

Constitutional Reform Processes and Political Parties

Principles for Practice



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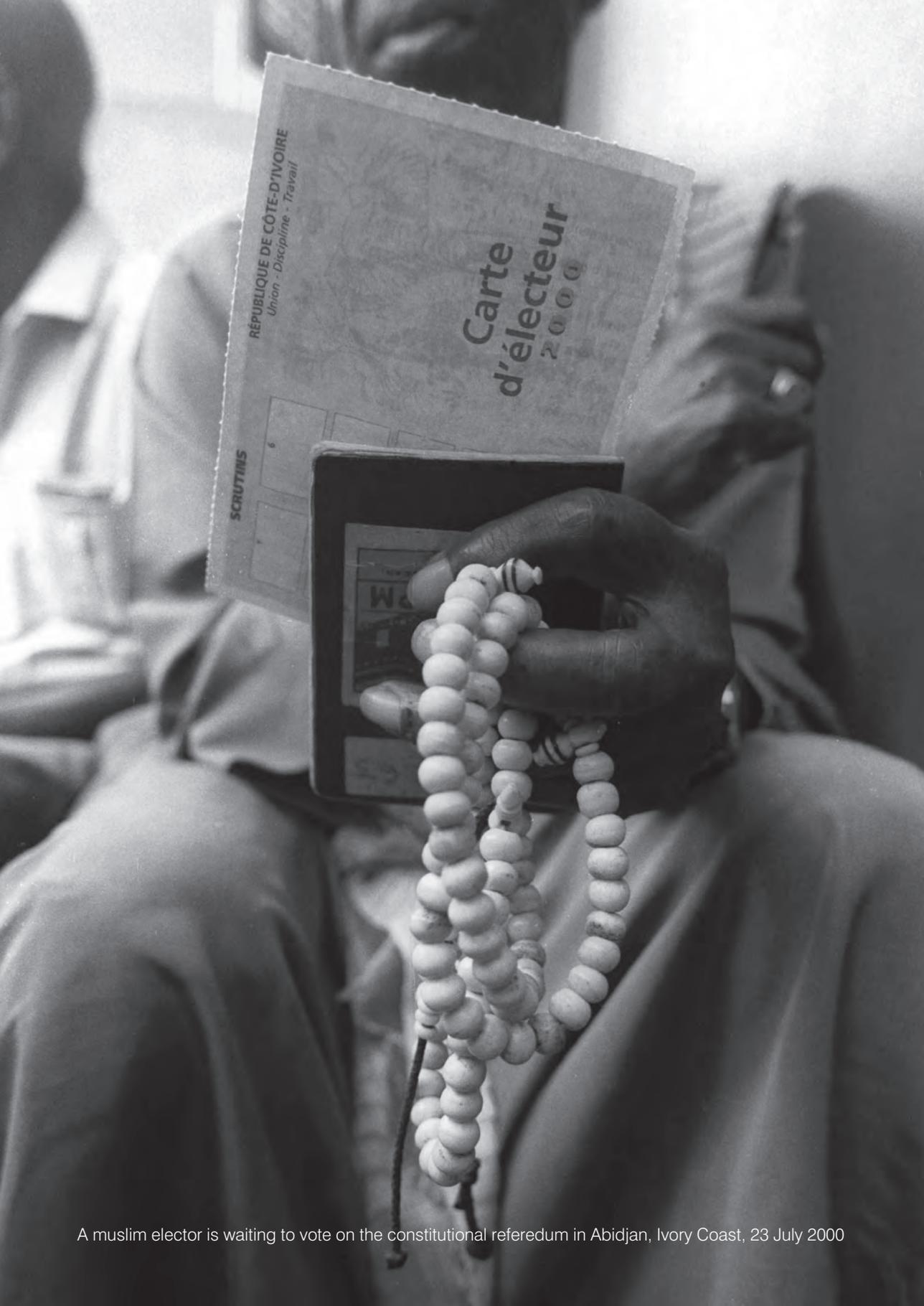
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Principles for Practice

Martin van Vliet, Winluck Wahiu, Augustine Magolowondo



RÉPUBLIQUE DE CÔTE-D'IVOIRE
Union - Discipline - Travail

Carte
d'électeur
2000

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A muslim elector is waiting to vote on the constitutional referendum in Abidjan, Ivory Coast, 23 July 2000

Content

Foreword	
His Excellency Joaquim Chissano	4
Preface	
Hans Bruning, Vidar Helgesen, Ton Dietz	7
Acknowledgments	8
1 Constitutional reforms and guiding principles	9
2 Constitutional reforms in democratisation	12
3 Constitutional reform and political parties	14
4 Constitutional reform in practice: Case studies	25
Ghana	26
Kenya	28
Malawi	31
Zimbabwe	33
Bolivia	35
Indonesia	38
Iraq	40
South Africa	42
Conclusions	44
5 Constitutional reform in phases	45
Constitutions available on the internet	53
References	54
Further reading	55
Colophon	56

Foreword



It is with profound pleasure that I am writing a preface to this publication, the subject of which is as historical as it is contemporary. It is a subject that deserves our attention. At a more personal level, the subject of constitutional reform is so dear to my heart. For one thing, this takes me down the cherished memory lane of my times when I had to participate in a constitution-making process from scratch for my own country, Mozambique, decades of years ago, early at the beginning of the 1970's. This also brings me back to the challenges I faced when I spearheaded the deep revision of that same constitution at the end of the 1990's in order to make it adequate to the development of our country and the big changes in the world relations. For another, experience now teaches us that constitution-making and constitutional reform are at the very core of state building and democratic consolidation. For this reason, the making or remaking of constitutions should not be construed as a legal project to be left to lawyers. Nor should this agenda be the sole preserve of politicians.

A constitution is the most important piece of legislation that any country has. Ideally, a constitution should reflect not only the history of the nation but also, and in my view most importantly, it must mirror the interests and aspirations of its people with regard to how they wish to be governed. The constitution should define the type of government people want, the powers their government should have and the limits of those powers. A constitution is, in its simplest form, the social contract between those who govern and the governed. As such, the making and remaking of a constitution is a societal and national project in which all sectors of society must participate. In other words, the process leading to a new or revised constitution is as important as the content if both of these (the process and content) are to be regarded not only democratic and legitimate, but also inclusive and popularly accepted. This is why I am particularly delighted that this publication is informed not only by the theory of constitution-making but, and in my view more importantly, what actually works and does not work in practice. Of course, there will never be a one-size-fits-all solution but it does help tremendously to learn from the praxis. After all, experience is the best teacher.

Being a former President and a politician myself, I must also highlight the importance of dialogue in the process of constitutional reform, especially between and among political actors. Oftentimes because of their partisan interests, political actors can be the greatest obstacles to this very important democratic undertaking, especially when some of them feel that the outcome will to them be a zero-sum game. Through dialogue, stakeholders tend to understand each other's fears and aspirations much better. Consensus while at the same time upholding the

basic virtues of a democratic constitutional reform process can best be obtained in a set-up that gives each of the parties concerned a chance to be heard and to be identified with the process. I therefore congratulate all those who have contributed to this publication for sharing with the audience the role of political parties and inter-party dialogue in constitutional reform processes. It is my hope that this publication will be well received and well utilised in the pursuit of democratic consolidation.

His Excellency Joaquim Chissano

Former President of Mozambique and Chair of the Africa Forum of Former Heads of State and Government

Preface

Constitutional reform processes within a particular country are often about responding to broad challenges of peace building, reconciliation, inclusion and socio-economic development in a way that is seen as legitimate and is widely accepted. As the demands placed on constitutions have increased, they have become complex and lengthy, and hence more challenging to design and implement. The stakes are often high in constitutional reform processes themselves, with vested interests and national divisions in play.

One major challenge is the need for actors with short-term interests, who may be leading the drafting of reforms, to ensure the long-term durability of a constitution for future generations. Political parties, often the key actors in constitution-building processes, are critical in addressing this challenge. Political parties have a unique contribution to make to constitution-building processes and to ensuring their long-term sustainability and legitimacy. In particular, dialogue between political parties can help overcome the temptation in politics to focus on short-term gain in order to allow constitutional reform to be durable across generations.

This publication provides a set of *guiding principles* for constitutional reform. These have been taken from practical experiences of constitutional reform in a number of countries. As the case studies illustrate, although country-specific reform processes may be unique in terms of (priority) objectives, context, popular involvement and achievements, these reform processes do go through similar phases. For instance, prior to the actual content deliberations, there is the need to decide on the way the reform will be institutionalised and to inform, educate and consult ordinary citizens and specific interest

groups. Once an agreement has been reached on a new (or revised) constitution, each country goes through an adoption and implementation phase. As a result of these commonalities, we have been able to identify some common best practices that cut across these phases. Bolstered by empirical evidence from academic reflections, it is these best practices that are presented in this publication as guiding principles.

It is not the intention of this publication, however, to provide a blueprint for the complex, unique and volatile processes of constitutional reform. Instead it aims to provide political parties and other institutions involved in similar processes with an accessible overview of common phases, characteristics, challenges and guiding principles for which country-specific solutions need to be found.

Hans Bruning

Executive Director NIMD

Vidar Helgesen

Secretary General International IDEA

Ton Dietz

Director ASC

Acknowledgments

This publication was conceived by the Netherlands Institute for Multiparty Democracy (NIMD) and has been developed jointly by NIMD, International IDEA and the African Studies Centre (ASC). It serves as a stepping-stone towards additional publications addressing specific aspects of the roles and responsibilities of political parties within constitutional reform processes in more detail.

8

We are deeply indebted to the three organisations that were not only ready to collaborate but also made their experts available to participate in this work. In this regard, special thanks go to the three lead authors: Martin van Vliet (ASC), Winluck Wahiu (International IDEA) and Augustine Magolowondo (NIMD). Anne-Mieke van Breukelen, Pepijn Gerrits and Marieke Hoornweg from NIMD also provided conceptual, technical and management support.

Special thanks also go to the participants who attended the 2011 NIMD Africa Regional Conference on Constitutional Reforms that was held in Maputo. Their valuable input into the formation of guiding principles is presented here.

His Excellency Joaquim Chissano, Former President of Mozambique set the tone at this conference in his inspirational keynote address that also provided the broad framework for debate on many of the issues dealt with in this publication. In addition, those countries that prepared case studies at the conference did a commendable job in relating their experiences to these principles and thereby underscoring both the relevance of the guiding principles and their applicability.

1 Constitutional reforms and guiding principles

The practice of constitutional reform as it is observed in this publication demonstrates broad acceptance of the importance of constitutional principles in tempering the political interests that will unavoidably shape these reforms in different contexts. This is a move away from practice to principles. In many cases, political parties have espoused these principles upfront and then struggled to live up to them, while in other cases, political parties have discovered the importance of pre-commitment to principles through their own trials by fire.

These guiding principles, which are intended to serve as a useful reference for political parties driving the reforms in their countries, are formulated in relation to different phases of constitutional reform processes.

1.1 Preparatory phase

Constitutional reform processes tend to be characterised by tensions and a wide diversity of views and interests. Creating solid foundations at a preliminary stage helps to protect the deliberations from collapsing as a result of these inherent tensions.

Guiding principles for the preparatory phase are particularly aimed at reaching:

- A preliminary agreement that explicitly states *why* a country wants to embark upon constitutional reform, *what the main objectives* are and *who the main actors* will be;
- A public statement in which political parties explicitly commit themselves to safeguarding the *public interest* throughout the upcoming reform process and express their willingness to pro-actively engage in *consensus-building*;
- A preliminary agreement between the main political actors and between political and civic actors on the *guiding democratic principles* as benchmarks for the upcoming constitutional reform process;
- A widely accepted agreement by both politicians and civil society on the legally embedded *institutional mechanisms* and their mandate for the upcoming constitutional reform process (including a clear accord on how to progress from the old to the new constitution);
- An informal or legally binding political agreement in which all major political parties commit themselves to *adopting the outcome* of the upcoming constitutional deliberations without fundamental changes;

- A widely accepted agreement by politicians and civil society on the *decision-making process* throughout the upcoming constitutional reform process;
- A widely accepted agreement by politicians and civil society on the *roadmap, timeframe* and *budget* for the upcoming constitutional reform process;
- An *enabling environment*, notably with freedom of expression and press freedom as well as a vibrant independent civil society, to inspire participation by an informed public during the constitutional reform process;
- An agreement on the *principal constitutional issues* to be presented to the general public for awareness-raising and consultation; and
- An agreement on the way popular contributions will *be analysed* (that is, quantitatively and/or qualitatively) and weighted.

1.2 Awareness raising and consultative phase

Actively engaging an informed citizenry throughout the reform process contributes to the popular legitimacy of the revised or renewed constitution, particularly at the normative level.

The guiding principles for this phase aim to stimulate the development of:

- Instruments and means to provide *information* in a balanced and accessible way to ordinary citizens on the main reform issues at stake as well as the upcoming reform process;
- A context within which *people feel free and secure* to express their views during this phase of the reform process;
- *Civic education* programmes on the principal constitutional issues that will enable people to participate in an informed manner;
- Possibilities for ordinary citizens, including minority groups and marginalised groups, to *participate* within the reform process;
- A pro-active role for *political parties* as the principal intermediary institutions connecting citizens with constitutional content; and
- Opportunities for specific institutions to *monitor* the neutrality of the awareness-raising and consultative efforts.

1.3 Content deliberation and drafting phase

Deliberation on constitutional content and its actual drafting are at the core of the entire reform process. The decision-making process, which will frequently need a deadlock-breaking mechanism to enable consensus building between the various contradictory views, is particularly crucial at this stage.

Guiding principles for the deliberative phase strive to encourage agreements on:

- A specific *deadlock-breaking mechanism* if the ordinary decision-making process fails to resolve different interests and viewpoints;
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- The level of *inclusivity* allowing majority and minority groups (or groups with a traditionally weaker voice in society) to partake and express their views, as equals, within the constitutional reform process;
- A formal statement by all participants emphasising that the constitutional deliberations must *serve the public good* as well as more partisan-specific interests;
- A well functioning *decision-making and consensus-building mechanism* that enables the bridging of divergent views;
- *Transparent feedback mechanisms* between participants and their interest groups and the general population during the deliberations;
- Ways of establishing and maintaining an environment conducive to deliberations where all participants are at ease and can express their views freely;
- An external *monitoring mechanism* for the actual deliberations;
- Institutional guarantees that provide a certain degree of *autonomy and integrity* in the deliberations and limit direct external interference within the process; and
- The need for input from legal experts to ensure *coherence* between the various constitutional articles agreed upon.

1.4 Adoption and implementation phase

Constitutional reform does not end with the adoption of a new or revised constitution. The transformation of the adopted changes into subsidiary laws is a lengthy, sensitive and indispensable part of the reform process.

Guiding principles for this final phase specifically aim to promote:

- A political agreement stipulating that agreements reached during the deliberative phase will be presented to Parliament (or a referendum) by the executive branch of government and adopted by Parliament *without fundamental changes*;
- The *unrestricted monitoring* of the adoption and implementation process by non-governmental, media and political organisations;
- A political agreement that ensures the adopted articles will be translated into *subsidiary law* within a specific timeframe;
- *Accountability mechanisms* that allow ordinary citizens to hold their representatives accountable for the agreements reached;
- Strategies to *educate and inform the general citizenry*, in an accessible manner, about the final results of the deliberative stage (for example, in preparation for a possible referendum); and
- A mechanism to ensure that the results of the deliberative stage obtain *wide popular legitimacy*.

2 Constitutional reforms in democratisation

The national soul

Often referred to as a country's supreme law, the constitution provides much more than an overarching legal framework for society. It regulates political power and strongly affects relations between society and the state. A constitution can play an important role in forging a common identity and creating institutional spaces where citizens interact on an equal basis with their leaders. From this perspective, as recognised by Justice Ismail Mahomed, a former Chief Justice of South Africa and the Supreme Court of Namibia, a constitution is nothing less than a *'mirror reflecting the national soul'*.

For a constitution to be embedded in such a political, social and cultural way, the process through which it is drafted (or re-drafted) is of great importance. There is increasing evidence that constitutions enjoy broader legitimacy if they emerge from inclusive, representative and participatory processes that allow all political actors to forge common institutions. Political parties, being intermediary organisations that aggregate political interests and views, have a crucial role to play in this respect. However, political parties also need to be better prepared when faced with the responsibility of actively participating in such important and politically sensitive reform processes. This is what makes principles like those espoused in this document, as well as efforts to agree on these principles in advance, extremely useful.

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Constitutional reform is an important vehicle on the road to democratic consolidation. And as intermediary institutions between the state and ordinary citizens, political parties should be in the driving seat.

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Waves of reform

The first wave of African constitutions following independence mostly served to transfer power to national elites, who then consolidated and centralised this power via constitutional amendments. National elites sometimes used constitutions to dominate the political system, justifying this as an essential part of buttressing the developmental state economic model. However, different economic indicators show that this constitutional model did not produce the intended economic results and, instead of encouraging economic progress, often resulted in legacies that have been dubbed a paradox of 'constitutions without constitutionalism'.

It is not surprising therefore that the new wave of constitutional reforms since the end of the Cold War and the fall of communism has sought different constitutional models. At an institutional level, these models are differentiated by their formal emphasis on electoral procedures, multiparty parliaments, independent courts, decentralised power structures and more inclusive political institutions that take account of diversity and gender criteria.

In recent years, quite a number of African countries have been taking yet another look at their constitutions. In Kenya and Zimbabwe, for example, reform processes have taken place as part of a negotiated settlement following a severe political crisis. The reforms in countries such as Ghana, Malawi, Mali and Tanzania on the other hand have been predominantly oriented towards further enhancing and consolidating democracy. In these and other countries, societal divisions continue to prove pervasive in both formal and informal institutions, including those in civil society and religious sectors. Proponents of constitutional reform – some of them within organised political parties – are increasingly observing that fundamental societal change will only emerge from constitution reforms that successfully catalyse changes in political culture in favour of shared values, constitutionalism, respect for the rights of citizens and the rule of law. These constitutional reform processes have therefore aimed at much more than designing new laws and institutions, as they are processes concerning questions of the nature of the state and its political culture.

In reforming political systems, the balance of power between government branches and the way politicians and citizens relate is obviously a delicate matter. The interests of the current political elites strongly affect the potential for and direction of reform. Balancing their specific short-term interests on the one hand and long-term national interests on the other is a major challenge confronting constitutional reform processes.

Sustainable fundamental change is premised on constitutional reforms that succeed in catalysing the emergence of stable, democratic nations. Such constitutional reforms have to contend with more than merely formally designing institutions; they also need to balance the competing short-term interests of key political actors and the long-term public good.

3 Constitutional reform and political parties

Within these various phases of reform, political parties play a key role in the drafting or redrafting of a constitution. The success or otherwise of reform processes in generating constitutions that reflect the people's ideals and are considered legitimate by ordinary citizens depends to a large extent on the functioning of political parties.

This section does not intend to provide a rigid model for the roles and responsibilities of political parties in a process as diverse, complex and challenging as constitutional reform. It instead offers an overview of potentially constructive contributions based on practical experiences gained, and provides various inspiring empirical illustrations.

Political parties play a prominent role throughout the entire constitutional reform process, from the preparatory stage to the implementation phase. It is important to recognise that political parties can potentially make contributions in three different capacities, namely:

- As individual political parties;
- As members of inter-party dialogue platforms; and
- As political parties in relation to other stakeholders.

Individual parties

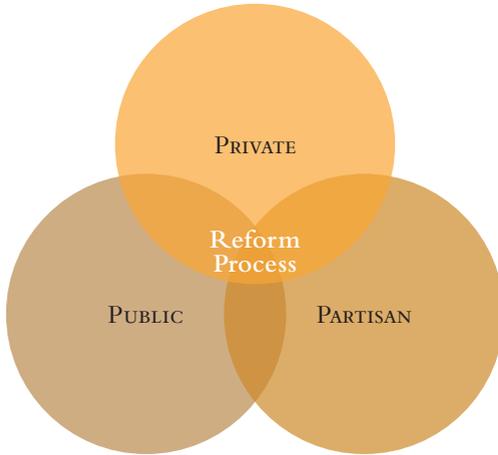
As highlighted in Section 1, recently renewed or revised constitutions are now increasingly expected to provide reliable democratic checks and balances, and must be considered legitimate in the eyes of the general population.

This Section provides an overview of the contributions individual political parties can potentially make, in line with their core functions in society. However, special attention will be paid to the fact that individual parties, in contrast to other institutions, are driven by a quest for political power, as this considerably influences their role in the constitutional reform process.

Constitutions set out a particular political framework, which affects the opportunities of individual parties to gain power and also formally determines how power is distributed. The stakes are thus high for political parties participating in constitutional reform. The role they play within a constitutional reform process is influenced by a combination of *private*, *partisan* and *public* interests.

FIGURE 3.1

Constitutional reform and political party interests



Private interests

The agenda of a political party within a constitutional reform process is partly shaped by the personal ambitions of its main representatives. This has been illustrated by attempts by incumbent presidents to extend the limits of their constitutional terms. While such efforts have been successfully blocked in Malawi, Nigeria and Zambia, long-term presidents in Burkina Faso, Uganda, Togo, Namibia and Chad have been able to maintain their personal position in power beyond the original length allowed.

Controversies over age limits, attestations of indigeneity and educational requirements for presidential candidates have also been inspired by personal interests. In Malawi, a suggestion to introduce an age limit for presidential candidates as part of the constitutional amendments was blocked, as all the candidates for the main parties would have been negatively affected. In Zambia, autochthony criteria successfully prevented an opposition leader from participating in the elections. However, taking the private interests of incumbent rulers into consideration has also proved constructive in the transition to democracy in various countries. In Ghana, for example, President Jerry Rawlings freely committed to reforming the constitution and allowing civilian rule in 1992, partly because of a clause in the proposed new constitution that provided immunity to all past leaders of coups in Ghana, a group which included himself.

The personal interests of political actors outside the executive are also at stake in processes of constitutional reform. The kind of electoral system agreed upon, for example, has an impact on the future career possibilities of

incumbent parliamentarians. Similarly, strengthening the separation of powers between government branches by avoiding the appointment of ministers from within Parliament directly goes against the individual ambitions of Members of Parliament (MPs).

Such private interests can be very influential within constitutional reform processes. The way the process of constitutional reform is institutionalised affects the potential scope of these private and short-term ambitions. Nevertheless, the case studies presented in Section 4 clearly demonstrate that such institutionalisation does not necessarily protect the reform process from personal or partisan interests. The success of constitutional reform processes primarily depends on continuous political bargaining, inter-party negotiations and consensus building.

While the proposed guiding principles in this publication offer a source of reference for these delicate inter-party processes, political parties also have individual responsibility to ensure constitutional reform does not lose sight of the public interest. This requires, amongst other things, the further anchoring of basic democratic values within political parties, as will be briefly elucidated in the next section.

Public interests

The involvement of individual political parties in constitution-building goes well beyond the private interests of their representatives. Political parties can also significantly contribute to safeguarding the public interests of constitutional reform processes. The exact manner in which this is done is highly context-specific but generating commitment to a core set of basic democratic values within individual political parties is crucial. Values that encourage political parties' participation in constitutional reform processes to safeguard the public interest include:

- **Inclusivity** of the main political and social voices, including minority groups;
- **Tolerance** for divergent viewpoints and interests;
- **Transparency** of the reform process;
- **Participation** of citizens (information, consultation and representation); and
- **Consensus building** with other stakeholders involved.

Partisan interests

Partisan interests are key drivers of constitutional reform processes as the case studies in the next Section illustrate. Political parties have different interests in the kind of electoral system selected, whether it be a first-past-the-post, proportional representation, multi-member constituency or single-member constituency system.

This applies also to the political system selected – for example, a presidential, semi-presidential or parliamentary system – as well as the degree of devolution they favour (level centralisation, decentralisation, or federalism) or the role of religious matters (secular state, state religion). As divergent views on these and many other issues are founded on specific partisan interests, agreeing on a new

constitution requires a delicate process of inter-party negotiations. As will be apparent from the case studies in Section 4 and the cross-country comparisons made in Section 5, constitutional reform processes tend to generate political compromises on a restricted number of the most pressing constitutional challenges rather than ideal constitutions.

The proposed guiding principles encourage and inspire political parties to jointly shape constitutional reform processes, in consultation with other stakeholders, in ways that generate an outcome popularly regarded as legitimate. But individual parties also have the potential to strengthen their role within the constitutional reform process as principal intermediary institutions connecting people with policies.

In line with academic conclusions, party representatives from the countries included in this publication observe that political parties perform weakly in this respect. They indicate that their parties often fail to embed the reform process within society or to provide effective channels for consultation and participation. Rather, a select group of national party representatives, in consultation with a limited number of experts, usually defines party positions on constitutional issues and on matters related to the reform process.

Based on the core functions of a political party in society, figure 3.2 provides an overview of their potential contribution to the formulation of a popularly accepted constitution. Promoting the role of political parties in connecting people with reform processes is essential for the consolidation and popularisation of democracy in society.

FIGURE 3.2

Overview of potential roles of individual parties

Functions political parties	Education	Aggregation	Articulation	Recruitment	Oversight
Constitutional Reform Process	Raise awareness and educate citizens, and party members (supporters) in particular	Collect and balance views from society at large, and party members (supporters) in particular, before elaborating party positions	Communicate party positions on key reform issues, both internally and externally	Internally elect party representatives to participate in the reform process	Monitor progress of reform and provide feedback to party members (supporters) and citizens in general

Inter-party dialogue

While issues related to constitutional reform have not featured prominently in internal party activities, political parties have collectively played a very influential and constructive role. In fact, the case studies presented in Section 4 clearly illustrate the determining impact of inter-party consensus building on the successful completion of the reform process. Such processes of inter-party dialogue at various party levels can be highly volatile, frequently derailed and frustratingly slow in yielding results but are nevertheless indispensable to the gradual establishment and strengthening of the democratic rules of the game.

In an increasing number of African countries, political parties have jointly established and institutionalised platforms of inter-party dialogue. The boards of these so-called Centres for Multi-Party Democracy (CMDs) often consist of the Secretaries-General of the parliamentary parties and representatives of the non-parliamentary parties. Independent staff members assist in formulating and implementing the agenda formulated by the political parties themselves.

The role of and possibilities for inter-party dialogue greatly depend on the context in which dialogue takes place. The following sections provide an overview of a wide variety of experiences of inter-party negotiations in constitutional reforms and make comparisons between them. This section highlights three specific advantages of the more institutionalised platforms of inter-party dialogue on the African continent. The three principal beneficial contributions of these inter-party dialogue platforms to sensitive constitutional reform processes are:

- Enhancing personal relations and building trust between political actors;
- Enhancing political consensus in preparation for reform processes; and
- Enhancing consensus building on contentious content issues.

Personal bonding and trust-building amongst political actors

Elaborating a new constitution or revising an existing one is a delicate and sensitive process. The way power is formally distributed in a society is often subject to change. Constructive relations amongst political party representatives, though not often emphasised, are crucially important for enabling inter-party negotiations and driving reforms.

The reality, however, is that levels of distrust between rival politicians are usually high, particularly in conflict or post-conflict situations. Before the numerous technicalities of a constitutional reform process can be tabled and discussed, some level of trust between the participating (political) actors needs to be established. Processes of trust-building are demanding and often disrupted, and require continuous focus throughout the reform process. The following example from Zimbabwe illustrates this.

Trust-building in a polarised context – Zimbabwe

While the Zimbabwean constitutional reform process aims to provide a way out of the country's deep political crisis, it has obviously been severely affected by the considerable levels of polarisation between Zimbabwe's three main political parties.

When the Constitution Parliamentary Select Committee (COPAC), predominantly composed of representatives of ZANU-PF, MDC-M and MDC-T, was set up, it immediately faced numerous practical challenges. The Zimbabwe Institute (ZI) was asked to assist in fundraising, capacity building, the drafting of a working plan and establishing a permanent secretariat.

However, in order to kick-start this round of reforms, it was much more important to address the extreme levels of personal mistrust between the parties. One of the key interventions in this early stage was the facilitation, through the Zimbabwe Institute, of various exchanges with South African politicians who had personally initiated the dialogue process that much later brought about an end to Apartheid. These regional exchanges were then followed up by frequent informal meetings, both inside and outside Zimbabwe, between COPAC members.

COPAC members have now been working together for over two years. While divergent partisan loyalties and interests as well as extreme forms of political competition outside the committee strongly impact on and frequently frustrate their ability to collaborate, personal bonding within the committee across the political divide has contributed to overcoming some of the challenges encountered.

The outcome of the constitutional reform process remains uncertain but, in the absence of alternative solutions, these personal relations underlying platforms of dialogue remain a key ingredient for a peaceful resolution to the relentless political challenges that Zimbabwe faces.

Enhancing political consensus-building prior to reform processes

In order to ensure the legitimacy of constitutional processes as well as their sustainability, it is of crucial importance to facilitate an agreement between the main political actors (that is, parties) on the need for and exact modalities of any upcoming reform process.

Inter-party dialogue platforms allow political parties to gradually build consensus on the way a constitutional reform process is to be shaped. For example, prior to the commencement of reform processes, political parties in a number of countries also agreed on a set of 'basic democratic principles', which were expected to be reflected within the new (or revised) constitution.

Such a homegrown agenda, created across the political divide, enhances the commitment of all the participating political parties to the reform process and the adoption of its final outcome. It also generates a legitimate basis for any support provided by the international community. The political consensus established in Ghana presents an inspiring example.

Inter-party dialogue as fundamental to reform – Ghana

The Ghanaian Political Parties Platform (GPPP) brings together the Secretaries-General of the eight main political parties and is facilitated by the Institute of Economic Affairs (IEA). Following extensive public debate on constitutional matters, this platform decided to commission a study of the main democratic shortcomings of Ghana's 1992 Constitution. The results were translated into a 'Democratic Consolidation Strategy Paper' that highlighted 30 major issues that required modification in order to further advance Ghanaian democracy.

In the run-up to the 2008 elections, all the political parties included a pledge for constitutional reform in their manifestos. Following his election as Republican President, Prof. John Atta Mills established a Constitution Review Commission in January 2010. The main opposition party initially disagreed with the executive appointment of the Commission (favouring an Act of Parliament). However, trust grew over the following months as the President appointed Commissioners who were widely considered as capable, independent and legitimate.

Political parties in Ghana have been at the forefront of their constitutional reform process. They reached a consensus for the need for reform and agreed upon the main issues requiring change. The platform of inter-party dialogue that regroups all Secretaries-General has allowed political parties to take the driving seat along the road towards progressive democratic reform.

Enhancing consensus-building on contentious content issues

The third specific contribution that inter-party dialogue platforms can potentially make to constitutional reform processes concerns the ability to build consensus on contentious content issues.

As highlighted above, partisan interests significantly influence ongoing constitutional reforms. Parties may favour specific electoral systems and political systems, and oppose or favour substantial decentralisation in line with their interests. Despite the overall importance of transparency, facilitating regular informal negotiations behind closed doors at various stages in the process can be an important strategy when conducting negotiations on the main content issues. The Kenyan case illustrates this well.

Inter-party negotiations over content issues – Kenya

An inability to agree on the type of political system and the level of devolution has frustrated the Kenyan constitutional reform process over the last twenty years, and the one time a political agreement was reached, it was not respected.

Amid the turmoil of continuously shifting alliances, the inability of the political class to reach and implement a consensus on the desired political system stood out. The two opposing positions – namely, a strong executive president in a majority electoral system versus a dual executive with a strong prime minister – were closely related to the perceived electoral interests of the main political coalitions and their ethnic support bases. Representatives of the main ethnic group defended the first position in order to maximise its influence while minority groups favoured a dual executive. In line with these interests, one group supported a very centralised government structure whereas others aimed for a decentralised configuration.

After the violent presidential election in 2007, political party representatives were under internal and external pressure to find a compromise on both issues and to complete the lengthy process of constitutional reform. Furthermore, the balance of power between the main political actors had shifted. The 2007 elections clearly showed that those favouring a dual executive system had the ability to win the election, even in a majority system under a single executive. This significantly reduced their push for a dual executive. When inter-party negotiations resumed at the highest level in early 2010, the opposing coalitions appeared not to be as united internally on the two main contentious issues. Combined with the fact that no political leader could be seen to be frustrating the finalisation of reforms, all of these factors positively impacted upon the inter-party negotiations.

For many years, the Centre for Multiparty Democracy-Kenya (CMD-K) had facilitated informal inter-party dialogue sessions on constitutional content and process-related matters. Parallel to the political negotiation process lead by Kofi Annan after the troubled elections, CMD-K set up a broad platform of political and civil-society representatives. They successfully influenced the agenda of the final agreement, in which constitutional reform featured prominently. The continuous efforts of inter-party dialogue and pro-active lobbying for the Annan-led initiative contributed to the adoption of a new Constitution in Kenya.

Constitutional reform processes are highly contentious processes in which political parties play a leading role. A mixture of personal, partisan and public interests shape parties' contributions to these processes. This section has outlined a number of tools that enable parties to strengthen their mediating role between citizens and constitutional reform. It has also pointed out three particularly constructive roles performed by platforms of inter-party dialogue. As the case studies in Section 4 demonstrate, inter-party relations and consensus-building efforts are a key factor in the success of constitutional reform processes. The following section briefly highlights the importance of constructive relations between political and civil society to constitutional reform.

Multi-actor initiatives

The behaviour of individual political parties and inter-party relations affects constitutional reform processes. Constructive relations between political parties and other stakeholders are, however, also crucial. In short, political parties cannot afford to operate in isolation if a constitutional reform process is to be socially embedded and its outcome is to be considered legitimate.

This final section suggests a number of actors that could be involved in the various phases of constitutional reform in cooperation with political parties.

FIGURE 3.3



Political parties and potential partners for reform

Phase	Potential Actors	Aim of Cooperation
Preparatory	<ul style="list-style-type: none"> • NGOs with constituencies • Religious institutions • Interest groups • Traditional leaders • Minority groups • Government branches 	Creating a maximum coalition on the need for and modalities of reform
Awareness and consultation	<ul style="list-style-type: none"> • Media, radio in particular • ICT organisations • NGOs with constituencies • Politicians at all levels • Traditional leaders • Electoral commissions 	Enabling informed citizens to express their viewpoints
Deliberative	<ul style="list-style-type: none"> • All major groupings represented • Specific focus on minorities 	Ensuring maximum inclusivity and legitimacy of the new or revised constitution
Implementation and adoption	<ul style="list-style-type: none"> • NGOs with constituencies • Public watchdog institutions • Media organisations 	Strengthening public scrutiny of the implementation of the new or revised constitution

Networks of cooperation between state institutions, political actors and civic organisations are established in different contexts. Nonetheless, two general observations can be made about their effectiveness.

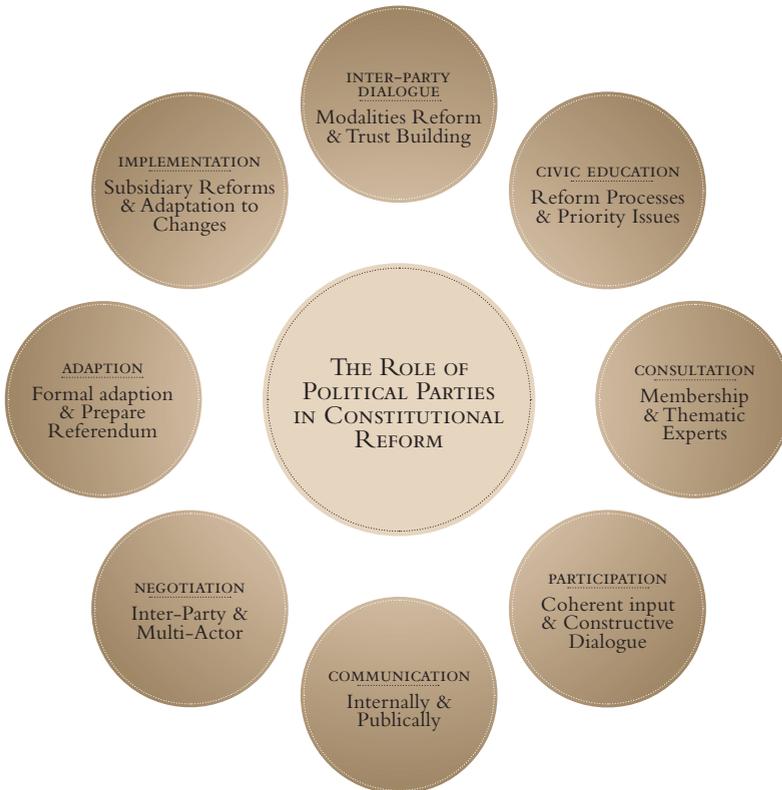
Firstly, in many young democracies in Africa, relations between political and civil society organisations are characterised by severe tensions. Discussions over the boundaries of each other's mandate, stringent state regulations restricting civil society organisations, the political ambitions of civil society leaders ('political submarines') and many other factors contribute to these tensions. Empirical evidence, however, suggests that constructive cooperation and critical scrutiny across the political-social divide is of great importance to the legitimacy of the reform process.

Secondly, networks of cooperation between political actors, state institutions and civil society should clearly go beyond the involvement of a limited number of formal non-government organisations (NGOs). The participation of more 'unusual suspects' – for example, traditional leaders, local party representatives, religious actors and the private sector – is essential to the social embedding of the reform process.

Individual political parties, platforms of inter-party dialogue and multi-actor initiatives can thus potentially contribute to processes of constitutional reform. Figure 3.4 provides an overview of the potential roles of political parties in different capacities throughout the various phases of constitutional reform.

FIGURE 3.4

Summary of the role of political parties in constitutional reform



4 Constitutional reform in practice: Case studies

This chapter presents and discusses eight specific experiences of constitutional reform. The countries covered here are Bolivia, Ghana, Indonesia, Iraq, Kenya, Malawi, Zimbabwe and South Africa. As the case studies illustrate, every reform process appears to be unique and highly context-specific. Even where similar legal instruments underpin processes, the outcomes vary considerably, partly as a result of the political context. These unique features notwithstanding, it is still possible to identify a number of common practices that have either facilitated or thwarted the success of a reform process. Most importantly, the commonly identifiable best practices bolster the guiding principles that were presented in Section 1.

CASE STUDY

Ghana



Key Lessons

- Constructive role of inter-party dialogue both before and during the reform process;
 - Clearly defined democratic principles that guide the reforms in advance;
 - Legal set-up of the process that enables (executive) manipulation;
 - Systematic civic education and popular consultations on reforms; and
 - Political context and popular involvement run the risk of (executive) manipulation.
-

Ghana's current constitutional reform process is based on solid political foundations. With the support of the NIMD and through the IEA, all the major political parties jointly agreed to commission a comprehensive democratic audit that has resulted in the 'Democratic Consolidation Strategy Paper', a public document that identified 30 major legislative weaknesses. In the run-up to the 2008 elections, the main parties included their commitment to constitutional reform in their manifestos.

Soon after taking office, President John Atta Mills established a Constitution Review Commission under the *Inquiries Act*. Arguably, this means that the executive has substantial power over the process and the legal ability to influence or even halt it. However, the way the President handled the selection of the review Commissioners points to the pivotal role of leadership in such a delicate process. In consultation with the Council of State, he strategically nominated people across regional, political and civic divides, thus significantly enhancing political and public trust in the Commission.

The Commission was mandated to consult ordinary Ghanaians as to their constitutional preferences and to draw up new legislative proposals. Before commencing, however, the commissioners jointly defined a number of basic democratic principles that would guide their work, and which they also announced publicly. Whatever the outcome of their work, it had to unite Ghanaians and be fully independent. Further, ownership had to lie, as far as possible, with ordinary citizens. The main weakness of this initial preparatory phase concerned the lack of a well-defined roadmap and timeline for the upcoming reform process.

Thanks to effective collaboration with the National Commission for Civic Education (NCCE), the Constitutional Review Commission undertook public

consultations through information campaigns, consultative meetings organised at the local level and site visits to the country's 170 districts. It aimed to increase popular participation through the media, reaching traditional authorities, local languages and other interest groups using modern informational technologies, including live television debates.

The Commission received over 80,000 submissions in total. After the contributions were divided over twelve different thematic areas, a national conference brought together 2300 stakeholders to start building consensus on the main content issues at stake. While the Commission is permitted to vote in order to adopt final proposals for constitutional amendments, it has indicated its preference for unanimity, having agreed on a combination of quantitative and qualitative criteria to filter consensus on issues. Legal experts have also been continuously consulted to advise on the legality and consistency of draft constitutional provisions.

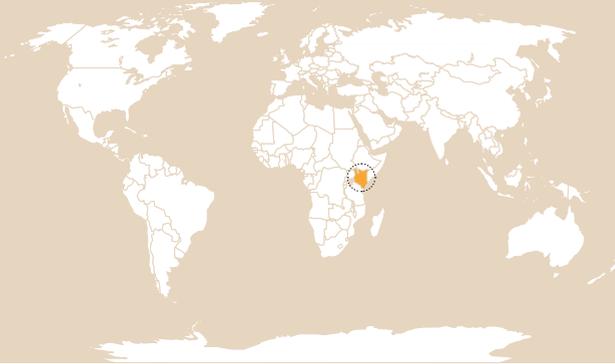
The remainder of the process is still unfolding. Once the Commission finalises its report and prepares a draft constitutional amendment bill, this bill will be presented to the President. One option will then be for the cabinet to publish a white paper for discussion in Parliament. Under the current Constitution, any amendment of clauses that are not entrenched in the Constitution may be adopted on the basis of a two-thirds majority, while the entrenched clauses require a 75% majority in a popular referendum with a minimum 40% turnout.

A second option, which is unlikely in the prevailing situation, is that the President may accept the findings of the Commission and then take no further action on reforming the Constitution. Observers believe that this option would be too risky in terms of its electoral consequences, particularly considering the degree of inter-party consensus that the Constitution should be amended.

The successful completion of the ongoing constitutional reforms in Ghana will continue to depend on inter-party consensus and dialogue. A critical stage may be reached once the process moves into parliamentary proceedings for constitutional amendment. Hopefully, the democratic principles espoused in Ghana's political foundations and in the present work of the Commission will encourage legislators to temper their partisan or short-term interests in favour of the long term public benefit.

CASE STUDY

Kenya



Key Lessons

- Inter-party negotiations and consensus building on contentious issues;
 - Smart decision-making mechanisms enabling the adoption of progressive reforms;
 - Successfully containing the impact of partisan interests throughout the process;
 - Constructive lobbying and scrutiny by non-governmental organisations; and
 - An independent body to monitor the implementation of the new Constitution.
-

The current (2010) Kenyan Constitution is the product of a long and protracted reform process. Amendments to the Constitution in 1990 removed provisions imposing one-party rule which dated back to independence in 1963. Civil society organisations then began to press for democratic reforms by forming an alliance to demand a new constitution. In 1992, they released *Kenya We Want Constitution* and, by 1993, the country's donors had started to close ranks with civil society in demanding far-reaching reforms.

However, it was not until 1997 that the ruling party, after winning the second multi-party elections against a divided opposition, agreed to implement constitutional reform. This was partly to reclaim the initiative after the opposition parties joined civil society in recognising that the constitutional playing field was skewed against them. At the time, opposition parties and civil society had started a new initiative calling for a people's assembly to frame a new constitution, arguing that Parliament lacked the legitimacy to do so. Increasing the stakes, these bodies publicly appointed a 'people's constitutional commission' to start the exercise.

Against this backdrop, the ruling party enacted a law to allow a 'review' of the existing Constitution through parliamentary supervision. The new law established the organs for constitutional review, including a commission appointed by the President, constituency deliberation forums and a national dialogue conference, of which all sitting MPs would be members. This would result in promulgation of a new constitution by parliamentary vote and presidential assent.

Once appointed, the chairperson of this commission started to negotiate with the civil society people's commission, which resulted in the merger of the processes

backed by civil society and the legislature. Subsequently, a new, merged constitutional review commission announced its mandate as a 'comprehensive review', whose output would be a new constitutional charter rather than a revised version of the 1963 charter.

The Constitution Review Commission published a new draft constitution (later dubbed the Bomas Draft), along with its report, in 2002. This draft became the centrepiece of a national multi-stakeholder dialogue convened at the Bomas Centre in Nairobi, following the historic 2002 elections that were won by the opposition and which ended Kanu's 40-year stint in power.

The key political parties at Bomas later split into two camps as the pre-election unity among opposition parties foundered. One party camp (the President's) led a walkout from Bomas in 2004 and refused to participate any further. Later that year, the Bomas Talks wound up the dialogue with the Bomas Draft, which was presented to the Attorney General for publication and tabling in Parliament.

This draft proposed a dual executive system with a prime minister as head of government. It also proposed far-reaching devolution of power at three levels. Although bound by the review legislation to publish the draft Constitution as it emerged from Bomas, the Attorney General made alterations that effectively re-introduced a presidential system of government and watered down devolution. This draft – known as the Wako Draft, after the Attorney General – was presented to a national referendum in 2005 November and rejected by 58% of the electorate, thus bringing the process to a halt.

The post-election violence in 2007 and 2008 made painfully clear the urgent need for reforms in Kenya's political architecture. This was recognised within the National Accord Agreement that Kofi Annan helped to facilitate between the rival parties. However it was obvious from previous reform experiences that any new attempt would require stringent safeguards against partisan manipulation of the reform process.

The *Constitution of Kenya Review Act 2008* identified four main institutions that would be involved in the reform process and their mutual relations, namely: a Committee of Experts (CoE), the Parliamentary Select Committee, the National Assembly and a popular referendum.

For over a year, the CoE, comprised of five Kenyan experts and assisted by three foreign nationals nominated by Kofi Annan, worked hard in the interest of tempering national sentiments in the post-conflict period. Of course, this was not 'just another process' but a continuation of the 2005 referendum. The CoE's mandate was solely to reconcile the contentious issues in the two previous constitutional drafts. Public consultation was mandated to obtain more information on how to effect reconciliation. The presence of a number of foreign experts helped to raise the CoE's profile and reinforce its credibility as a technical, not political, committee.

A two-thirds majority in Parliament was required to adopt the CoE's proposed amendments to the new Constitution. Individual politicians' and parties' ability to influence the content of the new Constitution on the basis of their specific interests was therefore limited.

Nevertheless, inter-party negotiations and consensus building on two contentious issues – namely, the type of political system and the level of devolution – were crucial in helping to generate a political support base that was large enough to ensure the new Constitution's adoption by Parliament. Although only a simple majority was required, it was clear that this would not be realised if an agreement was not reached on these two issues.

On the day the new draft Constitution was tabled in Parliament, 150 amendments were proposed but none managed to obtain support from the required two-thirds majority. The referendum eventually adopted the document with over two-thirds of voters supporting it, and a turnout of over 70%.

Following twenty years of troubled constitution-making, Kenyan citizens finally adopted a new Constitution on 4 August 2010. Despite its successful adoption, further challenges now lie ahead in terms of implementation. As constitutions are not operational documents by themselves they need to be translated into subsidiary laws, institutional mechanisms, budgets and policies. This requires careful design. In light of the importance of this phase, Kenya has set up a new institution to oversee the implementation of the Constitution, a process that is likely to take many years.

CASE STUDY

Malawi



Key Lessons

- Lack of legal entrenchment of reform process when political will was available;
 - Substantial efforts to allow public and civic institutions to contribute to reforms;
 - National constitutional conferences used to start consensus-building process;
 - Delays in reform due to the narrow political interests of the executive; and
 - Challenging political climate for public scrutiny of political processes.
-

The current constitutional reform process in Malawi started in 2005. The existing Constitution (adopted in 1994) has a number of internal inconsistencies, partly as a result of numerous amendments reflecting the narrow interests of specific political actors. Frequent litigation in the political arena has further strengthened the perception of a legal framework that cannot adequately address governance issues.

The commencement of the current reform process was weak in both legal and political terms. While the Malawian Law Commission (MLC) was commissioned by the executive to initiate the process by holding public consultations and drawing up a proposal for revision, no legal mechanisms were defined meaning there was no guarantee of any follow-up to their work.

Politically speaking, the decision to embark on a reform process was largely driven by the executive. After falling out with the ruling United Democratic Front (UDF) in early 2005, President Mutharika withdrew from the party and continued as an independent President. As he had the support of just a handful of MPs it was in his own interests to have a number of constitutional clauses, such as the ban on floor crossing, lifted.

The decision to initiate the reforms was clearly not based on a firm and publicly announced inter-party agreement in pursuit of further democratic consolidation. This meant that there was no comprehensive agreement on the exact objectives, timeframe or roadmap of the process, let alone an agreement on democratic principles to guide the reforms.

Nevertheless, the MLC embarked on a substantive awareness-raising and consultation process. They pro-actively invited the general public to make submissions and organised consultative meetings with a wide range of interest

groups. They compiled the contributions in specific 'Issue Papers' that were presented to 300 participants at the first National Constitutional Conference.

On the basis of this groundwork, a Special Law Commission (SLC) was then mandated to review the 1994 Constitution, address the various internal discrepancies and come up with recommendations for improvements. Its final report was discussed at a second, broader constitutional conference that addressed the Constitution article by article. The SLC eventually presented its report to Cabinet in August 2007.

This was the point at which the consequences of the bad political and legal foundation of the process became evident. Based on the SLC's solid preparatory work, the Minister of Justice was expected to present reform proposals to Parliament; instead, nothing has happened since August 2007.

It is clear that a number of the key constitutional recommendations emerging from the consultative phase were considered by the executive to be in conflict with its interests. The SLC's report, for example, proposed a 50% + one voting threshold for presidential elections, while President Mutharika had been elected on the basis of just 36% of the vote. The Commission also proposed curtailing the executive's mandate in appointing members of the Electoral Commission, and this was not readily accepted. Finally, the President had pushed for a reform that would enable him to appoint and/or dismiss the Vice President, a measure which had not been adopted by the SLC. The President subsequently refrained from instructing the Cabinet to introduce a Constitutional Amendment Bill in Parliament.

The constitutional reform process and specific issues had not been popularised to the extent that immediate protest was easily mobilised. Furthermore, people seem now to be paying an increasingly high price for raising their voice in the current political climate in Malawi.

While the legal set-up of Malawi's constitutional reform process is quite similar to that of Ghana, the political and popular context in which it has been shaped is sharply different. In this respect, the Malawian reform process would have benefitted from a much stronger, Kenyan-like, legal entrenchment of the reform process at the start and a Ghanaian-like, comprehensive inter-party agreement.

CASE STUDY

Zimbabwe

**Key Lessons**

- Inter-Party Committee collaborates in context of extreme political polarisation;
- Constitutional reform process very dependent on political consensus-building;
- Continued and enhanced regional political pressure of great importance;
- Strategic deadlock-breaking mechanisms have saved the process on various occasions;
- Popular awareness-raising and consultation has been highly politicised; and
- Civil society involvement along party lines, with limited space for civic scrutiny.

Following the much-disputed, violent and boycotted elections in 2008 and under severe international pressure, the three main Zimbabwean political parties negotiated a Global Political Agreement (GPA) and formed a 'unity' government. Constitutional reform became an important component of this agreement, aiming to pave the way for new elections to be organised under improved circumstances.

While the current constitutional reform process in Zimbabwe provides the three main political parties with a way out of the country's political deadlock, extreme levels of political polarisation are obviously affecting the process itself.

In February 2009, a 25-member Constitution Parliamentary Select Committee (COPAC) was set up, comprising MPs from the three main political parties and a number of influential traditional authorities. Despite extreme levels of animosity, Zimbabwean MPs across the political divide started to meet, establishing a joint secretariat and continuing to collaborate on the reform process. Efforts were made to establish improved personal bonds between the main actors involved and to build mutual trust – or at least reduce distrust.

COPAC's first task was to raise popular awareness and consult ordinary citizens on the main points of constitutional reform. Even the smallest technicalities quickly proved politically sensitive and it took weeks of tri-partite negotiations to agree on seemingly insignificant issues such as the selection of report writers. While ZANU-PF was pushing for civil servants to draw up the reports, both MDCs wanted civil-society representatives to do so. Eventually the parties agreed that a joint team of representatives from ZANU-PF, MDC-T and MDC-M would draft the reports. Within the context of extreme polarisation and mistrust, each step in the Zimbabwean reform process has thus required extensive negotiation.

Progress was, however, slowly realised and the outreach agenda was agreed upon at a meeting attended by all stakeholders in July 2009. Over 1400 people were then trained and divided into different teams to facilitate the participatory sessions at the local level. The parties provided 30% of the team members, while the remaining 70% came from civil-society organisations (although the three parties had selected them). After more than 12 months of consultation, 30% of the citizens told an Afrobarometer team of researchers that they had participated directly in the consultations, although only a minority were satisfied with the overall quality of those consultations.

The three parties then faced another major challenge that resulted in deadlock, namely the question of how they should analyse and regroup the many (contradictory) contributions that had been received. After extensive negotiations they again managed to agree on a mechanism that combined both quantitative and qualitative strategies of analysis. Extremely polarised inter-party relations have continuously impacted upon the constitutional reform process. When overall inter-party temperatures rise, the reform debates are immediately affected. This was evident, for example, when MDC-T disengaged from the government in the final quarter of 2009 as a result of the poor overall implementation of the GPA. It was almost impossible for COPAC to see any progress at that time.

Nevertheless, the Zimbabwean constitutional reform process is institutionally designed in such a way that it has overcome political hurdles. All three parties co-chair the 25-member COPAC and, in the case of deadlock at that level, a superior management committee intervenes. This team is comprised of the three main GPA negotiators, the co-chairs of the select committee and the Minister for Constitutional and Parliamentary Affairs.

The timelines for the finalisation of the process are difficult to determine, given that the reforms are taking place in an environment that remains volatile. Even if COPAC manages to come up with a draft constitution that is endorsed by the three parties and accepted by a majority of the citizens in a referendum, the articles related to elections still need to be implemented.

There remains a long way to go. Political dynamics and sudden incidents within both ZANU-PF and MDC-T, as well as international pressure, will continue to impact on the Zimbabwean constitutional reform process.

CASE STUDY

Bolivia

**Key Lessons**

- An inter-party dialogue to break deadlock and a constitutional reform process that was won not by the Constituent Assembly (CA) but by fostering compromise and mutual acceptance between parties, and between the President and Congress;
- Constitutional reform emerges as a highly political process despite a lack of trust in society and is seen as a source of governance problems with political parties still playing a dominant role; and
- The constitutional reform process has indirectly contributed to the sharpening of political parties' ideological orientations due to the structure of the negotiations and the holding of two electoral processes within two years (elections for the CA and the referendum)

Bolivia has been rated as one of the world's most unequal countries, with the World Bank ranking it second after Brazil in 2003. Bolivia also has the highest proportion (about 60%) of indigenous people in Latin America, based on indigenous language criteria.

Indigenous movements bringing together 36 communities have succeeded in pushing a multi-ethnic agenda in which these communities are all recognised, which culminated in Bolivia's 18th Constitution in 2009. Many saw constitutional reform as an opportunity to recreate the state and as a centrepiece of an historical 'refoundation' movement, with its alternative interpretation of the Spanish conquest of the region.

Congress had legally passed the call for a constitutional assembly in 2005, following growing demands from social movements and street demonstrations. In December of that year, the *Movimiento al Socialismo* (MAS) candidate Evo Morales, an indigenous leader, won the presidential elections with 56% of the vote on the basis of promises that included convoking a Constitutional Assembly (CA). Elections to the 255-member CA were held, concurrently with a referendum on state unity, in 2006.

MAS took 137 seats, falling just three seats short of the two-thirds majority required by law for the adoption of a new constitution. Moreover, the CA's composition reflected MAS's dominance in the western regions of the country, while the 60 seats of its main rival, the Podemos Party, mostly from the eastern regions.

The first four months of the CA between November 2006 and February 2007 were spent debating the technical procedures of drafting, with each group viewing the discussions as a tool to further its own interests. MAS had hoped to approve each article by a simple majority, while Podemos and its supporters in the CA demanded a two-thirds majority. In fact, agreement on this threshold was made a pre-condition for further participation in the CA, with divisions in the CA leading to violence in the streets and in the regions.

The CA finally approved its rules of procedure on 14 February 2007, when 81% of the members agreed to the overall text and two-thirds voted in favour of considering individual articles. A proposal could only be reconsidered if more than a third of the assembly proposed an alternative text. Failure to achieve a two-third majority would result in an inter-party dialogue mechanism to seek a new text; any irreconcilable differences would be settled by popular referendum.

With MAS's declared intention of 're-founding' Bolivia, the CA became a battleground amongst the highly ambitious members fighting for exclusive party positions. This had the potential to ignite conflict, considering that the real interests behind the MAS positions included the nationalisation of the (hydro-carbon-based) economy, land redistribution and the renaissance – if not outright political dominance – of indigenous populations.

The CA conducted a number of public consultations and site visits through its thematic committees, though it is not clear to what extent the views collected shaped the final Constitution. At the same time, the mobilisation of citizens in interest groups and social movements, particularly in a context of low trust in relations between political parties and civil society, can be credited with some of the considerable gains made by indigenous citizens and the poor in the provisions in the new Constitution.

Tensions between the two main parties (MAS and Podemos) intensified and made a constructive dialogue almost impossible. A breakthrough in the stalemate was created by the *Fundación Boliviana para la Democracia Multipartidaria* (fBDM) when it found two prominent but moderate representatives of each party willing to reopen the talks. This generated a new momentum. The process was saved and the text was submitted to the CA. A new multi-party commission was formed, led by Vice President Álvaro García Linera. However, not all of the agreements reached (including the one on regional autonomy) were reflected in the Constitution.

On 24 November 2007, the CA approved a preliminary draft of the Constitution in full. MAS and its allies claimed that the opposition had boycotted the final stages of the Assembly vote and incited violent protests against the CA, forcing it to move to a nearby military school for protection. By 8 December 2007 the Constituent Assembly had moved its sessions to Oruro, citing safety concerns.

Most of the members of opposition parties did in fact refuse to participate in the vote, although 165 of the 255 delegates turned up. The final draft Constitution was approved article by article in a marathon all-night voting session, and approval of the draft was announced on 9 December 2007. It was synthesised

and modified by an editing commission in La Paz. Leaders of several opposition parties and conservative civic committees in five provinces stated they would not recognise the new text, claiming it was approved illegally.

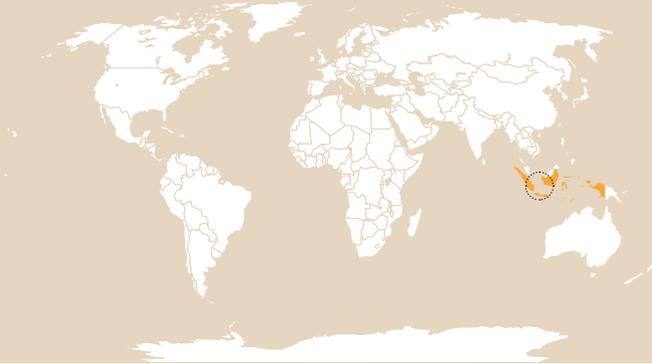
On 14 December 2007, the President of the CA presented the complete text to the Bolivian National Congress in order to legislate a referendum. The following day, marches and rallies were held in favour of the new Constitution in the capital La Paz, while in the departmental capital of Santa Cruz rallies were held in favour of an extra-constitutional 'Autonomy Statute'.

The constitutional text was further modified after dialogue between the President and opposition parties in September 2008 and in Congress during negotiations for a referendum in October 2008.

On 23 October 2008, the Bolivian Congress approved holding a referendum on the new Constitution, which duly took place on 25 January 2009. The new Constitution came into effect on 7 February 2009, approved by a majority of 61.7% of Bolivians.

CASE STUDY

Indonesia



Key Lessons

- The need for buy-in from some of the existing holders of power and influence made some reforms possible though not necessarily far-reaching;
 - Negotiations between incumbent and emerging but competing national leaders enabled the peaceful transfer of power and the emergence of a workable democratic framework;
 - Inter-party bargaining and negotiations frequently determine reforms and produce a constitution that is the most viable compromise;
 - It is useful to elaborate up-front on the scope of reform (in this case amendments) to an 'acceptable' level; and
 - A participatory process has benefits but it has to be accompanied by deliberate efforts to ensure that those participating are well informed.
-

Public demonstrations in Indonesia in 1998 calling for democracy led to the army's removal of the long-serving President Suharto and the introduction of reforms. These were aimed at reforming the democratic institutional framework to facilitate free elections in 1999, but did not manifest huge ideological disparities at this stage. The pressure for elections soon overshadowed calls for constitutional reforms, with most of the political parties taking part in the elections calling for substantive constitutional change only after they had been held. Once concluded, the custodian of the process of constitutional reform became the newly elected Parliament (MPR).

In 1999, a general session of the MPR agreed to undertake constitutional reforms based on consensus and negotiations between the parliamentary parties. The scope of reform was agreed as amending the 1945 Constitutions, which was venerated as an historic document, rather than making a new one from scratch.

A parliamentary committee (Panitia Ad Hoc 1 or PAH1) reflecting the composition and political balance in the MPR was mandated to handle constitutional reform. This committee immediately reaffirmed the constitutional principles of the 1945 Constitution, among them the integrationist *pancasila* principles and the retaining of the presidential system, although these were not further elaborated on at the time.

In addition, it was decided that if no consensus were achieved on a proposal for amendment, the original text would continue to apply. For instance, the controversial debate on the constitutional role of Islamic religion was resolved in

this way when parties unable to muster support for legislation based on sharia law conceded the retention of the original text (which in any case was more open-ended, and could be presented as a win-win outcome).

The parliamentary committee held its almost weekly sessions in public and also consulted public opinion via hearings in Jakarta and the provinces. Its work was, however, overshadowed by the euphoria of the time and the onset of campaigning in the presidential elections.

In July 2000, the parliamentary committee presented its comprehensive reforms outlining agreed proposals to amend the 1945 Constitution and, in some cases, proposing alternatives if no consensus was reached. The MPR opened new negotiations on the report. Among its membership, supporters of the old order (including conservative military representatives) argued that the proposals went too far.

As the spirit of compromise in the parliamentary committee begun to break down, the MPR lacked the procedures required to enable deeper discussion and compromise building, while some members were too new and inadequately informed to discuss the complex report. In reality, only about a third of the proposals in the committee's report were discussed. Complicating the internal disagreement within the MPR, other interest groups concerned with constitutional reforms, including elites not represented in the MPR, started to attack its credibility as the sole organ of review.

By 2002, the MPR had been able to resolve a number of issues, although not without controversy. Issues resolved included the question of decentralisation; the inclusion of human rights; the status of the DPR as an elected body; ending legislative representation of the police and the military; and trimming some of the powers of the Executive.

These resolutions were only possible because a tactical deal between the parliamentary committee and the two leading parties in the MPR facilitated the emergence of leadership in the executive that would endorse a final amendment package in the face of the absence of full consensus on the amendments. The deal itself was only possible because it went largely unnoticed in the contexts of the upheavals that occurred within the executive for a large part of 2001.

CASE STUDY

Iraq



Key Lessons

- Political consensus, particularly in divided societies, is fundamental and necessary when producing a legitimate constitution;
 - In situations where national actors inevitably and justifiably lack sufficient control over their own reform process, a stronger role for (and even predetermination by) external actors may be unavoidable;
 - The principle of participation by minorities has to consider the need for articulation of their (minority groups') roles in addition to mere membership in the relevant bodies that are involved in the constitutional reform process; and
 - The relevant legislation that provides the framework for the reform process should strive to be comprehensive by covering all the relevant aspects and phases of constitutional reform.
-

The constitutional reform process focused on in this case study was undertaken between 2003 and 2005, while Iraq was still occupied (under UNSC Res1483) and being administered by the US-backed Coalition Provisional Authority. In January 2005, a transitional national assembly was established to oversee the drafting of a constitution that was ratified by a referendum in October 2005.

With Shiite Arabs making up a 60% majority at the time, concrete guarantees for minorities were a key constitutional issue. In 2004, the CPA had been pushed by Iraq's religious leaders to scrap its plan to appoint a national conference to frame a constitution. Instead, elections were held for the transitional national assembly within the legal framework established by the Law of Administration during the Transitional Period (TAL), which itself was the outcome of negotiations between the US and the Shiite leadership.

The TAL is important because it set out not only the provisional structures of government and the process of constitution-making but also gave direction to the coverage of some issues in the final Constitution. For instance, it stipulated that the final Constitution had to be finalised within six months, on 15 August 2005, and presented for approval by the people no later than 15 October 2005.

It also required that the process start afresh, with a newly-elected national assembly, in the event of either the referendum's rejection or the national assembly's inability to produce a draft by mid-August, thus raising the stakes for the incumbents.

A provision that was not agreed upon by consensus centred on the threshold of votes required for the adoption of the Constitution in the referendum. Some parties considered that the requirement for the Constitution to be adopted – namely, a simple majority vote in favour and approval by two-thirds of voters in at least three governorates – was not only too strict but also counter-majority, and therefore undemocratic.

In the January 2005 election, which was boycotted by most Sunni Iraqis (in fact, Sunni turnout was said to be as low as 2%), a 275-member transitional national assembly was elected with a dual mandate to legislate and frame a new permanent constitution. The transitional assembly devised its rules of procedure and set up a constitutional committee (later called a commission) to handle constitutional negotiations and drafting.

Initially, this committee was composed of 55 members representing the political balance in the assembly, where the Shia Iraqis essentially controlled 48% of the representation. After lengthy bargaining over numbers, possibly to punish the Sunni Iraqis for their election boycott, the constitutional committee was expanded to implement increased Sunni participation, with the inclusion of 10 additional unelected Sunni members and another 15 as *ex officio* advisors. The committee was then seen as more inclusive and representative, in the final stages of its work.

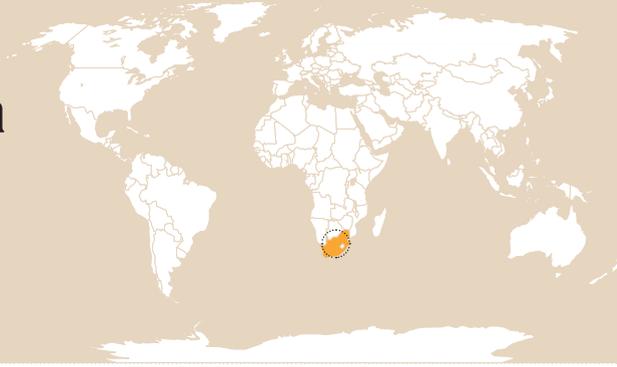
While the TAL recognised a role for public consultation on the Constitution, most of this was done through the United Nations assistance office; public input was only available once most of the constitutional proposals had been settled in the committee. The public however had a role to play in the referendum.

The draft produced by the committee in August 2005 was presented to a leadership council with only a few weeks left, according to the TAL, for its approval ahead of the referendum. At this stage, the rules were unclear as to the exact role of the leaders in relation to the draft. For some observers, this presented an opportunity for the US in particular to influence alterations by participating in the negotiations of the council, a less inclusive and representative body than the constitutional drafting committee.

The Constitution that emerged, while recognising Iraqi communities and the customary norms and principles of religious law that are familiar to the majority of ordinary Iraqis, subjected these to international principles of human rights that focus on individuals.

CASE STUDY

South Africa



Key Lessons

- Although popular participation was crucial to the reform process, it was the inter-party 'sufficient consensus' that guaranteed the success of the process;
 - The process strived to be as contemporary as possible while at the same time not overlooking important historical factors and developments that preceded it;
 - The fact that it was given sufficient time made it possible for the various sections of society to participate in the process and, ultimately, identify with the outcome; and
 - Use of 'immutable constitutional principles' provided a valuable confidence-building mechanism and safeguarded the objective of the new Constitution by ensuring that it complied with what had been agreed at the beginning of the process.
-

'Talks about talks' between representatives of the South African government and the African National Congress (ANC) had already started in the late 1980s, leading to a preliminary agreement to formalise these talks within a framework of democratising the Republic and ending apartheid.

In 1990, President de Klerk, whose National Party (NP) had established apartheid rule in 1948, lifted the ban on the ANC and other political parties, allowing them to return from exile. By 1992, the talks had crystallised into a multi-party dialogue forum known as the Convention for Democratic South Africa (CODESA), which broke down but not before agreeing on a key set of constitutional principles.

The following year, a new platform for talks was launched, known as the Multi Party Negotiating Process (MPNP), which drew lessons from previous talks and narrowed down its aspirations to negotiations on a constitutional framework for the democratic transition. The MPNP's Negotiating Council represented 26 political parties, and oversaw seven technical committees, including the Technical Committee on Constitutional Matters, which prepared the 1994 Interim Constitution.

South Africa then elected a Constituent Assembly (CA) to negotiate and draft a permanent constitution within two years. In the same elections, Nelson Mandela was elected as the first black President of South Africa, with former President de Klerk as his Second Vice President.

This power-sharing framework then oversaw the most critical phase of the constitution-making process. It was inclusive in terms of the composition of the CA, while the secretariat of the CA succeeded in rolling out a consultation exercise that generated at least two million submissions from the public. In reality, though, the key decisions on constitutional controversies were made in closed bilateral talks between the ANC and the NP, under what was then referred to as the principle of 'sufficient consensus'.

The Interim Constitution of 1994 stipulated that the new Constitution could not come into effect until three conditions had been met. Firstly, the Constitutional Assembly had to adopt the new constitutional text with a two-thirds majority vote; secondly, the text had to comply with the constitutional principles agreed to in the pre-constitutional phase; and thirdly, the Constitutional Court needed to be satisfied that those principles had indeed been respected and reflected in the final draft of the constitutional text.

43

According to the provisions agreed in 1994 by the negotiators, the Constitutional Court was required to review the entire text in detail and in the light of 34 constitutional principles. The text then had to pass a certification judgement in the form of an unanimous decision of all eleven judges or by a clear majority. The text passed by the CA would not be legally binding unless and until the Constitutional Court certified that all its provisions were in compliance with the constitutional principles. This procedure was inserted because the process of writing the Constitution was a negotiated one, as opposed to a populist or majority exercise.

The certification hearings began on 1 July 1996. The 29 political parties represented in the CA, together with interest groups, were allowed to submit briefs and arguments in what became the largest hearing in South Africa's legal history.

On 6 September, the court unanimously ruled that the text adopted in May 1996 could not be certified because it did not fully satisfy the principles and conditions agreed in the multi-party talks. The court also rejected eight of its clauses. This forced the CA to reconvene and address the issues in the ruling. On 7 October, the CA compromised and voted for a new text, with one party (the IFP) voting against it.

On 11 October the new text was presented to the Constitutional Court, which granted its unanimous approval on 4 December. This text became the Constitution of South Africa, which President Nelson Mandela signed into law on 10 December 1996.

Conclusion from these case studies

A democratic constitution is legitimised by consensus between political actors but also by its inclusion of the voice of citizens and other institutions, at least on the most controversial or important issues. The constitutional process should make it possible to arrive not at the most ideal constitution but at a political consensus on the most pressing constitutional challenges.

It should not be assumed that the drafting team in constitutional processes is credible and acceptable to everybody, particularly the parties involved. If the process is based on negotiations, the mutual suspicions involved tend to crystallise in the drafting team. While drafting may appear to be technical and requires (for many participants) considerable subject proficiency, it is the fulcrum of a political process.

5 Constitutional reform in phases

The country cases presented in the previous Section clearly illustrate the uniqueness of each constitutional reform process. Differences in political context, levels of popular involvement, the extent of socio-political conflicts as well as the multiplicity of norms mean that it is difficult to present specific cases of constitutional reform as 'best practices' that could be of immediate relevance in other settings.

The eight case studies do, however, share a number of generic characteristics and challenges that are addressed in country-specific ways. All the reform processes included efforts at awareness-raising, consensus-building, adoption and implementation. Above all, the empirical cases illustrate the *political nature* of constitutional reform and the central role political parties play throughout these processes.

The empirical experiences of constitutional reform demonstrate that contentious processes of inter-party negotiation and consensus building do not foster 'ideal constitutions' or 'constitutional revolutions'. They predominately generate modest but crucial steps along the lengthy path of gradual democratic reform.

This Section aims to provide an overview of the principal phases of constitutional reform and to present common features for each of these phases. Examples from the case studies in Section 4 are included in order to demonstrate first and foremost the importance of inter-party cooperation for keeping the reform process on track. It is on these empirical foundations that the guiding principles for constitutional reform, which were outlined at the start of this publication, are founded.

FIGURE 5.1

Principal phases of constitutional reform

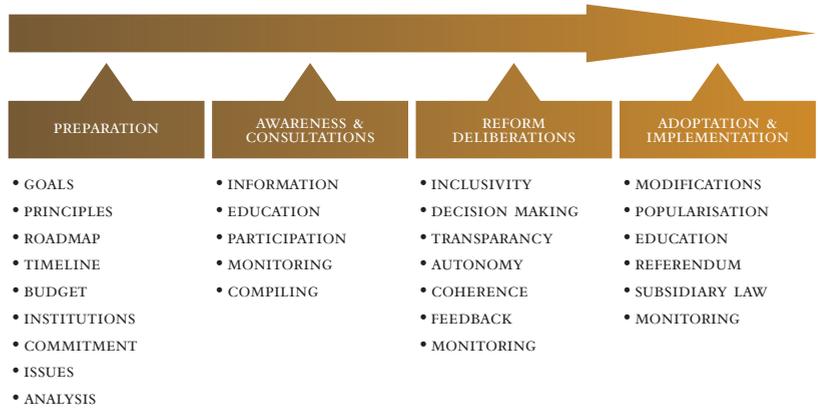


Constitutional reform processes progress through similar phases, each with a number of key characteristics that need to be addressed in a country-specific manner.

Actors involved in processes of constitutional reform are confronted with a number of similar challenges within these particular phases. Figure 5.2 provides an overview of these recurring issues and offers useful guidance in the search for country-specific solutions.

FIGURE 5.2

Characteristics of constitutional reform phases



These characteristics are briefly clarified in the paragraphs below and are illustrated with examples from the case studies. Again, the intention is not to present a blueprint for countries embarking on constitutional reform but to provide a reference point derived from actual reform experiences and offer input for country-specific discussions.

5.1 Preparatory phase

Creating a solid foundation for constitutional reform before entering into the often lengthy and politically sensitive deliberative process is crucial for a successful outcome. Issues to consider during this phase are:

- **Defining goals and generating commitment to the reform process**

The cases of Ghana, Indonesia and South Africa sharply contrast with the Malawian experience. While in the former cases an inter-party dialogue on the objectives and scope of reforms created a political basis for those reforms, the latter case was largely driven by the executive from the outset. All the case studies illustrate that political parties are principal actors throughout the entire constitutional reform process. Fostering inter-party agreements on the goals of reform in this initial phase is a crucial starting point.

- **Agreeing on basic democratic principles to guide the reform process**

The South African case is most often referred to in this respect. No fewer than 34 constitutional principles were defined up-front. Furthermore, the Constitutional Court was mandated to verify whether the new Constitution was in compliance with these basic democratic principles at the end of the reform process. In Ghana, the Constitutional Review Commission publicly stipulated at an early stage that the reform process should safeguard national unity (content) and be conducted in an inclusive and independent manner (process). In the vast country of Indonesia, basic principles of national integration and unity informed both the process of subsequent reforms and the content deliberations. Legislation that guided the reform process in Iraq emphasised (amongst other factors) the need to safeguard the rights of minorities. This legislative principal was used later on in the process to increase the representation of the Sunni minority within the deliberations. These practical experiences illustrate the advantage of reaching an agreement at an early stage on a number of democratic principles that guide (and safeguard) the subsequent volatile reform process and the content deliberations.

- **Reaching consensus about a roadmap, timeline and budget for reform**

Experience shows the importance of spelling out the different steps in the entire reform process before engaging in content deliberations. This helps to reduce controversies over the process of reform arising in a later phase when contradictory views can persist and relations between the participants may be tense. The lack of such a clear timetable is one of the main weaknesses of the reform process currently underway in Ghana. While a timeline often avoids the content deliberations lasting too long, the Iraqi case suggests that having too ambitious a timetable also poses challenges. The most recent reform efforts in Kenya seem to offer an example of a roadmap and timetable that successfully contributed to maintaining the pressure on the actors involved. Finally, a realistic (and publicly known) budget for the reform process minimises the risk of a reform process becoming stalled halfway because of financial challenges.

- **Selecting the institutions to guide the actual reform process**

The institutions involved in constitutional reform are very context specific, as can be seen from the case studies. Institutions involved include Constituent Assemblies, Constitutional Review Commissions, Committees of Experts, Parliamentary Committees, the legislature and the executive. While the institutional choices are context-specific, there is a more generic legal and political lesson to be learnt too. The Bolivian, Kenyan and Malawian cases in particular illustrate the importance of specifying the formal relations between the institutions involved in the reforms with the legislature and the executive. All the case studies also demonstrate that the institutional choices made should primarily enable realistic consensus-building between the main political stakeholders on the most pressing constitutional challenges rather than establishing too ambitious a process aimed at fostering an ideal constitution.

- **Identifying the principal constitutional issues for consultation and debate**

In preparation for popular consultation, stakeholder conferences and political negotiations in some of the case studies illustrated the advantages of reaching political agreement on the main constitutional issues to be addressed. In Ghana, political parties jointly identified 30 principal issues for reform, based on years of public debate and academic input. In Zimbabwe, the three parties agreed on a priority list for consultation after a lengthy and delicate negotiation process and in Kenya the political negotiations centred on two main political matters, namely devolution and executive mandate. The views of ordinary citizens cannot be collected for every constitutional article later on in the process. A workable consultative programme thus requires timely efforts to agree upon a priority list of constitutional issues.

- **Agreeing on a mechanism to analyse and accommodate popular views**

If popular consultative programmes are envisaged, the timing of these initiatives is important, as is having in place a broadly accepted mechanism for handling divergent popular views. In the Iraqi case, for example, the results of public hearings came to the table only when most of the issues had already been settled. In Zimbabwe, the lack of a clear mechanism to weigh up and treat popular contributions led to political stalemate that was solved only after weeks of inter-party negotiations. In Ghana, too, commission members indicated that they faced challenges in treating the many popular views expressed there.

5.2 Awareness and consultative phase

Raising popular awareness of the process and content of constitutional reform and enabling participation has the potential to contribute to the legitimacy and sustainability of the final outcome.

- **Providing information and civic education to raise popular awareness**

If a constitutional reform process allows public participation, it is essential for people to be well informed and educated about the major constitutional issues at stake, as well as the main characteristics of the reform process itself. In Bolivia, Ghana and South Africa, general public information campaigns and civic education programmes were organised by the reform institutions on matters of content and procedural issues. In Iraq, this task was predominantly undertaken, although at a late stage, by the United Nations. The current reform commission in Ghana also greatly benefited from the efforts of an institution that has been operating since the early 1990s and that is constitutionally mandated to provide civic and political education on a structural rather than an ad hoc basis. In some cases, there might be a need to set up a monitoring mechanism for these information and education programmes to verify their neutrality. In addition to these relatively balanced efforts, influential information and civic-education programmes are always conducted by political, civic and religious interests groups on the basis of very specific interests. Bolivia, Kenya and Zimbabwe are obvious examples in this respect. This underscores, once again, the highly political nature of every phase in the constitutional reform process.

49

- **Ensuring popular participation in the reform process**

People participated extensively in the constitutional reform process in Bolivia, Ghana, Kenya, South Africa and Zimbabwe. Over two million submissions were recorded in South Africa, while in Ghana every district was visited twice and, with the use of modern communication tools, this generated more than 80,000 popular submissions to the Ghana Constitutional Review Commission. In Bolivia the various interest groups served as primarily a channel for indirect participation while the election of members of the constitutional review body enabled democratic representation. This was also true in Iraq, though to a lesser extent due to a partial boycott of the elections. In Malawi, stakeholder conferences were organised and civil society participated actively, though the linkages to ordinary citizens were much weaker. Popular participation has the potential to contribute significantly to the legitimacy of the final outcome of a constitutional reform process and to lay the foundations for a concluding referendum. On the other hand, the Iraqi and Indonesian cases illustrate that limited direct popular participation does not necessarily obstruct the process from achieving its goals. In cases where popular views have been gathered, there is the need for a systematic approach to the compiling of all the contributions made, usually in the form of thematic reports to be presented and discussed during the subsequent content deliberations and the drafting phase.

5.3 Content deliberations and drafting phase

There is no blueprint for an institutional setting that enables consensus-building on constitutional issues and the successful conclusion of a constitutional reform process. Inter-party negotiations form the very heart of this phase and determine the outcome to a large extent. Based on the cases in Section 4, this section highlights some of the key elements that affect such a political negotiation process.

- **Guaranteeing a high level of inclusivity during content deliberations**

Before the actual content negotiations take place, the question of who sits around the negotiation table is of utmost importance. Precisely because of the need to have all the 'political' sections in society represented, 25 Sunni representatives were appointed in the transitional assembly in Iraq. After a walkout by a substantial number of delegates from the Constituent Assembly in Bolivia in 2007, the body lost too much legitimacy to come up with an acceptable constitution. In Indonesia, the inclusion of some of the incumbent power holders was essential to achievement of reforms by the emerging leaders, although it also limited the scope of these reforms. As political negotiations mostly determine the success of a constitutional reform process, the content deliberations and drafting phase should include all the relevant political stakeholders, notably minority groups.

- **Setting-up a strategic decision-making and deadlock-breaking mechanism**

In the face of numerous contradictory views and divergent interests, the kind of decision-making mechanism in place is an important factor in the success of the entire constitutional reform process. In South Africa, parties were able to move forward once the principle of 'sufficient consensus' was adopted, preventing the process from being hijacked by minor interests. In Indonesia, the decision to maintain the original constitutional text for issues where no consensus for reform could be achieved ensured progress. In Kenya, the need to have a two-thirds majority in Parliament for specific amendments reduced the impact of narrow interests included within the Constitution. In Bolivia, a failure for an amendment to obtain two-thirds majority support in the constituent assembly activated a deadlock-breaking mechanism of informal inter-party dialogue, while a referendum would serve as a last resort. All the case studies illustrate the importance of having an agreed decision-making process and deadlock-breaking mechanism in place to stimulate consensus building, although this is done in a very context-specific way.

- **Balancing transparency and informal negotiations**

All the case studies contain examples of crucial moments in the reform process when informal discussions and negotiations behind closed doors effectively enabled a process of give and take between political adversaries. Nevertheless, in order to ensure the legitimacy of the final outcome, popular trust in the process is important, as is enabling people to hold their representatives accountable for the final outcome, guaranteeing levels of transparency of the actual deliberations.

- **Maintaining levels of autonomy in the reform debates**

All the case studies convincingly show that constitutional deliberations are not technocratic discussions that can be isolated from political interference or obtain levels of autonomy 'above' politics. In Kenya, inter-party compromises reached on difficult topics such as devolution and executive powers were a stimulus for the entire reform process. In Zimbabwe, overall inter-party relations

and constitutional negotiations determine every tiny step in the lengthy reform process. In Bolivia, it was not the Constituent Assembly that managed to come up with a text that was publically endorsed; instead, final negotiations between the president and Congress and between political parties actually made the difference in the end. In Indonesia, too, it was the political compromises made at the final stage on a selected number of issues that led to progress. The autonomy of constitutional reform processes is thus largely relative. It is for precisely this reason that the guiding principles for constitutional reform presented in this publication are primarily aimed at inspiring political parties.

- **Ensuring legal coherence between the constitutional articles adopted**

Numerous legal contradictions between constitutional articles appeared in the constitutions drawn up in Eastern Europe in the 1990s and these provoked considerable governance challenges in the transition to democracy. The involvement of legal experts throughout the deliberative and particularly the drafting phase helps to prevent such challenges arising once a constitution has been adopted.

- **Having feedback and monitoring mechanisms in place**

Ensuring that participants in the deliberative phase regularly consult their interest groups and provide feedback helps to create a support base for the compromises reached. External monitoring of the deliberations and drafting has the potential to maintain public trust in the process and to keep people well informed.

5.4 Adoption and implementation phase

Although not often recognised as such, the implementation phase forms an integral part of the reform process. Constitutional reform remains far from effective if the results adopted are not adequately translated into subsidiary laws and the institutions set up and then implemented in practice.

- **Preventing modifications to inter-party agreements**

Once an inter-party agreement, based on popular or stakeholder consultation, has been reached on the revision or drafting of a constitution, the process should contain safeguards to ensure that that such an accord is not changed in the final stage by powerful groups or individuals. Examples of this occurred in the Kenyan case study. While legal dispositions could make it more difficult for political actors to change the outcome of a negotiated agreement, publicly expressed inter-party commitment to the outcome could also be considered.

- **Popularising the final outcome and educating people**

To enable people to come to terms with the adopted changes and a revised or new constitution, a political education programme at this stage is an integral part of the reform process.

- **Translating constitutional agreements into subsidiary laws**

Once a referendum on a proposed constitution has taken place, public and international attention usually drops significantly. However, crucial steps in the reform process still have to be taken. Translating the constitutional agreements into subsidiary laws, newly set-up institutions, policies and budget reallocations is crucial. In Kenya, a specific body has been created to monitor the implementation of the newly adopted constitution to examine whether the reform process remains on track in this final stage.

Constitutions available on the internet

'African Human Rights Law document database'; hosted by the University of Pretoria, South Africa. After clicking on the country name, the Constitution appears under the heading 'national legislation'.

» <http://www.chr.up.ac.za/index.php/documents-by-country-database.html>

'Constitution Finder': an alphabetical list of almost all the world's national constitutions prepared by volunteers and hosted by the University of Richmond, USA.

» <http://confinder.richmond.edu>

The 'National Constitutions' website gives access to the constitutions of 104 countries. It is part of an initiative by the Constitution Society, a private, not-for-profit organisation dedicated to promoting principles of constitutional republican government that was founded in 1994 and is based in the United States.

» <http://www.constitution.org/cons/natlcons.htm>

A list of government constitution websites of most countries in the world, sponsored by the US-based Comparative Constitutions Project (CCP) and hosted by the University of Illinois. The CCP also maintains a repository where 173 constitutional documents are stored (19 from Africa). The site claims to have 720 constitutions that they will make publicly available when the copyright status of each text has been determined.

» http://portal.clinecenter.illinois.edu/cgi-bin/rview_search?REPOSID=1&mode=browse

» <http://www.comparativeconstitutionsproject.org/>

» <http://www.constitutionmaking.org/files/GovernmentConstitutionWebsites.pdf>

Natlex, the database of the International Labour Organisation, provides information on social security and related human-rights legislation.

» http://www.ilo.org/dyn/natlex/natlex_browse.byCountry?p_lang=en

The site of 'Africa Law Reporter' offers access to case law, secondary literature on legal matters as well as local copies of the full text of six African constitutions (Ethiopia, Rwanda, Senegal, South Africa, Sudan and Uganda). The initiator of

this site, Justice Francis M. Ssekandi, the former Justice of Appeal in Uganda, intends to include all the constitutions in this database in the future.

» www.jurisafrica.org

The site of the Eastern Africa Centre for constitutional development (Kampala, Uganda) offers access to 36 national constitutions of African countries.

» http://www.kituoachakatiba.org/index.php?option=com_docman&task=cat_view&gid=34&Itemid=36

'Researching Constitutional Law on the Internet' provides links to world constitutions including Francophone countries (currently not functioning) and is prepared and maintained by the University of Chicago Library.

» <http://www2.lib.uchicago.edu/~llou/conlaw.html>

World legal materials from Africa: an alphabetical list prepared by the Cornell Law Library containing links to the constitution in multiple languages as well as to other sites of national importance such as ministries, legislation, embassies and so on.

» <http://www.law.cornell.edu/world/africa.html#cote>

Guide to Law Online prepared by the Law library of Congress (Washington, US), gives access to a plethora of legal sources from all the countries in the world.

» <http://www.loc.gov/law/help/guide/nations.php>

Constitutions, treaties and official declarations, collected and maintained by Richard Kimber.

» <http://www.politicsresources.net/const.htm>

The 'International Constitutional Law' (ICL) project provides English translations of and other textual material related to constitutional documents. It cross-references those documents by applying ICL keys allowing for quick comparison of constitutional provisions. Its major editor and contributor is Prof. Axel Tschentscher and it is hosted at the Universität Bern (Switzerland).

» <http://www.servat.unibe.ch/icl/>

References

- Afrobarometer Briefing Paper (2011): *'Public perceptions on constitutional reform in Zimbabwe'*.
- Bieniek, L. & Kennedy, B. (2010): *'Moving forward with constitutional reform in Kenya'*. A report of the CSIS Africa Programme.
- Ghai, Y. (2006): *'The Role of Constituent Assemblies in Constitution Making'*. Paper commissioned by International IDEA.
- Glinz, C. (2011): *'Kenya's new constitution'*. Paper commissioned by the Konrad Adenauer Foundation.
- International Crisis Group (2011): *'Zimbabwe: The road to reform or another dead end?'*
- Kanyongolo, F.E. (2011): *'Deepening a culture of constitutionalism in Africa: Challenges and Prospects'*. Paper presented at NIMD conference, Maputo.
- Kariuki, P. (2011): *'Constitutional reforms and constitutionalism in Africa: Case study Kenya'*. Paper presented at NIMD conference, Maputo.
- Kramon, E. & Posner, N. (2011): *'Kenya's new constitution'*. Journal of Democracy, Volume 22.
- Mills, G. (2011): *'Why Africa is poor: And what Africans can do about it'*.
- Msiska, K. (2011): *'Constitutional reform: Experiences from Malawi'*. Paper presented at NIMD conference, Maputo.
- NIMD (2009): *'Writing autobiographies of nations, a comparative analysis of constitutional reform processes'*.
- Pwamang, G. (2011): *'Reflections on the current constitutional reform process in Ghana'*. Paper presented at NIMD conference, Maputo.
- Radelet, S. (2010): *'Emerging Africa: How 17 countries are leading the way'*.
- Wahiu, W. (2011): *'Constitution building in Africa: Where from and where to'*. Paper presented at NIMD Conference, Maputo.
-

Further reading

Benomar, J.; **Constitution-Making after Conflict: Lessons for Iraq**, *Journal of Democracy*, Vol 15 No. 2, 2004

Hart, V.; **Democratic Constitution Making**, Special Report 107, 2003
United States Institute of Peace
(downloaded from www.usip.org)

Ghai, Y. & Guido, G.: **Constitution Building Processes and Democratisation**, International IDEA 2006 (available at www.idea.int)

Hassen, E.; **The Soul of a Nation; Constitution-making in South Africa**, Oxford University Press, 1999

Elster, J.; **Forces and Mechanisms in the Constitution-Making Process**, Vol 45 *Duke Law Journal*, 1995-1996

Democracy in the Making: Key Options in Iraq's Democratisation Process, International IDEA, 2005
(available at www.idea.int)

Other principles for reference

Constitutional principles in South Africa's constitutional negotiations, as contained in the Interim Constitution of the Republic of South Africa (1994), Article 71, Paragraph 2. Available at the website of the Constitutional Court: www.constitutionalcourt.org.za.

Namibian constitutional principles (UN Resolution): The UN Secretary-General's report S/15287 (1982) contained the 1982 Constitutional Principles. This report was referenced in Further Report of the Secretary-

General Concerning the Implementation of Security Council Resolutions 435 (1978) and 439 (1978) Concerning the Question of Namibia, U.N. SCOR, 44th Sess., at 10, U.N. Doc. S/20412 (1989). "The text of the Principles concerning the Constituent Assembly and the Constitution of an independent Namibia which was transmitted to the Secretary-General on 12 July 1982 (S/15287)." The Security Council then approved this report, implicitly adopting the principles, in S.C. Res. 632, U.N. SCOR, 44th Sess., at 3, U.N. Doc. S/INF/45

(1989) "The Security Council approves the report [S/20412] of the Secretary-General and his explanatory statement concerning the implementation of the United Nations plan for Namibia." Available at www.constitutionnet.org.

The UN SG note on constitution making principles: United Nations, Guidance Note of the Secretary General. UN Approach to Rule of Law Assistance, April 2008. Available at www.unrol.org.

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Authors

Martin van Vliet
Winluck Wahiu
Augustine Magolowondo

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About the authors:

Martin van Vliet studied Cultural Anthropology and Development Sociology at the University of Leiden where he specialised in African politics and research methodologies and wrote his Masters thesis on Mali's decentralisation process. Between 2004 and 2010 he worked for the Netherlands Institute for Multiparty Democracy (NIMD). In addition to the management of political party support programmes in Mali and Zambia, he contributed to the development of generic party support strategies and edited NIMD's handbook 'Writing Autobiographies of Nations: A Comparative Analysis of Constitutional Reform Processes (2009)'. In 2009, he received funding from the Netherlands Ministry of Foreign Affairs to undertake a PhD at the African Studies Centre in Leiden. His research focuses on local accountability mechanisms in five African countries; the contribution of Malian MPs in shaping accountability; transformations in Mali's party system over the last few decades; and the current legal reforms there. He regularly conducts consultancies for the Netherlands Ministry of Foreign Affairs, think tanks and non-governmental organisations and teaches at different institutions.

Winluck Wahiu is an expert on constitution-making and comparative constitutional law at International IDEA. In 2008, he was acting Programme Manager for International IDEA in Nepal, where he helped establish a programme in support of a participatory process of constitution-building as Nepal made the transition from war to peace and from monarchy to republic. Previously, he was involved in advising on and drafting Kenya's draft Constitution, which went to a referendum in 2005. From 2001 to 2005, he gained practical experience of the national implementation of human rights norms through litigation strategies as the programme coordinator of the African Human Rights and Access to Justice Programme, an initiative that was part of the Kenyan and Swedish sections of the International Commission of Jurists. He received a commendation from the Kenya Law Society in 2004.

Augustine Magolowondo, PhD, is a political scientist by training with expertise in the areas of democratisation aid, development cooperation, the strengthening of political parties, decentralisation and conflict management, focusing geographically mainly on Sub-Saharan Africa. He is the Africa Regional Programme Coordinator at the Netherlands Institute for Multiparty Democracy (NIMD). Before joining NIMD, Augustine worked as a National Expert for the German Technical Corporation (GIZ) in Malawi in democracy, decentralisation and dialogue promotion programmes. He is a recipient of the Justus-Liebig University of Giessen (Germany) 2006 Developing Countries Young Researchers Award in recognition of his 2005 PhD Thesis "Democratisation Aid as a Challenge for Development Cooperation: A Comparative Study of Overall Policies of Two Bilateral (Germany and USA) and Two Multilateral (UNDP and EU) Development Agencies and how they are implemented in Malawi".

This publication provides a set of guiding principles for constitutional reform based on practical experiences of constitutional reform processes in a number of countries (Bolivia, Ghana, Indonesia, Iraq, Kenya, Malawi, Zimbabwe and South Africa). While the primary focus of the publication is on the role of political parties in constitution-building processes, the publication is also of relevance to other actors involved in similar processes as it provides the reader with an overview of common phases, characteristics, challenges and guiding principles that may be customised to country specific contexts.

“I personally witnessed the democratic transition in Chile from nearby while living there. Today, many people in other regions in the world are also bravely taking to the streets demanding political freedom and economic justice. These countries are – or will be – confronted with the need to elaborate new constitutions that reflect the ideals and hopes of ordinary citizens. I am convinced that the international community has a useful role to play in assisting these countries. But modesty and respect for country ownership is essential. I very much welcome this publication and am confident it makes a useful contribution to the reform processes currently underway in so many countries.”

Hon. Kathleen Ferrier

Member of Parliament of the Netherlands,
Former Chair of the African Studies Centre in Leiden