



## Best Practices in Constitutional Reform

*Timothy M. Meisburger*  
*The Asia Foundation*

### INTRODUCTION

As countries seek to make the transition from authoritarian to democratic government, or to consolidate democracy, they often either revise their current constitution or draft a new constitution; but few of those working on the process will have had previous constitutional reform experience in their own country, or will have a good idea of the long term implications and impact of the decisions made during the reform process. To assist policy-makers and others engaged in constitutional development or reform this paper will provide a basic overview of the process and, drawing on the previous experience of many countries, make generalizations about what has and has not worked in constitutional design.

## Constitutional Development and Reform

A constitution serves as the foundational law of a state, describing the organization of the institutions of government, and the scope and limitations of government power. Although we typically associate constitutional government with democracy, almost all states have some form of written or unwritten constitution. Many authoritarian states have constitutions that would seem in theory to guarantee freedoms and some level of democracy, but which are ignored in practice (called façade constitutions). In some countries these constitutions will simply be revised, while in others an entirely new document will be constructed. In either case the development process will be broadly the same.

In very broad terms there are two types of constitutions; the framework, and the legislative. A framework constitution describes the institutions of the state and the rules of the political game, and is generally relatively short; while a legislative style constitution will be much longer and include substantial law unrelated to the institutions of state. Framework constitutions enable the legislature to craft laws to implement the constitution, making it easier to amend in the future if circumstances require. Legislative constitutions tend to be more fragile as politicians often seek to codify their partisan agenda in the relatively immutable constitution.

The process of constitution writing can generally be broken down into several steps:

- 1) Initial formal or informal discussions on how the constitution will be drafted or revised;
- 2) In some cases (about a third of all constitutional development

processes) an interim constitution is agreed on that governs the country and the drafting process during the transition;

- 3) a group (often a sub-committee) develops a draft, or synthesizes several drafts (there may also be public consultation during this period);

- 4) the draft is debated, amended and adopted by an assembly or legislature;

- 5) in some cases adoption by the assembly is sufficient, but about half the time constitutions are ratified through a public referendum.

In most cases constitutional reforms or new constitutions will be drafted by the legislature or sub-committee; or by a constituent assembly expressly elected (or appointed) for the purpose. Parties and others may also prepare and submit drafts, if the deliberative process allows for that. The average the time required to fully develop a new or revised constitution ranges from 12 to 14 months, but additional time may be needed when public consultation is part of the process (South Africa had a two year, inclusive consultative process that resulted in widespread acceptance of the constitution when it was completed.)

In a transitional environment there can be tremendous political pressure to complete a constitution in a very short period. Occasionally actors in the international community have contributed to this pressure in the belief that it is a box to be ticked on the way to stable and democratic government. Both practical experience and academic research suggest pressure for rapid constitutional development may be counterproductive; and that for stability and sense of local ownership a consultative and transparent process is even more important than the actual substance of the document.

## Lessons Learned

**Durability** – A constitution is the fundamental law of a nation. It describes the structure, functions and limits of government, and defines the rights reserved to the people. A constitution limits the power of the government, but also limits the power of the people, protecting the basic rights of the individual and minorities from the unfettered power of either monarchy or majority-rule. Except through the process of amendment, rules and rights laid out in a constitution are not subject to the normal political process.

Significant research has been conducted on factors that led to durable constitutions in post-war Europe, and more recent transitions<sup>1</sup>. A durable democratic constitution is likely to be short, and focused primarily on matters of procedure (framework constitution). Since a constitution is the basic law of the state, once enacted is not subject to the normal political process. To the extent that contentious or politically unsettled issues are included in a constitution, the resulting document will be fragile. The strength of democracy is its ability to manage disagreement and conflict through a political process, but whatever is inside the constitution is not subject to that political process.

A constitution should also be concise because it should be accessible. A durable and democratic constitution is owned by the people. Any citizen should be able to read or hear any article of the basic law of the land and understand it. To describe in three paragraphs of dense legalese what a normal person would state in two sentences is to erect an insurmountable barrier between the people and their constitution.

1) See Ginsburg, Elkins and Melton; *The Lifespan of Written Constitutions*, *Record Online*, Spring 2009

Durable constitutions tend to emerge under conditions characterized by an open, participatory process; and a public ratification process also contributes to constitutional longevity.<sup>2</sup> Finally, the extent to which the constitution is “alien to the customs and way of thinking of the people”<sup>3</sup> it will be fragile. This phenomenon of fragility or public rejection was noticed both during the post-World War II period and during more recent waves of democratic transition, when many constitutions were drafted by foreign experts unfamiliar with the social and cultural mores of the nation.

**Participation** – Both practical experience and academic research suggest that when constitutions are drafted by an exclusive group of local elites, or by outside experts, they are fragile, and the people feel little ownership or loyalty to the constitution. In contrast, when the people participate both directly and through real representatives in the development of the constitution they do feel they own it, and will struggle to defend it. But participation takes time, and too often in the past public participation has been sacrificed because local actors (or sometimes the international community) felt there just wasn’t time. Sometimes entrenched elites rush the process to avoid real participation and ensure existing elite control (this is a major risk in Middle East today). In every instance where constitutional development or reform was conducted without significant public participation, this lack of public involvement was subsequently seen as a major flaw in the process.

While some have argued that the public will not be interested or engaged in constitution-making, surveys show otherwise. For example, a survey in Thailand<sup>4</sup> revealed that just 10% supported the idea that constitutional amendments should be drafted and endorsed by

2) *Ibid.*

3) See the entry Constitution and Constitutional Government in *The New Encyclopedia Britannica*, Volume 16, 2007, pp. 692-693, for information on post-war constitution making.

4) See Opinions divided on constitutional reform process, *Bangkok Post*, 9/23/2009, for a summary of relevant data from the survey report “Constitutional Reform and Democracy in Thailand”, *The Asia Foundation*, Bangkok 2009, <http://asiafoundation.org/publications/pdf/603>

Parliament, and only 16% approved of an amendment process led by experts. A strong majority (67%) said they preferred a participatory amendment process that included consulting ordinary people across the country. When asked if constitutional amendments should be endorsed by Parliament or put to a national referendum, an overwhelming majority of 84% opted for the referendum. To ensure public acceptance and legitimacy it makes sense to devote as much time as required to ensure that the general public feels they have had adequate opportunity to participate in the process.

**Constituent Assemblies and Constitutional Conventions** – A constituent assembly and a constitutional convention are two different things. Constitutional commissions and constituent assemblies differ in that a constitutional commission’s mandate is limited to strictly drafting a new constitution, whereas a constituent assembly may have a much broader mandate. In addition to drafting a new constitution, a constituent assembly’s mandate may also include other duties and obligations such as amending existing legislation, serving as an interim government during the state’s transition, and drafting regulations governing presidential or parliamentary elections. On occasion, a constituent assembly and a constitutional commission may both be utilized during the constitutional drafting process (i.e., Nepal), with the commission being part of the constituent assembly.

Constituent assemblies are also often assembled in haste, but experience suggests that this is a more critical process than is generally assumed. The make-up of the assembly is important to ensure it is representative of the population as a whole, rather than merely political or economic elite. The procedure used to select a constituent assembly

or constitutional drafting committee and the rules under which it operates can also significantly affect the content of the final document. For example, when a constituent assembly has the authority to turn itself into a legislature, it invariably does so, with the procedure used to select the assembly usually incorporated into the constitution as the procedure for the legislature.

Surely these issues: size of legislature, method of election (proportional or group representation, first-past-the-post, etc.) should be debated in the assembly rather than determined before the assembly ever sits for its first meeting, but the allure of power can be too strong to resist. For this reason members of a constitutional assembly are sometimes not allowed to turn the assembly into a legislature, and are restricted from serving in other governmental capacities or running for office for a period of ten years or more after their service on the assembly. The rationale is that this approach prevents potential conflict of interest, in that the members will be subject to (rather than controlling) the government they develop.

**Role of International Community** – Although the international community has played a positive role in constitutional reform and development in many emerging democracies, in some cases it has been criticized. In internationally administered post-conflict states there can be pressure to complete the reform as soon as possible, especially in situations where the international community is managing the process. For example, the 1991 Paris Peace Accords that ended the war in Cambodia allowed just 90 days for constitution-making; very little time for deliberation and no time for public participation.

Cambodia also provides an example of the second major complaint about the international community, that it is often too involved in determining the substance of the constitution. In 1992 the initial draft of the Cambodian constitution was written by a French “constitution expert”, with subsequent deliberation merely editing of that draft. While the draft was consistent with international norms, it in no way reflected the culture or consensus of the Cambodian people, and is widely ignored to this day.

**Conflict Resolution** – One reason why there is often so much pressure to complete a new constitution as quickly as possible is because the process is often used to resolve an on-going conflict. While this is obviously important, it should be recognized that ending a conflict, and establishing a democratic state are two different objectives, and meeting one doesn’t necessarily ensure the other. For example, in countries like Afghanistan or Somalia where warlords control different parts of the country, one could end the conflict by allowing the warring factions to become political parties and share power in a new national government. The result might be called multi-party government, but if the warlords retained absolute power in their own areas, the country would not be a democracy. This applies as well to politically conflicted societies. If the conflict is ended through an agreement to share power among the existing or new parties, but those parties lack internal democracy, the country will not be very democratic. There is not clear procedure to resolve this tension between the equally important but differing objectives of ending conflict and establishing democracy; but there is certainly strong evidence that enhanced public participation would be a key element in a solution.

## Programmatic Options for External Assistance

As has been stressed throughout this brief, constitutional issues are very sensitive and often controversial. Appropriate instruments and approaches should be used for different contexts, but informed by in-depth analysis. The following are some possible options for external assistance to a reform or development process

*Assistance to help define the architecture of the constitutional making process:* Assistance may be required to help governments identify appropriate rules and procedures to manage and drive the development process, identify the institutions that should be involved, define the role of constitutional drafters, and apply realistic time frames. Models should help ensure participation of women, minorities and other underrepresented groups.

*Participation and Civic Education:* Public participation in the constitutional development process is essential to build legitimacy and ownership, but many citizens may lack the information needed to participate in a meaningful way, and may not recognize the long term significance of decisions being made. Without this information, and in an environment where there may be tremendous political pressure to finish the constitution quickly, there is a danger that participation will be overlooked by both local and international actors because there is ‘simply not enough time’ (the timing excuse is often used to lock in policies and structure that empower existing elites or special interests).

It is critical that as early as possible civic education programs are developed to provide information about the constitutional reform

process<sup>5</sup>. In most cases civic education will be most cost-effective when broadcast on television, but print and radio can also be effective media, particularly in reaching specific target groups or minorities. Surveys should be conducted to assess level of knowledge among various target groups so that education can be accurately targeted. Surveys may also measure citizen preferences for various constitutional options. Programs can be conducted to increase media capacity to monitor and inform the public about the development process.

*Facilitate Public Input into the Process:* Some constitutional reform efforts will include a formal process for public input. This can be in the pre-draft stage, or after a draft has been completed. Earlier is probably better, and both probably best. This should be encouraged, and it is appropriate to provide technical and financial support for such processes. In some cases the offer of funding for a public consultation process can be an effective inducement for constitutional commissions to conduct such a process. One common model for public consultations in other developing countries has been a series of public forums held around the country.

If there is no formal consultation process, it would be appropriate (if politically feasible) to support an unofficial process through civil society actors, to help ensure that information on public preferences is available to the drafters. Qualitative information from public forums or focus groups—whether the process is official or unofficial—should be supplemented with quantitative data on preferences gathered through a national survey. Such a survey might be combined with the civic education survey described above, or could be a smaller and more rapid telephone-based poll if time is an issue.

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5) It is important to develop a comprehensive timeline for the reform process that will enable citizens to know what to expect at each stage of the process.

*Technical Assistance to the Drafting Committee:* Where appropriate, technical and/or financial assistance can be provided to the drafting committee. Such assistance should be facilitative rather than directive. Avoid the ‘expert trap’, where an individual or small group of foreign experts promotes a particular constitutional model as ‘best’ for the country. Experience shows that the best constitution will be the one that best reflects the country’s unique cultural and social consensus, and that an inclusive development process is more important for public acceptance and legitimacy than content.<sup>6</sup>

*Comparative Analysis of Different Constitutions:* Support for a government agency or private think tank to conduct comparative analysis of constitutions developed in other emerging democracies. This might also include intraregional consultations and dialogues to guarantee basic protections are enshrined in the constitution. Analysis should be carried out in tandem with clear monitoring guidelines to identify any deficiencies in the document drafts.

*Encourage Ratification through a Referendum:* Public acceptance of the legitimacy of a constitution is dependent on the perception of ownership and consent. In some cases ratification by a legislature is seen as public consent, as legislators are elected by the public; but in most transitional situations—where legislatures have only limited democratic legitimacy—experience suggests that a public referendum is the best way to determine legitimacy, confer consent, and promote long-term acceptance and political stability. It would be appropriate to encourage a referendum as the capstone of a reform process, and where appropriate provide technical and financial assistance for the process. That can include assistance to the election management body (which

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6) Ginsburg, Elkins and Melton; *The Lifespan of Written Constitutions*, Record Online, Spring 2009 <http://www.law.uchicago.edu/alumni/magazine/lifespan>

will also strengthen capacity for future elections), as well as civil society support for civic education and referendum monitoring.

## ONLINE RESOURCES

*Additional information about constitutional development and reform is available on the web:*

- Ginsburg, Elkins and Melton; The Lifespan of Written Constitutions, Record Online, Spring 2009  
*<http://www.law.uchicago.edu/alumni/magazinellifespan>*
- Hart, Vivian; Democratic Constitution Making, United States Institute of Peace, Special Report 107, July 2003  
*[www.usip.org/files/resources/sr107.pdf](http://www.usip.org/files/resources/sr107.pdf)*
- Kritz, Neil; Constitution-Making Process: Lessons For Iraq, Public International Law & Policy Group, June 2003  
*[www.usip.org/publications/constitution-making-process-lessons-iraq](http://www.usip.org/publications/constitution-making-process-lessons-iraq)*
- Meisburger, Tim, Constitutional Reform and Democracy in Thailand, The Asia Foundation, Bangkok 2009, available on the web at *<http://asiafoundation.org/publications/pdf/603>*
- Widner, Jennifer; Constitution Writing and Conflict Resolution (website), *<http://www.princeton.edu/~pcwcr/>*
- Williams, Paul; Post-Conflict Constitution Drafter's Handbook, Public International Law & Policy Group, January 2007, *<http://www.publicinternationallaw.org/areas/peacebuilding/consthandbook/PILPG-PostConflictConstitutionDrafterHandbook-Jan07.pdf>*

## ABOUT THE AUTHOR

**Tim Meisburger** is The Asia Foundation's regional director for Elections and Political Process. Based in Bangkok, Mr. Meisburger provides support for democracy programming across Asia, including technical assistance for democratization-related projects in Nepal, Bangladesh, Sri Lanka, Pakistan, Afghanistan, Thailand, Philippines, Japan, Cambodia, East Timor, and Indonesia. Mr. Meisburger managed the Foundation's civil society assistance programs for the 1998 Cambodian National Election, and the 1999 Indonesia National Election. Prior to joining the Foundation, Mr. Meisburger worked as an election administrator for the UNTAC mission in Cambodia in 1992-1993, and for the Organization for Security and Cooperation in Europe (OSCE) in Bosnia in 1996. In 1994, he worked as a political party trainer and observer in the South African election. In addition to his election work, Mr. Meisburger has been involved in international development and humanitarian relief.

## ABOUT TAF:

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