Introduction

Constitution Makers on Constitution Making*

Tom Ginsburg and Sumit Bisarya

More than thirty years ago, the American Enterprise Institute (AEI) convened a set of politicians and lawyers who had participated in processes of constitution making. The resulting volume, Constitution Makers on Constitution Making, presented two authors from each of eight countries to consider issues of process and substance. The approach of letting constitution makers speak for themselves, in a comparative framework, was novel and valuable. Constitution making is frequently idealized, and careful analysis of the perspectives of those closest to the process provided illuminating insights.

More than half of the world’s nations have rewritten constitutions since 1989, a year which marked an epochal change in history. These post–Cold War constitutions are qualitatively different than those that came before, containing more rights, a host of independent regulatory agencies, and more elaborate systems of accountability. Another change in constitution making came in the twenty-first century, in which new concerns about the balance between liberty and security have arisen. Recent years have seen new attention to issues of inequality, indigenous rights, resource use, and climate change. Security sector reform is another issue that has arisen with increasing frequency, as the boundary between peace treaties and constitution making becomes more blurred.

In parallel with the revival of constitutionalism in many countries, a new wave of academic work has emerged, providing a kind of renaissance of comparative constitutional studies (Hirschl 2015). New theories and impressive developments in social science (in areas such as negotiation theory and behavioral psychology), along with more sophisticated empirical techniques, allow us to ask more sophisticated

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† Seven of the eight cases involved participants who had actually participated in constitution making. Two prominent scholars were invited to discuss the American case.
questions of constitution makers. This volume reflects an effort to leverage all these developments to answer the old question: how are constitutions actually made?

Under the auspices of The International Institute for Democracy and Electoral Assistance (International IDEA), we brought together a set of people who had been involved in constitutional drafting, to replicate the original project with a new set of case studies. We sought to take advantage of developments in scholarship and the real world since 1988, by addressing analytic problems in the field through the most recent cases. We wanted a set of cases that spanned geography and a range of constitution-making situations so as to capture the breadth of the field as it exists today. And we sought to understand how constitutions are made in reality: how agendas are formed, processes designed, and deadlocks broken. To use an American metaphor, we wanted the “inside baseball” of constitution making.

We made three important deviations from the process used by AEI in the development of the prior volume. Firstly, we brought a group of constitution makers together for four weeks at the Netherlands offices of International IDEA - rather than bringing them together for a single, two-day conference as was the case at AEI. This enabled a more in-depth exchange among the constitution makers, which improved the quality of the case studies through ongoing cross-learning amongst the authors. (Our Tunisia, Kenya, and Ecuador case studies were added later.) Second, we invited only a single author for each case, to maximize the comparative component of the inquiry. Third, we asked the constitution makers to apply a specific analytic framework to their narratives to explain the process and results of the decision making related to constitution design choices. This both enabled a more comparative approach and allowed us to challenge, and update, the framework.

Our basic framework starts with treating constitution making as a bargaining process, in which multiple groups come together to try to resolve certain problems from the past, and to produce a constitutional text for the future that has broad agreement and social acceptance. Like all bargaining processes, the participants may have trouble reaching agreement, and may run into unexpected difficulties. Information – on the effects of different institutions, and on the intentions of other participants in the process – is not always available, and emotional factors may make bargains difficult even when information is relatively complete. Time pressures may work to force agreement or threaten to break it apart. And unexpected events can change perceptions and interests in the middle of the process.

We sought to explore the role of these challenges, and the bargaining and drafting techniques that allowed the parties to work around them. In this sense, we are “selecting on the dependent variable” by focusing only on cases where constitutions were actually completed. As we shall see, even these “success” stories feature many examples of unanticipated challenges and suboptimal outcomes.

Our starting point in thinking about process was the classic paper on constitution making by Professor Jon Elster, *Forces and Mechanisms in the Constitution-Making Process* (1995). Elster’s article is a masterful explanation of constitution making over time, noting that it has come in several waves. He draws on eighteenth-century
thinkers to identify reasons, passions, and interests as major forces in constitution making. One of his useful points is that, despite our image of constitution makers as exercising the pouvoir constituent and speaking for a sovereign people, no constitution-making process is truly unconstrained. Instead, constitution making is subject to both upstream and downstream constraints. The former involves those that are set prior to constitution making, including the process of convening the body, any procedural rules or governing principles that are announced before it is established, and external forces that limit the substantive choices it can make. Peace agreements that precede constitution making are a frequent source of these constraints. Downstream constraints are those that flow from ratification, and to some extent from implementation as well. This simple framework of Elster’s provides a powerful and enduring lens through which to understand the dynamics of constitution making in many contexts.

At the same time, there are certain trends that have become apparent in constitution making in the post–Cold War world that require new analytic frames. Constitutions in this era have a different character than those that were produced in the earlier waves. In terms of process, there is the increasing role of the international community in constitution making, often as part of a broader intervention into a conflict. Constitution making is a key part of building new states (Wallis 2014). There is also the increasing penetration of international norms into national constitutional norms. Not unrelatedly, there has been a normative trend toward public participation in the process of constitution making – no longer is constitution making something that is done behind closed doors by small groups of elites. This trend has itself been promoted by the international community, as well as civil society, providing a twin constraint on national elites from both above and below.

Another trend has been the rise of constitutions that are produced in an iterated fashion over time, in which several documents are adopted in sequence, sometimes but not always labeled as interim or transitional. Andrew Arato (2016) calls this configuration of new features “post-sovereign constitution-making,” noting that it moves away from the paradigm of a single moment in which a sovereign people bind themselves. South Africa, which had both an interim constitution and a final one, as well as numerous political agreements along the way, is perhaps the paradigmatic example, but it is one that has been followed in many other countries. Of the cases examined in our volume, Burundi and Nepal mirror South Africa in their use of principles and interim constitutions, while the Kosovo process was also tightly bound by principles determined at the outset of the process. Tunisia’s...
process featured a series of agreements as well. Kenya’s process followed an earlier, failed round of constitution making and so can be considered iterated as well.

Also with regard to process, Elster envisions ratification through public referendum as the archetypal downstream constraint, yet from the cases examined here only in Burundi, Ecuador, and Kenya did the constitution makers have to consider the hurdle of formal public approval. In Tunisia and South Africa, the processes involved a hybrid system in which there would be a public referendum if the elected constituent assembly could not agree on a draft with the required super majority. This incentivized drafters to complete the job themselves.

Lastly, unlike the two classic cases of France and the United States which are the focus of Elster’s analysis, many modern constitution-making bodies have included a growing number of women – 34.61% in Ecuador, 33% in Nepal, 28.1% in Tunisia, and 28% in Kosovo – and members of discrete minorities such as indigenous populations, who may be given designated seats. Many are selected through elections – as in our cases of Nepal, South Africa, Tunisia, and Ecuador. Elections should be considered part of the set of upstream constraints, as they provide mandates to the delegates.

Substantively, as mentioned above, certain trends are also apparent in constitutional design. These include: the increasing deployment of federalism and other means of spatial decentralization of power to resolve internal violent conflict; the rise of “fourth branch” institutions that can monitor the performance of government, such as National Human Rights Institutions (NHRI)s and counter-corruption commissions; the growing powers of constitutional courts; the increasing number of rights clauses in national constitutions; new attention to the environment; and a rise in concerns of identity and inclusion, for ethnicity, gender, and other dimensions of social difference.

To examine these issues, we looked at a set of seven cases: Burundi, Ecuador, Kenya, Kosovo, Nepal, South Africa, and Tunisia. These are very different environments for constitution making, and our criteria in selecting these cases from a broader set of applicants reflected a desire for diversity in terms of region, system of government, and type of process. Several of these are countries recovering from violent conflict and war, a factor which tends to encourage international attention. Constitution making in our era is transnationally embedded, and our cases reflect a range of levels of engagement with the international community. In Burundi and Kosovo, international involvement was intensive and sustained, and constitution making can be understood as emerging rather directly out of a peace agreement.

Madhesi Forum, and several other agreements between the government and different groups. These documents then were invoked by parties seeking to leverage their negotiating positions.

Our original meeting also included a representative from Georgia.
among warring parties. In South Africa, Ecuador, Kenya, and Nepal, there was a good deal of attention from outside, but also a good deal of constitutional expertise in the country, and the primary shape of the deal was locally determined. Tunisia’s dynamic was local revolution, and the process was locally managed.

Gargarella (2016) following Alberdi (1981 [1852]) argues that constitutions should be assessed first by their ability to address their “central dramas.” Each of these cases had a very different drama, though there are some interesting connections and parallels across the cases. Kosovo involved the drama of securing national independence in a highly fraught context, in which memories of the wars that accompanied the breakup of Yugoslavia remained fresh. South Africa was also an instance of what the judge and activist Albie Sachs has called nation building in the aftermath of decades of apartheid and violent conflict. Burundi, too, involved memories of ethnic conflict, including multiple instances of genocide in the country’s history. Nepal’s “People’s War,” led by the Maoists, had an ethnic as well as a class dimension, and had the goal of producing an inclusive federal constitutional order. Ecuador’s efforts involved regional and ethnic conflict. Kenya’s central drama was the struggle for governmental integrity, but it also occurred in the aftermath of civil conflict, as ethnic-based violence had followed the prior election. And Tunisia’s constitution making followed its popular revolution that triggered the Arab Uprising throughout the Middle East. Thus, a common motive triggering constitution making is an effort to find a more effective, and in some cases inclusive, model for governance. It was also apparent from the cases that the definition of the central drama might not be agreed at all levels – for example in Tunisia much of the debate within the Constituent Assembly was focused on the identity of Tunisia as secular or Islamist, as well as the character of the political system, whereas for the younger revolutionaries the transition was more about social justice and human dignity.

These dramas, to which constitution making responds, frame the political process of bargaining under constraints. Constitution making, as Gabriel Negretto (2013) has noted, involves mixed games of cooperation and competition. Parties may have a joint interest in resolving certain core challenges, but may differ in terms of the particular solutions, which often have distributive consequences. It is this process of sorting out the costs and benefits, of creating new institutional structures, and of inspiring the public to support the outcome, that successful constitution making must grapple with. Beliefs, assets, and constraints come into play; deadlines and timelines matter, as does the sequence in which issues are tackled. We seek to address these issues of time, information, and constraint in the bargaining process, and to deepen our understanding of the roles of public participation, elites, and the international community in constitution making.

The remainder of this introduction is organized as follows. We first focus on the issue of assets and constraints that designers bring to the table; then turn to the role of uncertainty and beliefs in the process. We then examine lessons from the cases in terms of process design, international involvement, public participation, and the role...
of courts. We subsequently turn to lessons from the cases for substance. We examine the production process of two aspects of constitutions, the preambles and the transitional provisions, which typically form the bookends of the text. How these particular parts are drafted provides an interesting insight into the way constitution makers proceed through their task. We conclude with reflections on the range of lessons that can be drawn from our cases.

I. ASSETS AND CONSTRAINTS

Constitution making is, in our conception, the process by which a formal constitutional document is produced. The process begins with the decision to draft a new constitution and ends with the promulgation and entry into force of the resulting document. It includes numerous internal stages, such as gathering ideas, negotiating, drafting, reviewing, and perhaps seeking public approval. This process can take anywhere from a few months to many years.

Clearly, this description of the formal process is inadequate in that constitution making is embedded in a larger set of historical struggles, typically beginning long before formal constitution making is launched and ending well after formal promulgation. These background dynamics determine the relevant upstream and downstream constraints, in Elster’s terminology. In some cases, the key constitutional decisions may be taken earlier, in a peace negotiation or other context. For example, in Kosovo, talks held in Vienna under the auspices of mediator Martti Ahtisaari resolved some of the major issues for a future constitution, well before it was clear that such a constitution would indeed be produced. And one nominal downstream constraint – the formal adoption of the constitution by the elected assembly – proved to be meaningless relative to the need for international approval thereof. Thus, the notion of constraints is a fluid one and requires case-by-case analysis to determine what limitations actually are present on the process.

In South Africa, one can trace the struggle for a democratic constitution back many decades. In the immediate pre-constitutional period, political prisoners were released, and initial negotiations began. Upstream political agreements made during this period had important implications for the process of future constitutional negotiations. For example, it was agreed at the CODESA I talks, at an early stage of the political transition, that decisions in the South African transition should proceed on the basis of “sufficient consensus,” an undefined term that was interpreted to mean that only the two main players would have a veto. Later, this led to agreement on the rule for adoption of the final constitution: it would have to be agreed by a two-thirds majority, and if that could not be reached, a draft with the support of a majority of members could be sent to referendum.

Given the iterative nature of modern constitution-making processes, constraints also evolve through the course of the same process. Nepal is perhaps the clearest...
example of this, involving, as it did, two consecutive constituent assemblies with vastly different compositions. Initial upstream constraints on the first process were not airtight, but they did eventually lead to its failure, along with the establishment of a new set of rules for a second Constituent Assembly that accomplished its goal.

Another set of constraints comes from the structure of the cleavages at issue. South Africa was essentially a bilateral negotiation, pitting the white apartheid forces against the African National Congress, but there were other parties whose interests had to be taken into account, most visibly the Inkatha Freedom Party. Burundi’s conflict was essentially a bilateral ethnic one, pitting Hutu and Tutsi forces against each other. Constitution making in Kenya featured a number of different elite groups, whose coalitions shifted over time. Ecuador’s exercise was one of intense regional conflict, while in Kosovo, there was internal unity at the early stage but also some bilateral personality-based politics. The principal societal cleavage – relating to the Serb minority – had been removed from the constitutional negotiations by the preceding Ahtisaari principles which dictated a series of minority rights and protections with which the constitution makers were enjoined to comply. The most complex of our cases was Nepal, which is an utterly diverse country with lots of cleavages. It is tempting, but in our view mistaken, to attribute to this diversity the failure of Nepal’s constitution-making process to produce a complete settlement. After all, we know of other cases of unilateral constitution making – Georgia is an example, though outside the scope of our volume – that ended up producing an unstable solution because of the surprising results of the post-constitutional elections. Instead, we would argue that multisided bargaining is more difficult but that it was specific choices that led to Nepal’s instability.

Constraints can also be indirectly articulated by international financial organizations. Tunisia offers the best example of such an external constraint, as the country saw its credit rating decline as the constitutional drafting process went on. These external decisions placed further time pressure on the MPs to conclude a deal. Credit rating agencies, along with the International Monetary Fund and the World Bank, may prioritize economic concerns over long term democracy building.

The background or upstream iterations of bargaining also determine the assets that constitution makers bring to the table. If constraints are limits that shape the process, assets are conditions or features of the environment that facilitate the process of constitution making. In some cases, these may be a set of accepted commitments and ideas about how future governance ought to work; in other cases, the assets might include political party structures or historical leaders. For example, the presence of a unifying leader can be a major asset. The presence of George Washington in Philadelphia, a man who everyone agreed would serve as the first president of the country, helped to channel disagreements on other issues.

In our cases, the unquestioned position of a Nelson Mandela helped to channel conflict and overcome constraints in South Africa. Ebrahim reports that, in South
Africa, Mandela would attend meetings but rarely speak. While not involved in the
decision-making meetings, Mandela’s presence in the background provided reassur-
cances for all sides. The presence of a Mandela – or in other contexts, a George
Washington or Jawaharlal Nehru – is a great advantage but not one that can be
engineered. (Interestingly, Mandela also appeared in Burundi as an external medi-
ator, pushing the parties toward agreement.)

Beyond resolving conflicts, the inclusion of eminent figures can also help to add
weight to the constitution-making body, and as a result increased legitimacy to its
proposals. In the United States in 1787, the inclusion of an ailing Benjamin Franklin
helped to strengthen the authority of the Philadelphia Convention.

The availability of local political and legal expertise is also an important asset.
South Africa’s African National Congress had a good deal of legal and political
talent, developed over many decades. It also was able to channel the various strands
of the anti-apartheid movement into a single voice, more or less, securing a better
deal than had it been fractured.

Locations can be assets too. After the fall of communism but before the
Yugoslavian breakup, Kosovo leaders gathered in the historically important town
of Kačanik to adopt a new constitution for a republic, within the framework of
Yugoslavia. The location helped to contribute to a narrative. In another context, the
2007 Constitution of Bolivia was to be drafted in Sucre, a relatively neutral site
between two competing regions of the country (Landau 2013: 953). The earlier
round of Kenyan constitutional negotiations had taken place at Bomas, outside the
main center of Nairobi. For negotiations, locations have symbolic meaning, which
makes some better than others. The Vienna talks on Kosovo could not have been
held in Berlin, Washington, or Moscow, for each of these places would be viewed as
partisan. Instead, having a Finnish negotiator lead talks in Vienna projected a sense
of neutrality for the partisans.

The state of the economy may also be an important factor as either asset or
constraint. In Tunisia, the deteriorating economy and high unemployment placed
pressure on the constitution makers to complete their task.

In short, some assets can be engineered, but others are simply a product of the
situation of constitution making. Constraints are typically taken as given, but
sometimes result from earlier rounds of negotiation and interaction that shape the
constitutional moment.

II. THE ROLE OF UNCERTAINTY AND BELIEFS

Constitution making is often conceived of as a Rawlsian process, in which insti-
tutional designers are picking institutions in ignorance of the position they will hold

4 Violence eventually forced the Constituent Assembly to move locations (Landau 2013: 956).
in post constitutional governance. Their beliefs about the outcomes are important in incentivizing the choices they make.

The cases we have examined suggest that there are two common reasons that things may not go quite as planned: random shocks and electoral surprises. Random shocks are truly unpredictable events that occur in the course of constitution making: The 2015 earthquake in Nepal is a paradigm example. That event strengthened the hand of the majority to push through a deal on the constitution, though as Dev writes, it did not actually lead to a more accommodating bargain. And in South Africa, the assassination of Chris Hani in April 1993 was a significant event that surprised everyone. The shock changed beliefs about the probabilities of certain events, making the specter of civil war more salient for all, and this threat was leveraged to reach agreement on the timing of elections. In both cases, the shocks created crises which sped up the timeline of constitution making. On the other hand, the assassination of Tunisian Constituent Assembly member Mohamed Brahmi in July 2013 froze the process for months and threatened to derail it entirely.

Electoral surprises, of course, are taken into account in the standard framework. But what is perhaps interesting is how often politicians involved in constitution making seem to miscalculate the electoral results. In Kenya, Raila Odinga pushed for a new constitution, perhaps hoping to take the presidency, but the International Criminal Court’s decision to indict Uhuru Kenyatta and William Ruto on the eve of the first post-constitution election led to a backlash that swept them into office. While we do not analyze the case in this volume, constitution making in Georgia was pursued under the very strong conviction that Mikhail Saakashvili’s party would win the post-constitution-making election; it did not, despite the fact that there was no major challenger in sight beforehand. The sudden political emergence of Bidzina Ivanishvili, who formed his Georgian Dream Coalition six months before the October 2012 election, proved an unexpected surprise. Saakashvili’s idea of strengthening the Parliament and the state apparatus proved to be unrealizable in an era of informal political domination by a single figure.

In Burundi, constitution making in the interim period of 2001–2005 proceeded during a period when two major political forces were to alternate interim presidencies of eighteen months each. Neither holder would be allowed to contest the first post-constitutional election. As constitutional decisions had to be taken as to how the president would be selected under the final arrangement, Jean Minani, a leader of the FRODEBU party, decided not to take the interim presidential term, as he thought that the Parliament would be a better base in which to take the permanent presidency after constitutional adoption and the interim president would not be eligible to run for presidential office at the end of the interim period. However, he did not anticipate that the rival CNDD-FDD party would contest the elections, and surely did not expect that they would win. When CNDD-FDD won the elections under a constitution they had no role in designing, they had little investment in implementing it, and President Pierre
Nkurunziza went on to serve three consecutive terms in office, with grave human rights abuses taking place.

Electoral uncertainty also played a role in the Nepal case, though in a less unpredictable way. When the first Constituent Assembly failed to complete its work, the Supreme Court ordered it disbanded, leading eventually to new elections. From the perspective of the sitting politicians, the court case was a kind of random shock that they did not expect. But the subsequent elections, which produced a political configuration completely inverse to the first Constituent Assembly, was an example of uncertainty shaping the subsequent agreement. In turn, the second Constituent Assembly was guaranteed to remain as a legislature in the post-constitutional period, reducing uncertainty for individual politicians and perhaps facilitating the ultimate agreement.

The bargaining process can also lead to parties switching positions, as they learn from each other or from new information. Proposals to turn Kenya’s system into a parliamentary one have surfaced from time to time but never overcome the logic of presidentialism. In Nepal, the Communist Party Nepal – Maoist (CPM(M)) abandoned its position on presidentialism. The fluidity of interests, and the repeated failure of political actors to predict post-constitutional politics with accuracy, is an important theme that deserves explicit inclusion in a neo-Elsterian framework. Despite pervasive uncertainty, there seems to be a good deal of optimism bias among actors drafting behind the veil of ignorance.

III. LESSONS FROM THE CASES: PROCESS DESIGN

Our cases tell us a good deal of how constitutional process can be used to facilitate agreement, resolve deadlocks, and either help or hinder the constitution makers in achieving their goals. We address several different issues: the design of the forum, the sequencing of issues, the role of deadlines, secrecy and publicity, and mechanisms for breaking deadlock.

A. Plenaries, Back Channels and Forum Design

As a formal matter, constitution making is often developed through constituent assemblies, either specially elected for that purpose or doubling as a sitting legislature. In South Africa, the Constitutional Assembly was both houses of Parliament, sitting together in plenary. In Nepal and Tunisia, the Constituent Assembly was elected as such and then doubled as the country’s legislature. In other cases, the legislature itself may produce the constitution. In the unusual case of Kosovo, a constitutional commission did the formal drafting, on the basis of a working group that had done much of the work already; the Assembly played only a minor role in