Journal of Democracy 19 .

<sup>21</sup> See footnote 3 above.

It is unlikely that any of these provisions would have been included if the process was less participatory. In many cases the political elites perceived the draft document as a threat to their class. In the case of Kenya, the elites rejected provisions that restricted their terms in office or opened them to recall by their constituents, and provisions that diminished Presidential powers. In Colombia and Guatemala, the elites undermined the constitution which sought to overcome social divisions and discrimination against indigenous and other excluded groups. In Colombia, the elites did so by not implementing the constitution, whereas in Guatemala they campaigned against it and prevented its adoption at the referendum stage. In South Africa, however, the majority which took power was also the group to benefit from the reforms, so the issue did not arise in the same fashion.

### *Representativeness*

The degree of representativeness, and the context within which the constitution is negotiated, will impact on the content of the constitution. More representative and inclusive negotiations resulted in constitutions better able to support democratization because they were free from provisions obviously undermining the quality of the democracy.

In Hungary, the representative (though not participatory) constitution building process resulted in a solid democratic constitution. In contrast, in 1957 Colombia's constitution building process resulted in a political pact known as the National Front. This pact aimed to resolve the violent conflicts of the 1940s between Liberals and Conservatives by guaranteeing them equal power sharing. The agreement resulted in state power being shared by only two parties and resulted in the exclusion of indigenous people and other political forces. It politicized the judicial branch and resulted in a corrupt administration. It undermined any true democratic competition and put in place a repressive political environment and rendered elections meaningless. Ultimately it exacerbated the divisions and injustices which initiated the later conflict.<sup>22</sup>

The difference is thought to result from the representativeness of the bargaining group. Encarnacio has argued that a similar reason why Spain's 'pacted' transition resulted in a consolidated stable democracy.<sup>23</sup> In contrast to Latin America, where the pact building was elite driven and secretive with few powerful actors, in Spain the bargaining group included practically the whole ideological spectrum and the agreement instituted policy limitations that were representative of the major interests in society.<sup>24</sup>

The context also affects the outcome. Thus, where the constitution is negotiated with an undefeated autocratic government in an atmosphere of possible military retribution, the negotiated constitution tends to retain undemocratic provisions. The negotiators of the key 1989 agreement in Chile were representative, as the opposition parties had strong credibility and legitimacy in the eyes of the population. Nonetheless, tactical considerations and fear of military retribution led the opposition to agree to a constitution which retained many entrenched autocratic provisions, including institutionalized military representation in the legislature. Negotiations for further reform, attempted through an unrepresentative legislature with electoral rules favoring the right and the military, were unsuccessful for many years. Finally, in 2005, amendments successfully removed the last undemocratic provisions.

Similarly, constitutions written and imposed by one faction or one dominant interest, rather than negotiated, have tended to be biased towards that interest or undermine some aspect of democracy. For instance, the 1980 Pinochet constitution in Chile, written after the coup, sought to entrench a military control and exclude the Left from political power. It resulted in years of oppressive dictatorship. The 1990

---

<sup>22</sup> See case author's description of this pact in Colombia case study.

<sup>23</sup> Encarnacio "Do Political Pacts Freeze Democracy? Spanish and South American Lessons" (2005) 28(1) West European Politics 182 at 182.

<sup>24</sup> Ibid at 187-191: Spain adopted many different forms of pacts: a secret pact between Franco's democratic opposition that set up the democratic transition based on a series of compromises; followed after the elections of 1977 by policy-building pacts such as the Moncloa pact which addressed economic reform, salary regulation, and incorporated extensive redistributive policies.

Fiji constitution explicitly sought to entrench military and indigenous Fijian power and has been the source of ongoing political tension.

Nigeria, Bahrain, East Timor and Rwanda are examples of constitutions which were dominated by one interest and, all except East Timor have resulted in constitutions with undemocratic elements. The Nigerian constitution seeks to centralize power in the executive and undermines the system of checks and balances by seeking to place the judiciary and police under executive control. The Bahrain constitution retains ultimate power in the hands of the king and his appointed chamber of the legislature. In Rwanda, the constitution includes provisions restricting political speech and a body to control political parties, but it is too early to tell how the constitution will play out in the longer term.

### **iii) Popular support**

In the study, constitutions that were representative or involved a process of consultation and participation were perceived as more legitimate and hence received greater popular support. Representativeness, even without participation, seemed to be a sufficient criterion to ensure at least initial popular support for the constitution. It is important to keep in mind, nonetheless, that popular support for a constitution in the building stage is only one element in a search for peace and democracy. Popular majorities may discriminate against a minority, or undermine human rights. In Bahrain, for instance, the Islamists, who have popular support and are gaining some legislative power, have used such power to undermine women's rights.

#### *Participation*

Popular consultation seems to have generated widespread public support for the constitutions in South Africa, Rwanda, Colombia, and the 2000 Charter in Bahrain. Although note that in Guatemala, the 'no' campaign successfully undermined the support gained through consultations and led to the constitution's defeat at referendum.

The study illustrated that populations increasingly feel entitled to participate in constitution building, particularly if they have participated in the past. They reject constitutions where their input was not sought. For instance, the public debate and deliberative process undertaken for the 1975 constitution building process in Nigeria created sufficient expectation of participation that the attempt to impose the constitution in 1999 resulted in the population rejecting it and has led to an ongoing political and constitutional crisis.

Similarly, in Bahrain, the drafting of the constitution without consultation after the Charter has led to a constitutional crisis, with many parties boycotting elections and demanding a new constitution. In Bahrain, the political opposition seems to be the driving force behind the demands for participation. They were the primary participants at the consultations on the Charter. In Nigeria the dissatisfaction is more widespread and includes civil society and the population more broadly.

In contrast, populations have not necessarily rejected constitutions which did not incorporate all their suggestions, if genuine consultation was undertaken. As the case study on Rwanda shows, even a constitution that is quite restrictive on political speech and did not adopt all the views of the people, benefited from having been made in a participatory fashion. The constitution has strong support in Rwanda. Similarly, there is a stark difference between the response of the Nigerians to the 1975 constitution which did involve a process of dialogue and consultation, although it was ultimately shaped by the military, and the 1999 constitution which was rejected vociferously for not having been participatory. Although the 1975 constitution did not ultimately resolve the division in Nigerian society it did include innovative attempts at addressing the ethnic divides, and was accepted with a degree of hope, until it became clear that the military was prepared to interpret it as it saw fit to ensure that its candidate should take power.

## *Representativeness*

Negotiations undertaken by representative bodies do benefit from a perception of legitimacy as was seen for instance in Hungary and Chile, in contrast to Bahrain and Nigeria. Where a constitution is drafted and controlled by one dominant party or faction without the need for negotiation or compromise, it is less likely to be perceived as legitimate by the population, as it was in Nigeria and Bahrain, and to a lesser extent East Timor.

The relationship between parties and the population is an important element of representativeness. In Chile and Hungary the parties were representative and had strong grass roots support. Nigeria, Kenya, Colombia, Guatemala, however, have a rapacious and self serving political class which has sought to undermine any constitutional reform. In Nigeria the close connection between the political parties and the military which has repeatedly violently overthrown governments and has imposed brutally repressive policies puts into question their representativeness, and the legitimacy of any constitution negotiated between them.

### **iv) Democratic education and empowerment**

Democratic education and empowerment is essential to sustainable democracy building. A participatory process can provide an opportunity for the democratic education of the population, and thus their empowerment. In Kenya, the process was explicitly designed to encourage widespread democratic dialogue and to encourage the population to engage with questions of the role of constitutions, and the responsibility of politicians under a democracy.

It remains to be seen whether the politicization and empowerment of the people through such processes is transient or more long lasting. In South Africa and Kenya, civil society continues to demand that the constitution be adopted, even if in Kenya the process has been hijacked by the more self-serving politicians. In Nigeria, the participatory process in 1979 may have laid the groundwork for the current vocal demands for genuine participation in the latest process. Since the Colombian constitutional process, there has been greater involvement in politics by those that were previously excluded, particularly the Indians.

The experience in Guatemala, however, suggests that participation that increases hope and involvement can be easily crushed where traditional forces re-assert control. The very active civil society participants in the participatory process seem to have dissipated after the failure of the referendum, and have left the political sphere to the political elites. The implementation commission has lost much status and many commissioners have resigned.

### **v) Divisive effect**

The question of whether it is necessary at times to rely on elite compromises and to avoid societal dialogue of a divisive issue is difficult and requires careful assessment of the whole context. The participatory processes did not have a divisive effect in the case studies considered, although it is possible to imagine that a process could have been used in that fashion.

Careful planning and management may reduce the chance of polemic issues destroying the process. In Afghanistan, for instance, the participation process was managed in a careful fashion to prevent the warlords or Islamic extremists from dominating. However, such issues have been seen to create deadlocks. For instance, in Indonesia the incremental reform approach has so far avoided the deadlock that arose in the Jakarta Charter process over the issue of Shari'a law. Nonetheless, avoidance can be risky if the issue surfaces later without balanced discussion. In Fiji, it was feared that a participatory process would lead to increased ethnic divisions. However, the failure to debate the issues in the broader population, and explain why the constitution adopted the moderating provisions it did, weakened the constitution when the political elites turned to divisive ethnic rhetoric. While a participatory process may, as feared, have brought out the radical ethnic viewpoint, the process of education and dialogue may have

also resulted in a more moderate consensus in society and immunized it against the later use of radical ethnic rhetoric.

#### **vi) A threat to the established power structure**

The use of more participatory and inclusive processes was shown to broaden the constitutional agenda and reduce the chance of the process degenerating into a mere division of spoils between powerful players. However, at the same time, in the case studies, such constitutions tended to threaten the established power structures, many of which reacted by undermining the constitutions, amending them, preventing their adoption, or preventing their enforcement.

As seen in table 2 below, in three of the five cases which adopted representative and participatory constitution making process (Kenya, Colombia, Guatemala), the constitution was not adopted, or adopted and not implemented, by the dominant power structures because it challenged their power. In Kenya, during the participatory part of the process, the constitution incorporated the concerns of the people and sought reforms which were perceived as a threat to the elite political class (such as provisions that restricted their terms in office or opened them to recall by their constituents, and provisions that diminished Presidential powers). The National Constitutional Assembly was formed partly of those representing civil society and partly of the politicians in question, however, the final say on the draft and on its adoption was in the hands of that political elite and thus the these players sought to delay and undermine its adoption.

Similar issues arise in Colombia, where a reforming constitution was adopted by a process that excluded the politicians, who then sought to undermine its enforcement. In Guatemala, the constitutional drafting process resulted from the peace negotiation which were inclusive and representative, however the constitution was defeated at the referendum stage following a strong 'No' campaign by the conservative elite. In both Guatemala and Colombia, the political elites retained sufficient power during or after the process to undermine the long term implementation of these agreements.

In contrast, South Africa, Hungary and Chile brought to power new interests and resulted in stable democracies. South Africa adopted a strong democratic and rights based constitution. Hungary also avoided major undemocratic elements in the constitution. In Chile the balance of power in the negotiation resulted in a constitution that maintained situations of privilege and undemocratic elements in the institutional framework for many years. However, at the time, no other option may have been possible, and a long period of incremental reform has resulted in a stable democracy.

Constitution building is a political act subject to political constraints. Although civil society may see the constitution building as an opportunity for genuine restructuring of the system, the government or elites fear losing their powers. Participatory and inclusive processes have resulted in constitutions that represent the interests of the population rather than merely the political elite. The constitutions that emerged from participatory processes were the most democratic and socially just, and had the most popular support. However, they resulted in constitutions that were threatening to the political elites, which may attempt to undermine their adoption and implementation.

A central challenge will be how to address the opposing requirements of creating incentives to tie in powerful elites, without abdicating a genuine consultative process that fosters political dialogue and empowers the people. There are difficult trade-offs here. There is no simple answer to this dilemma, which requires careful weighing of the surrounding circumstances and options for implementation of the constitution, including the degree of local popular activism.

## vii) Prior history, institutions and culture<sup>25</sup>

The democratic success of constitutional reform processes are subject to a variety of limitations ranging from historical factors, customs and informal institutions and deep seated divisions that are difficult to breach. Nonetheless, even in cases with long standing history of autocratic regimes or civil conflict, constitutional processes and reform can have an impact on the structure and nature of society, and the process of democratization.

In Ghai's words:

A key significance of the constitution lies in the possibilities of the democratization of state power that they open up. They provide new institutions for the articulation and resolution of conflicts. They constitute new frameworks for political competition. They promote new symbols of identification and loyalty and lay the basis of national integration.<sup>26</sup>

South Africa, Hungary and Chile can be considered the most successful transitions towards democracy, so far they have been at peace for over 10 years and are consolidating democracies. These states at least had some rule of law tradition: South Africa had technical capability although it had been used in a discriminatory fashion, Chile had a substantial period of democracy prior to the 16 years of Pinochet rule, and Hungary had a strong rule of law tradition derived from the Austro-Hungarian regimes despite the extended period of corrupt autocratic regimes.

The remainder of the cases have little rule of law tradition and a weak bureaucracy. Most have experienced many years of civil conflict or authoritarian regimes since their independence, and have been under authoritarian constitutions and rules. Nevertheless, there are signs of improvement in many of the cases considered. While it may be premature to evaluate the outcome of the case studies that have not yet reached the 10 year mark, especially those that are under 5 years, in all cases where the process was inclusive, representative or participatory, the constitution building process has led to incremental democratization in the state.

## CONCLUSION

The cases of constitution building processes discussed in this study illustrate some ways in which processes can affect democratic transitions. Although the cases adopt diverse approaches to constitution building and are rooted in different historical, institutional and political contexts, certain trends can be seen across many of the cases.

The cases explored above suggest that *representative negotiated* processes constitute a minimum for a sustainable transition to democracy. The more representative processes resulted in constitutions free from provisions that undermine the quality of democracy (such as provisions which aim to ensure that a particular group retains executive or legislative power irrespective of elections). However, constitutions written and imposed by one faction or one dominant interest, rather than negotiated, tended to be biased towards that interest or undermine some aspect of democracy. An unrepresentative or imposed constitution created or aggravated dissent and political tensions, whereas a representative constitution building process provided a forum for the negotiation of solutions to the divisive or contested issues that led to violence, or for a negotiated transition from an authoritarian regime.

*Participatory processes* can play a reconciliation and healing role through societal dialogue, and can support sustainable peace by forging a consensus vision of the future of the state. The use of more

---

<sup>25</sup> See Table in appendix setting out past constitutional and institutional history.

<sup>26</sup> Ghai "The Political Consequences of Constitutions" in Ghai (ed.) *Law Politics & Government in the Pacific Island States* (Institution of pacific studies, Suva Jifi, 1988) at 351.

participatory and inclusive processes were shown to broaden the constitutional agenda, and also provided an opportunity for the democratic education of the population, and thus their empowerment.

Nonetheless, it is important to keep reasonable expectations of what can be achieved through participatory processes in these highly politicized and often divisive environments. The mere fact of a participatory process will not necessarily result in an inclusive or democratic constitution, nor will it ensure peace or prosperity in the state, or prevent unconstitutional conduct by power brokers (eg Uganda and Thailand). Moreover, reformist constitutions will threaten established power structures, which, may react by undermining the constitution, amending it, preventing its adoption, or preventing its enforcement. However, a key challenge will be how to address the opposing requirements of creating incentives for the powerful players to participate in constitutional processes and to commit to implementation, without abdicating a genuine consultative process that fosters political dialogue and empowers the people.

While it may be premature to evaluate the outcome of the case studies that have not yet reached the 10 year mark, especially those that are under 5 years, in all cases where the process was inclusive and representative or representative and participatory, the constitution building process has led to incremental democratization in the state.