



**International IDEA
Democracy-building & Conflict Management (DCM)**

SECOND DRAFT

**CONSTITUTION BUILDING PROCESSES AND DEMOCRATIZATION:
A DISCUSSION OF TWELVE CASE STUDIES**

**Prepared for
INTERNATIONAL IDEA
by
Dr KIRSTI SAMUELS**

EXECUTIVE SUMMARY	4
Impacts	4
i) Building peace	4
ii) Substance of the constitution and quality of the democracy	4
iii) Popular support	5
iv) Democratic education and empowerment	5
v) Divisive effect	5
vi) A threat to the established power structure	5
INTRODUCTION AND METHODOLOGY	5
Why Democracy	6
Categorization of cases	8
i) Pre-transition environment	8
ii) The process	8
A REVIEW OF THE CONSTITUTION BUILDING PROCESSES	9
Outcome Negotiated by Elites, Process Inclusive, Representative, Participatory	10
Kenya	10
Colombia	11
Guatemala	12
Afghanistan	13
Negotiated between elites, Process Not Inclusive, Representative, Not Participatory	14
Hungary	14
Fiji	15
Chile	16
Indonesia	17
Outcome imposed from the top (authoritarian regime or one dominant faction or party), Process Not Inclusive, Representative, Participatory	18
Rwanda	18
Outcome imposed from the top (authoritarian regime or one dominant faction or party), Process Not Inclusive, Representative, Not Participatory	19
East Timor	19
Outcome imposed from the top (authoritarian regime or one dominant faction or party), Process Not Inclusive, Not Representative, Not Participatory	20
Nigeria	20
Bahrain	21
DISCUSSION	22
i) Building peace	23
A Representative process	23
A participatory process	23
Failure to adopt or implement	23
ii) Substance of the constitution and quality of the democracy	23
	2

Representativeness	24
Participation and inclusivity	25
iii) Popular support	25
Representativeness	25
Participation	26
iv) Democratic education and empowerment	26
v) Divisive effect	27
vi) A threat to the established power structure	27
Prior history, institutions and culture	28
CONCLUSION	29

EXECUTIVE SUMMARY

This paper explores 12 cases of constitution building¹ undertaken during times of transition from civil conflict or authoritarian rule during the last fifteen years.² The cases are diverse in context, constitution building approach, constitutional culture and knowledge, and outcome. The paper provides a *tour d'horizon* of constitutional building processes and the discussion seeks to draw out common themes from the cases and elucidate some of the ways that constitution building processes have impacted on the content of the constitution, on the broader democratization process in the state, and on any return to violent conflict.

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

Impacts

i) Building peace

The cases show that a participatory or representative constitution building process can provide a forum for the negotiation of solutions to the divisive or contested issues that led to violence, or for a negotiated transition from an authoritarian regime. In contrast, an unrepresentative or imposed constitution can create or aggravate dissent and political tensions.

A participatory process can also play a reconciliation and healing role through societal dialogue, and can support sustainable peace by forging a consensus vision of the future of the state. The failure to adopt or implement a constitution built through a participatory process can result in increased dissatisfaction and societal tensions, and even a return to conflict.

ii) Substance of the constitution and quality of the democracy

In the study, the more representative processes resulted in constitutions free from provisions that undermine the quality of democracy (such as provisions which aim to ensure that a particular group retains executive or legislative power irrespective of elections). In contrast, constitutions written and imposed by one faction or one dominant interest, rather than negotiated, have tended to be biased towards that interest or undermine some aspect of democracy.

Participatory and inclusive processes tended to result in constitutional drafts which provided rights to those groups which had not up to then gained political protection or recognition, or include provisions addressing issues of social and economic justice, corruption and the failure of elites to act responsibly. These provisions did tend to render the adoption and enforcement of the constitutions more controversial, as they were often perceived by the elites as a threat to their power or privilege.

¹ The 12 case studies that form the basis of this analysis were prepared for International IDEA by the following experts. I am grateful to the case authors for their analysis of the constitution building processes in their respective cases. Factual descriptions are derived from their cases, although I take responsibility for the implications I draw from them. Afghanistan case study: Carolyn McCool; Bahrain case study: Mohamoud Awil; Chile case study: Esteban Montes and Tomás Vial; Colombia case study: Iván Marulanda; East Timor case study: Randall Garrison; Fiji case study: Jill Cottrell and Yash Ghai; Guatemala case study: Roddy Brett and Antonio Delgado; Hungary case study: Andrea Mezei; Indonesia case study: Edward Schneier; Kenya case study: Jill Cottrell and Yash Ghai; Nigeria case study: John Simpkins; Rwanda case study: Priscilla Ankut.

² This time frame corresponds to the beginning of a wave of democratization at the end of the Cold War.

iii) Popular support

Constitutions that were representative or involved a process of consultation and participation were perceived as more legitimate and hence received greater popular support. Representativeness, even without participation, seemed to be a sufficient criterion to ensure at least initial popular support for the constitution. Popular support for a constitution, while important, is not the only criteria by which to evaluate a constitution, however. A constitution that does not adequately protect human rights and minorities may still obtain popular support.

The study illustrated that populations increasingly expect to participate in constitution building, particularly where they have participated in the past. Populations have tended to reject constitutions imposed on them without their involvement. In contrast, if genuine consultation was undertaken, they have not necessarily rejected constitutions which did not incorporate their suggestions.

iv) Democratic education and empowerment

Participatory processes can provide an opportunity for the democratic education of the population, and thus their empowerment. It remains to be seen whether the politicization and empowerment of the people through such processes is transient or more long lasting.

v) Divisive effect

The question of whether it is necessary at times to rely on elite compromises and to avoid societal dialogue on a divisive issue is difficult and requires careful assessment of the whole context. The participatory processes did not have a divisive effect in the case studies. Careful planning and management avoided polemic issues destroying those processes, but such issues can at times create deadlocks.

A non-participatory process was used in some instances to transition to a stable democracy, whereas in others, the failure to sufficiently include the population in discussions led to divisive issues resurfacing later in an extreme way without the opportunity for balanced discussion.

vi) A threat to the established power structure

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

Thus, a key challenge is how to address the opposing requirements of creating incentives for the powerful players to participate in constitutional processes and to commit to implementation, without abdicating a genuine consultative process that fosters political dialogue and empowers the people. There is no simple answer to this dilemma, which requires careful weighing of the surrounding circumstances and options for implementation of the constitution, including the degree of outside enforcement capability, and the degree of internal popular activism.

INTRODUCTION AND METHODOLOGY

This study forms part of the International IDEA *Constitution Building Processes in Democratization* program. The program aims to:

- Influence the agenda-setting of donors/international community drawing their attention to the contribution that Constitution Building Processes (CBP) can give to a successful and sustainable democratization;

- Improve knowledge/practice of international actors providing assistance to CBP;
- Enrich analysis of academics and experts debating on CBP and their impact on democracy-building;
- Strengthen the capacity of national stakeholders, particularly national reform bodies and legislatures, leading/playing a major role in CBP.

This paper arises out of series of meetings exploring comparative experiences of constitution building processes. It aims to discuss the 12 case-studies prepared by external consultants, which provided the focus for the meetings, from the perspective of what they can tell us about the role of Constitution Building Processes in democratization.

Why Democracy

Democracy and peace are adopted in this paper as the two criteria by which the impact of constitutions should be assessed. For countries emerging from violent conflict or facing the threat of violent conflict, the importance of sustainable peace is self-evident. The importance of democracy requires a little more explanation.³ This paper takes the view that despite the fact that transitions to democracy have been shown to be destabilizing and conflict prone,⁴ and that democratization without careful understanding of the pressures in the society can create conflict in itself, democratization should still be considered the best governance structure for long term conflict cessation.

In the immediate post-conflict environment, the adoption of a democratic regime can assist in the resolution of the struggle for power by providing an internationally and domestically accepted standard of who is entitled to govern based on open and fair competition for power on the basis of popular vote.⁵ Moreover, it is hoped that conflict mediating structures and increased opportunities for participation will encourage non-violent resolution of conflicts,⁶ which as Jock Covey, Deputy SRSG in Kosovo highlights, is one of the key elements for the creation of sustainable peace.⁷

Nevertheless, there are no simple and universal relationships between democracy, peace and development. Democratic institutions are not enough to prevent conflict and poorly designed democratic institutions can ferment it in sharply divided societies. Democratization “can also become the tool of powerful economic interests, reinforce societal inequalities, penalize minorities, awaken dormant

³ The project adopts the operational definition of Democracy as a form of government “combining three essential conditions: meaningful *competition* for political power amongst individuals and organized groups; inclusive *participation* in the selection of leaders and policies, at least through free and fair elections; and a level of *civil and political liberties* sufficient to ensure the integrity of political competition and participation” (International IDEA, “Democracy and deep-rooted Conflict: Options for negotiators”, 1998).

⁴ Snyder From Voting to Violence : Democratization and Nationalist Conflict (Norton, New York London, 2000) at 352.

⁵ See Bastian and Luckham "Introduction" in Bastian and Luckham (eds.) Can Democracy Be Designed? : The Politics of Institutional Choice in Conflict-Torn Societies (Zed, London, 2003) 1 at 15. See also Gurr and United States Institute of Peace. Peoples Versus States : Minorities at Risk in the New Century (United States Institute of Peace Press, Washington, D.C., 2000) at 153.

⁶ See Gurr and United States Institute of Peace. Peoples Versus States: Minorities at Risk in the New Century 153. See eg Krain and Myers Democracy and Civil War: A Note on the Democratic Peace Proposition (1997), Davenport 'Constitutional Compromises' and Repressive Reality: A Cross-National Time-Series Investigation into Why Political and Civil Liberties Are Suppressed (1996).

⁷ He states that peace would only become durable when parties sought to achieve their goals through peaceful means in a legitimate competition for power. Covey, Dziedzic, et al. (eds.) The Quest for Viable Peace: International Intervention and Strategies for Conflict Transformation (USIP Press, Washington DC, 2005).

conflicts, and fail in practice to broaden popular participation in government”.⁸ Moreover, re-creation of a predatory, shadow, or authoritarian state will be likely to lead to a return to conflict. As Michael Bratton recently concluded, strengthening of state capacity and democratization must proceed together “To be sure, it is impossible to democratize successfully in the absence of the political order that only a state can provide. But, by the same token, the state is unlikely to provide a durable order unless it is legitimated by democracy”.⁹

In the longer term, the adoption of democratic governance structures is still considered best able to ensure peace and legitimacy. Despite the destabilizing and conflict prone nature of transitions to democracy, studies have found that autocracies are less stable (more prone to regime change) than democracies.¹⁰ Thus, ultimately, as Hegre and Ellingsen argue: “The most reliable path to stable domestic peace in the long run is to democratize as much as possible”.¹¹

For simplicity, this paper adopts the view of Diamond and Morlino that the key factors in an assessment of the quality of the democracy will be: the strength of the rule of law, the level of political participation, the nature of the political competition, the extent of horizontal and vertical accountability, respect for civil and political freedoms, progressive implementation of greater political equality, and responsiveness to citizens.¹²

It is also useful to define the term “state”, which, for the purposes of this paper, is taken both to mean a geographic sovereign political entity with a permanent population, a defined territory, a government, and the capacity to enter into relations with the other states, as defined under international law,¹³ as well as a set of social institutions claiming a monopoly of the legitimate use of force within a given territory, as defined by Max Weber.¹⁴ The internal sub-elements of states are defined as a political regime (or system of government),¹⁵ a governance framework (or constitution)¹⁶, and a set of state institutions (or

⁸ Bastian and Luckham "Introduction" at 1. See also Lake and Rothchild "Conclusion" in Rothchild (ed.) *The International Spread of Ethnic Conflict: Fear, Diffusion, and Escalation* (Princeton University Press, Princeton, 1988) at 345.

⁹ Bratton "State Building and Democratization in Sub-Saharan Africa: Forwards, Backwards, or Together" (2004) Afrobarometer Working Papers No 43 at 24.

¹⁰ Hegre, Ellingsen, et al. "Toward a Democratic Peace? Democracy, Political Change, and Civil Wars, 1816-1992" (2001) 95(1) *The American Political Science Review* 33 at 42. See also Davenport *Freedom under Fire: Repression, Context and Fragility of the Domestic Democratic Peace* (2005).

¹¹ Hegre, Ellingsen, et al. "Toward a Democratic Peace? Democracy, Political Change, and Civil Wars, 1816-1992" at 44.

¹² See Diamond and Morlino "The Quality of Democracy: An Overview" (2004) 15(4) *Journal of Democracy* 19 at 22-29, where they acknowledge that there is no absolutely objective way of assessing a single framework for democratic quality. Nonetheless, similar criteria are set out by Bastian and Luckham "Introduction" at 24-25.

¹³ According to Article 1 of the Montevideo Convention on the Rights and Duties of States, December 26, 1933, which is considered to represent customary law, a state should satisfy the following criteria:

The state as a person of international law should possess the following qualifications:

- (a) a permanent population;
- (b) a defined territory;
- (c) government; and
- (d) capacity to enter into relations with the other states.

Its existence under international law is not however determined by recognition by other states (Article 3).

¹⁴ Weber, M. 1919/*Politics as a Vocation*, *Wirtschaft und Gesellschaft*, Max Weber's definition of the modern state 1918 [A short extract from a very long lecture given by Max Weber in 1918 at Munich University. Published 1919 as *Politics as a Vocation*.

¹⁵ "Government" in Calhoun (ed.) *Dictionary of the Social Sciences* (Oxford University Press, <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t104.e714>, 2002). These regimes range from liberal democracy to autocracy.

¹⁶ Although Weber uses the term social institutions, I prefer not to use it. Note that Max Weber also used the term “human community” interchangeably with social institutions. I rely instead on governance framework or

organizations) such as the armed forces, the legislature, and the justice system. State capacity refers to the strength and capability of the state institutions.

Categorization of cases

The cases are distinguished in this paper according to two important features: i) The pre-transition environment; and ii) The key features of the constitution building process.

i) Pre-transition environment

Broadly, five cases are categorised as taking place during a transition from violent conflict (Colombia, Guatemala, Afghanistan, Rwanda, and East Timor). Seven cases are categorized as taking place during a transition from some form of authoritarian regime¹⁷ (Nigeria, Kenya, Fiji, Hungary, Chile, Indonesia, and Bahrain). Afghanistan and East Timor transitioned both from violent conflict and authoritarian regime.

ii) The process

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

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

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

Table 1

Constitution Building Processes	Grand design	Incremental
Following or during authoritarian, military or communist rule	Fiji Hungary (followed by further reforms but initial reform was grand design) Nigeria Kenya Bahrain	Chile Indonesia

constitution rather than institutions, to prevent confusion between institutions defined as “deeply embedded patterns of social practices or norms that play a significant role in the organization of society” and institutions as “organized or bureaucratized administrative structures”). "Institutions" in Calhoun (ed.) *Dictionary of the Social Sciences* (Oxford University Press

<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t104.e837>, 2002) .

¹⁷ For the purpose of this analysis I have not differentiated between military and other authoritarian regimes.

Following or during violent conflict	Colombia Guatemala Afghanistan (also post authoritarian rule) Rwanda East Timor (also post authoritarian rule)	
---	--	--

A REVIEW OF THE CONSTITUTION BUILDING PROCESSES

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

Table 2: Categorization of process

Constitution Building Processes	Outcome negotiated between elites	Outcome imposed from the top (authoritarian regime or one dominant faction or party)
Process: Inclusive Representative Participatory	Kenya Colombia Guatemala Afghanistan (somewhat participatory)	
Process: Not inclusive Representative Participatory		Rwanda (somewhat representative)
Process: Not inclusive Representative Not participatory	Hungary Fiji (somewhat representative) Chile Indonesia (somewhat representative)	East Timor (somewhat representative)
Process: Not inclusive Not representative Not participatory		Nigeria Bahrain

Outcome Negotiated by Elites, Process Inclusive, Representative, Participatory

The processes in Kenya, Colombia, Guatemala and Afghanistan are examples of processes where the outcome was negotiated by elites but the process was inclusive, representative and participatory (or somewhat participatory in the case of Afghanistan).

The constitution building processes in Colombia, Guatemala had an explicit peace-negotiation element. They provide interesting parallels to the Kenyan constitution process as they were also initiated by strong popular pressure and undertaken through consultative processes. In Colombia, the process was also participatory, although in Guatemala it was less so. In both cases, the political elite that felt threatened by the reforms has sought to undermine the resulting constitution.

*Kenya*¹⁸

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

The process

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

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

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

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

¹⁸ This analysis is drawn from the case study prepared by Jill Cottrell and Yash Ghai for International IDEA.

The difficulties continued, however, as the National Assembly that was to then vote on the draft is constituted of many of those that had already rejected the draft. The process was further undermined by various court challenges, including one which resulted in a judgment that the Review Act is unconstitutional. This judgment has not been contested by government, but following strong civil society pressure it has announced that it will ultimately take the draft to a referendum once the National Assembly has adopted it.

Outcome

This process emphasized the nature of a constitution as a compact among the people and with their government. The process aimed to encourage habits of genuine rational debate, to heal divisions and to settle differences by negotiation and discussion. It politicized the people and gave them incentives to study and understand the constitution and the available options. It also had the effect of broadening the reform agenda, especially with respect to social issues.

However, the resulting constitution became a threat to the elite political class, whose zeal for reform disappeared once they replaced Moi in power. The elite political class reacted by undermining the process, and have so far blocked any constitution from being adopted.

*Colombia*¹⁹

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

The process

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

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

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

Outcome

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

¹⁹ This analysis is drawn from the case study prepared by Iván Marulanda for International IDEA.

Despite the progress since the 1991 constitution building process, Colombia remains a weak democracy where most of the decisions, opportunities, and power are limited to an exclusionary elite. Moreover, since its adoption, the constitution has faced ongoing attempts by the traditional elite to undermine it. For instance congress has failed to implement key aspects (eg decentralization provisions).

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

Guatemala²⁰

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

The process

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

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

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

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

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

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

²⁰ This analysis is drawn from the case study prepared by Roddy Brett and Antonio Delgado for International IDEA.

Outcome

A long history of power accumulation and influence is not easily changed in a short period of time. The social conditions benefited the empowered elite groups which fought to protect their privileges. Nonetheless, while the reforms did not change power structures, they did give experience to new political actors. Since then, members of civil society have been agitating for legislation implementing the accords.

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

Afghanistan²¹

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

The process

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

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

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

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

²¹ This analysis is drawn from the case study prepared by Carolyn McCool for International IDEA.

The outcome

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

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

Negotiated between elites, Process Not Inclusive, Representative, Not Participatory

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

*Hungary*²²

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

The process

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

The national roundtable seems to have been representative of most of the political views in society. Despite having been banned between 1949-1989, the opposition political parties appear to have maintained solid public support, and the socialist lobbies had emerged in the 1980s with the softening of the socialist model. For the main part the process was not consultative or participatory. Demonstrations during the negotiations did seem to indicate that the people were ready for change, although 40 per cent of the adult citizens did not know that the roundtable was taking place. The one exception was a referendum on the timing of the President elections. The referendum returned a yes on the issue of whether the President should be elected after Parliamentary elections. This was a tactical move by some of the parties to upset a secret deal being made for a directly elected President, and they were successful as the balance of power was in their favor after the elections for the legislature.

²² This analysis is drawn from the case study prepared by Andrea Mezei for International IDEA.

The outcome

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

Although the process can be considered a 'pacted transition' negotiated between elites, the constitution did not result in halfway measures or special deals protecting the Party (as happened for instance in Poland). This is thought to reflect the power, representativeness and good leadership of the opposition groups. The compromises made by the government were a pragmatic response to rising pressure for change within the Party, among the elites outside of the Party, and within the broader public, and reflected a world where communism was beginning to crumble.

The agreements set out a road map for the transition and the future state. They acted both as the interim structure and the final constitution, and achieved a relatively smooth transition with minimal violence. The constitution has been largely implemented and enforced and it continues to play an important role in the political debate.

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

*Fiji*²³

Fiji's 1993-1997 constitution building process involved an independent constitutional commission which undertook a degree of consultation with the public. However, in substance it was still an elite dominated political negotiation: the constitution was drafted and passed by the legislature though political bargaining. The legislature had been elected under the 1990 constitution, drafted by the military coup leaders who toppled the first Indo-Fijian government, and which sought to entrench the dominance of the indigenous Fijian population in power.²⁴

The process

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

The Reeves commission (one Indo-Fijian, one indigenous Fijian and an international chair) was relatively representative of the main political divisions but not of other interests in society (eg those of women). There was little public participation. Some believed that a public enquiry would revive old hostilities and

²³ This analysis is drawn from the case study prepared by Jill Cottrell and Yash Ghai for International IDEA.

²⁴ According to Article 41(1) of the 1990 Constitution, the 70 members of the legislature were to be allocated 37 indigenous Fijian members and 27 to Indo-Fijian members, which meant that the indigenous Fijian members would always retain control.

politicize the review and that secrecy was essential for concessions and deals. However, the commission did recognize the need for public input and did consult as extensively as it could, but it was limited by the fact that it was only a three member body with few resources.

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

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

The outcome

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

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

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

*Chile*²⁵

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

The process

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

²⁵ This analysis is drawn from the case study prepared by Esteban Montes and Tomás Vial for International IDEA.

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

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

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

The outcome

Since 1989 Chile has had seven elections under the modified constitution and incrementally the constitution has been reformed to dismantle the autocratic protections. Until recently, the constitution still favored the military and contained restriction on democratic elections. Ongoing reforms were sought in the legislature. However, the right successfully vetoed any reform until this year. Since 2005, reform has finally become possible, primarily because the entrenched provisions had begun to favor the leftist government in power.

The incremental elite negotiated process in Chile has ensured a slow regime change, incremental reduction of authoritarian institutions and rules, and a slow consolidation of democracy. It has taken place largely without violence. However, it has taken over sixteen years and the central autocratic elements of the constitution remained until 2005. Moreover, it must be kept in mind that Chile had a long history of peaceful democratic rule, and retained an institutionalized and deeply rooted culture of rule of law, and a largely uncorrupt and professional judiciary, police and public auditor. The military dictatorship presented a major break in this, but even the military regime sought to operate through rules and constitutional legitimation.

The constitutional reform process has not become more inclusive or participatory, even in the following 16 years. The impact of this lack of participation seems to be reflected in the fact that the people do not feel that the constitution represents their views. In 2003 only 12% of the population said that the constitution contained ideas that belonged to all Chileans, 18% considered that represented the majority and 39% thought it represented the military and the political right.

*Indonesia*²⁶

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

²⁶ This analysis is drawn from the case study prepared by Edward Schneier for International IDEA.

The process

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

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

Outcome

Similarly to Chile, the early stages of the process took place in an atmosphere where there was concern over possible military take over. However, this process of reform is taking place in a very different historical and state institution context to that in Chile. Since independence, Indonesia has largely been governed by executive centered, quasi-military regimes operating under emergency powers. There has been little legislative capacity developed in the legislature, or culture of rule of law. Civil society and government institutions are weak. It has so far resulted in limited democracy.

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

Outcome imposed from the top (authoritarian regime or one dominant faction or party), Process Not Inclusive, Representative, Participatory

*Rwanda*²⁷

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

The process

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

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

²⁷ This analysis is drawn from the case study prepared by Priscilla Ankut for International IDEA.

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

The constitution was finally adopted with strong support at a referendum.

Outcome

There is concern that the constitution favors RPF interests and includes too many limitations on freedom of expression and political parties. The constitution was negotiated in an atmosphere of restricted political freedom which has reigned since 1994 when the RPF entered Kigali. The RPF had total control of the political sphere during the 1999-2003 transition period. It curbed the activities of political parties, the media and civil society, in particular through the Forum of Political Parties which has the power to recall members of the legislature. Moreover, the Hutu political parties have been turned into empty shells by the suspicion of any form of Hutu politics following the genocide.

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

Rwanda does not have a democratic history, and there are concerns that the current regime is not truly democratic and has authoritarian tendencies. It is possible that in the longer term the restrictions on democracy in the constitution will result in renewed instability and violence. Nonetheless, the inclusive and participatory process has so far resulted in a high level of public support for the constitution.

Outcome imposed from the top (authoritarian regime or one dominant faction or party), Process Not Inclusive, Representative, Not Participatory

*East Timor*²⁸

In East Timor, the constitutional process was undertaken at the end of violent conflict where one side won (with the assistance of the international community) and Indonesia was ejected. The constitutional process acted as a symbol of independence after 25 years of Indonesian rule. It was undertaken while East Timor was under international administration, but was elite driven and dominated by one winning faction. It was not participatory.

The Process

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

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

²⁸ This analysis is drawn from the case study prepared by Randall Garrison for International IDEA.

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

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

Outcome

The process adopted in East Timor did not encourage the creation of a national consensus over the future of the state, or reconcile differences between the various interests, be it the decommissioned fighters, the excluded youth or the former opponents in the 1975 civil conflict. It was dominated by one faction among those who won. The short time frame, encouraged by the international community, also reinforced this dynamic as it restricted the opportunity for adequate consultation and participation. The constitution is considered to be a Fretilin constitution, and there is ongoing political tension between those excluded and those in power (for instance the 4 December 2002 riots, or the recent crack down on opposition demonstrations in Suai on 6 March 2005). This case suggests that for a constitution to have domestic legitimacy, it requires buy-in by all interests in society rather than simply that of the dominant political party.

Outcome imposed from the top (authoritarian regime or one dominant faction or party), Process Not Inclusive, Not Representative, Not Participatory

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

*Nigeria*²⁹

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

1979 process

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

In December 1976 local elections were held. A Constitutional Assembly was selected the following year (203 members selected by local government councils and 20 appointed by the Supreme Military Council). This produced a relatively representative body which then debated the constitutional draft for 9 months.

²⁹ This analysis is drawn from the case study prepared by John Simpkins for International IDEA.

Very heated and divided positions were adopted in relation to certain issues such as Shari'a law. The work of the constituent Assembly was reviewed and amended by the Supreme Military Council that then enacted the 1979 constitution by decree.³⁰

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

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

The 1999 process

The 1999 constitution was not negotiated or debated, but was simply imposed by the military. The military government appointed a committee of 25 men to draft a new constitution, which was signed into law in May 1999. Even when it did canvass public opinion the government ignored the public's recommendations.

Outcome

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

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

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

*Bahrain*³¹

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

³⁰ Constitution Building and the Struggle for Resource Control in Nigeria, By Otiye Igbuzor igbuzor@cddnig.org, <http://www.dawodu.com/igbuzor1.htm> (Secretary, Citizens Forum for Constitutional Reform).

³¹ This analysis is drawn from the case study prepared by Mohamoud Awil for International IDEA.

The process

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

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

Outcome

It is believed that the Emir initiated the reform process to regain personal power abdicated by his father to his cousin, as well as in response to popular pressure. The drafting of the national action charter and the popular referendum did help heal divisions in society. It diminished violent social tensions and brought political stability and limited political participation to the public. However, the imposition of the constitution without consultation or participation has increased tensions, caused resentment and appears to be leading to a constitutional crisis.

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

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

DISCUSSION

The review of constitutional processes undertaken above explored the main elements of the process adopted (see also Tables 3 and 4 in the appendix for a tabulated description) and how the constitution building played out. Although the process will only be one factor in a complex situation involving domestic and international political forces, historical and institutional restrictions, and questions of strategy, leadership, and timing, it is useful to draw out some tentative conclusions.

It is clear from the case studies that how constitutions are made, particularly following civil conflict or authoritarian rule, has an impact on the resulting state and its transition to democracy. Whether the constitution is imposed or negotiated plays an important role in the outcome, as do questions of the extent to which the process was representative, inclusive and participatory. The following discussion reviews the way outcomes were affected by the constitutional building processes.

i) Building peace

A Representative process

The cases show that a participatory or representative constitution building process can provide a forum for the negotiation of solutions to the divisive or contested issues that led to violence, or for a negotiated transition from an authoritarian regime.

In Chile, Hungary and Indonesia, a negotiated representative constitution building process was successfully used to avoid violence during a regime transition. In contrast, an unrepresentative or imposed constitution can create or aggravate dissent and tensions in the population. In Bahrain, for instance, a clear contrast exists between the first stage of the constitutional reform process which was participatory, and which reduced the level of tension in society, and the later imposition of the constitution without any participation, which led to escalated tension and seems to have engendered a constitutional crisis.

Similarly, in Nigeria, the imposed nature of the 1979 constitution has increased societal tensions, and created strong demands by the people for genuine involvement in the reform process. In East Timor, the domination of one political elite faction, whose representativeness raises concerns, resulted in dissatisfaction with the constitution, and political tension with those that feel that their voice was not heard in the deliberations.

A participatory process

A participatory process can also play a reconciliation and healing role through societal dialogue, and support sustainable peace by forging a consensus vision of the future of the state. In Guatemala and Colombia, the process was used to search for a way to bring to an end longstanding conflicts. In order to do so, a consultative and inclusive process was required that reflected the fact that injustice and exclusion and a demand for more equal access to power and state resources were driving forces in the conflicts. In both of those cases, the draft constitutions that came out of the consultation process addressed some of the key fault lines in society for the first time. These processes also encouraged armed groups to seek reform through political means. The constitutional negotiations were considered to have been successful at the time, although they were later undermined by the political elites' failure to adopt or implement the agreements. In Guatemala the conflict effectively ended in 1996 but a degree of structural violence remains. In Colombia, an armed conflict continues, although the nature of the conflict has evolved substantially, increasingly driven by a growing criminal element benefiting from the state of chaos.

Also where there is a need for reconciliation in society, particularly in states emerging from civil conflict, the constitutional process as national dialogue can play an important role. In Rwanda, a traumatized society, the need for some form of reconciliation was pressing and the extensively participatory process seems to have given all Rwandans a sense of ownership of the constitutional framework for their state.

Failure to adopt or implement

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

ii) Substance of the constitution and quality of the democracy

The quality of the democracy can be affected by the substance of the constitution. Free and fair elections, social justice and political freedoms, and accountability mechanisms are some of the elements that

determine the quality of democracy.³² Provisions that aim to ensure that a minority or particular group retain executive or legislative power undermine a basic requirement of democracy, namely the right to choose the government through free and fair elections. Participation in the selection of leaders and policies through free and fair elections, is a basic element of democracy³³

Representativeness

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

In Hungary, the representative (though not inclusive) constitution building process resulted in a solid democratic constitution. This is thought to result from the representativeness of the bargaining group. Encarnacio has argued that a similar reason why Spain's 'pacted' transition resulted in a consolidated stable democracy.³⁴ In contrast to Latin America, where the pact building was elite driven and secretive with few powerful actors, in Spain the bargaining group included practically the whole ideological spectrum and the agreement instituted policy limitations that were representative of the major interests in society.³⁵

In contrast, in 1957 Colombia constitution building process resulted in a political pact known as the National Front. This pact aimed to resolve the violent conflicts of the 1940s between Liberals and Conservatives by guaranteeing them equal power sharing. The agreement resulted in state power being shared by only two parties and resulted in the exclusion of indigenous people and other political forces. It politicized the judicial branch and resulted in a corrupt administration. It undermined any true democratic competition and put in place a repressive political environment and rendered elections meaningless. Ultimately it exacerbated the divisions and injustices which initiated the later conflict.³⁶

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

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

³² Diamond and Morlino "The Quality of Democracy: An Overview" (2004) 15(4) *Journal of Democracy* 19 .

³³ See footnote 3 above.

³⁴ Encarnacio "Do Political Pacts Freeze Democracy? Spanish and South American Lessons" (2005) 28(1) *West European Politics* 182 at 182.

³⁵ *Ibid* at 187-191: Spain adopted many different forms of pacts: a secret pact between Franco's democratic opposition that set up the democratic transition based on a series of compromises; followed after the elections of 1977 by policy-building pacts such as the Moncloa pact which addressed economic reform, salary regulation, and incorporated extensive redistributive policies.

³⁶ See case author's description of this pact in Colombia case study.

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

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

*Participation and inclusivity*³⁷

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

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

iii) Popular support

In the study, constitutions that were representative or involved a process of consultation and participation were perceived as more legitimate and hence received greater popular support. Representativeness, even without participation, seemed to be a sufficient criterion to ensure at least initial popular support for the constitution. It is important to keep in mind, nonetheless, that popular support for a constitution is only one element in a search for peace and democracy. Popular support is not enough to indicate a democracy supporting constitution. Popular majorities may discriminate against a minority, or undermine human rights. In Bahrain, for instance, the Islamists, who have popular support and are gaining some legislative power, have taken advantage of such power to undermine women's rights.

Representativeness

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

³⁷ Inclusiveness is used in this paper to differentiate between agreements reached between narrow elites (including political elites), and those negotiated between broader more diverse and inclusive bodies.

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

Participation

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

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

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

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

iv) Democratic education and empowerment

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

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

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

v) Divisive effect

The question of whether it is necessary at times to rely on elite compromises and to avoid societal dialogue of a divisive issue is difficult and requires careful assessment of the whole context. The participatory processes did not have a divisive effect in the case studies, although this was used as a justification in some cases for not adopting such a process.

On the one hand, careful planning and management may reduce the chance of polemic issues destroying the process. In Afghanistan, for instance, the participation process was managed in a careful fashion to prevent the warlords or Islamic extremists from dominating.

On the other, such issues can at times create deadlocks. For instance, in Indonesia the incremental reform approach has so far avoided the deadlock that arose in the Jakarta Charter process over the issue of Shari'a law. Nonetheless, avoidance can be risky if the issue surfaces later without balanced discussion. In Fiji, it was feared that a participatory process would lead to increased ethnic divisions. However, the failure to debate the issues in the broader population, and explain why the constitution adopted the moderating provisions it did, weakened the constitution when the political elites turned to divisive ethnic rhetoric. While a participatory process may, as feared, have brought out the radical ethnic viewpoint, the process of education and dialogue may have also resulted in a more moderate consensus in society and immunized it against the later use of radical ethnic rhetoric.

vi) A threat to the established power structure

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

As seen in table 3 below, in three of the four cases which adopted representative and participatory constitution making process (Kenya, Colombia, Guatemala), the constitution was not adopted, or adopted and not implemented, by the dominant power structures because it challenged their power. In Kenya, during the participatory part of the process, the constitution incorporated the concerns of the people and sought reforms which were perceived as a threat to the elite political class (such as provisions that restricted their terms in office or opened them to recall by their constituents, and provisions that diminished Presidential powers). The National Constitutional Assembly was formed partly of those representing civil society and partly of the politicians in question, however, the final say on the draft and on its adoption was in the hands of that political elite and thus the these players sought to delay and undermine its adoption.

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

In contrast, Hungary and Chile which adopted a representative negotiation but not participatory have resulted in stable democracies. Hungary avoided major undemocratic elements in the constitution. In

Chile the balance of power in the negotiation resulted in a constitution that maintained situations of privilege and undemocratic elements in the institutional framework for many years. However, at the time, no other option may have been possible, and a long period of incremental reform has resulted in a stable democracy.

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

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

Prior history, institutions and culture³⁸

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

In Ghai's words:

A key significance of the constitution lies in the possibilities of the democratization of state power that they open up. They provide new institutions for the articulation and resolution of conflicts. They constitute new frameworks for political competition. They promote new symbols of identification and loyalty and lay the basis of national integration.³⁹

Hungary and Chile can be considered the most successful transitions towards democracy, so far they been at peace for over 10 years and are consolidating democracies. Both of these states at least had some rule of law tradition: Chile had a substantial period of democracy prior to the 16 years of Pinochet rule, and Hungary had a strong rule of law tradition derived from the Austro-Hungarian regimes despite the extended period of corrupt autocratic regimes.

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

³⁸ See Table in appendix setting out past constitutional and institutional history.

³⁹ Ghai "The Political Consequences of Constitutions" in Ghai (ed.) *Law Politics & Government in the Pacific Island States* (Institution of pacific studies, Suva Jifi, 1988) at 351.

CONCLUSION

The 12 cases of constitution building processes discussed in this study illustrate some ways in which processes can affect democratic transitions. Although the cases adopt diverse approaches to constitution building and are rooted in different historical, institutional and political contexts, certain trends can be seen across many of the cases.

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

The benefits of *participatory processes* were accompanied by apparent trade-offs, which render them more complex to evaluate. Participatory processes can play a reconciliation and healing role through societal dialogue, and can support sustainable peace by forging a consensus vision of the future of the state. Also participatory processes tended to result in constitutional drafts which provided rights to those groups which had not up to then gained political protection or recognition, and addressed issues of social and economic justice.

The use of more participatory and inclusive processes were shown to broaden the constitutional agenda, and also provided an opportunity for the democratic education of the population, and thus their empowerment. However, at the same time, such constitutions tended to threaten the established power structures, which, reacted by undermining the constitution, amending it, preventing its adoption, or preventing its enforcement. Thus, a key challenge is how to address the opposing requirements of creating incentives for the powerful players to participate in constitutional processes and to commit to implementation, without abdicating a genuine consultative process that fosters political dialogue and empowers the people.

There is no simple answer to this dilemma, which requires careful weighing of the surrounding circumstances and options for implementation of the constitution, including the degree of outside enforcement capability, and the degree of internal popular activism.

APPENDIX

Table 3: Summary of outcomes of the constitution building processes

Case	Constitution negotiation or drafting process	Constitution adoption process	Democratic Content	Popular or elite responses	Role wrt to violence during the transition and afterwards	Democratic outcome <5 yrs 5-10 yrs >10 yrs
Transitions from authoritarian regimes						
Hungary 1989	Representative political elite negotiated grand design process Not inclusive Not participatory	Adopted by the same body Legislative adoption was mere formality	No obvious democracy-undermining provisions	Popular support Elite and population sought to implement	Violence free regime transition	>10 yrs: Consolidating democracy.
Chile 1989-current	Representative political elite negotiated incremental process in 1989 Not inclusive Not participatory Ongoing negotiations by political elites in legislature with entrenched military	Adopted by the same body Since then the reforms have been adopted/rejected by the partially representative legislature.	For 16 years from 1989, it retained institutionalized military representation in the legislature. Since 2005, final reforms have removed all obvious democracy-undermining provisions.	Popular support Military and Right seek to undermine, but reforms largely implemented	Violence free regime transition	>10 yrs: Semi-democratic state with incremental changes towards a more democratic model
Fiji 1995-1997	Somewhat representative elite negotiated grand design process Not inclusive	Adopted by legislature that was biased towards ethnic Fijians under pressure from government and party leaders	Retains reduced but entrenched bias in the legislature towards ethnic Fijians.	Population uncertain of content, increasing discontent Indigenous Fijian elite dissatisfied and undermine	Coup followed by new elections, increasing tension	5 - 10 yrs: Semi-democratic state with ongoing ethnic tension

	Not participatory			implementation.		
Indonesia 1998-current	Relatively representative elite negotiated incremental process Not inclusive Not participatory	Adopted by the legislature which is increasingly representative	Incremental amendments to 1945 constitution and electoral law resulting in constitution with no obvious democracy-undermining provisions	Popular support Elite apparently seek to implement	Violence free regime transition	5 – 10 yrs: Semi-democratic state with incremental changes towards a more democratic model
Nigeria 1999	Constitution imposed by military Not representative Not inclusive Not participatory	Adopted by military decree	Weak checks and balances as Government has control over the judiciary and police.	Population dissatisfied Elite seeking to keep reform process within control of political elite	Violence free regime transition but ongoing discontent and instability	< 5 yrs Semi-democratic state with ongoing dissatisfaction and instability
Bahrain 1999-2002	Constitution imposed by Emir Not representative Not inclusive Not participatory except wrt Charter	Charter adopted by referendum. Constitution adopted by executive decree.	The elected legislature is diluted by the second chamber appointed by the King (with same power). The king also has final word in any legislative dispute.	Population and opposition dissatisfied. Opposition boycotting elections Government and king seeking to slow and control reform process	Violence free transition from Emirate to Monarchy. Reduced popular tension during charter consultation but increased since imposed constitution	<5yrs Semi-democratic constitutional monarchy with ongoing dissatisfaction and instability
Kenya 2000-2004	Representative elite negotiated grand design process Inclusive participatory	Adoption required political elites to support in the legislature Not inclusive Political elites not representative	No obvious democracy-undermining provisions	Not adopted. Process derailed by dominant power structure Population dissatisfied Government seeking to control process and outcome	Violence free regime transition	< 5ys Incomplete process, Semi democratic state, ongoing dissatisfaction
Transitions from civil conflict						
Colombia	Inclusive and representative	Adoption by same	No obvious democracy-	Adopted but not	Reduced violence during the process but	> 10 yrs

1991	negotiated grand design process Participatory	body	undermining provisions	implemented. Implementation derailed by dominant power structure Ongoing conflict	return to civil conflict since then	Civil conflict and semi-democratic state
Guatemala 1997-1998	Inclusive and representative negotiated grand design process Participatory	Adoption by referendum following amendment by unrepresentative political elites in the legislature Successful campaign against adoption by elite political and military forces	No obvious democracy-undermining provisions	Not adopted. Process derailed by dominant power structure. Loss of faith in politicians and peace agreements especially by population involved in the conflict and civil society	Reduced violence during the process but structural violence remains	5-10 yrs Civil conflict and semi-democratic state
East Timor 2000-2002	Relatively representative elite negotiated grand design process. Not inclusive Not participatory	Adoption by the same body Concerns over the representativeness of the elected body	No obvious democracy-undermining provisions	Dominant executive, some signs that human rights and checks and balances will not be applied Opposition dissatisfied, youth dissatisfied	Launch of new state with minimal violence. Tensions remain in society	< 5yrs Weak democracy
Afghanistan 2001-2004	Representative and inclusive grand design process Somewhat participatory	Adoption by the same body	Some concerns over women's rights and the role of Islamic law, otherwise no obvious democracy-undermining provisions	So far relative popular and elite support	Launch of new state with low violence. Ongoing conflict with Taleban	< 5yrs Weak democracy
Rwanda 2002-2004	Somewhat representative elite negotiated grand design process Not inclusive	Adoption by same body	Limitations on freedom of expression and control of members of the legislature through Forum of Political	Popular support	Launch of new state with minimal violence 10 yrs after genocide.	< 5yrs Semi- democratic state

	participatory		Parties which has the power to recall members of the legislature.			
--	---------------	--	---	--	--	--

Key: Processes are categorized as not inclusive where the key shaping of the document involved only political elites and did not make careful provision for minority voices or other interests to be represented. Processes are characterized as unrepresentative where the political elites do not have strong links to the population or are elected by unconstitutional or biased processes. Weak democracies are those states which have largely democratic institutions but have only recently adopted them and thus remain unconsolidated. Semi-democracies have undemocratic institutions or constitutions or were weak democracies which show no signs of consolidating over time. The democratic content of the constitution reflects the position that manipulation of electoral systems to ensure an ethnic minority or other group remain in power undermines basic requirements of democracy, namely the right to chose those that will rule you through free and fair elections. This also applies to other ways of controlling the executive or legislature (appointment of members or quota by military or authoritarian body).

Table 3: Summary of key features of processes in case studies

Case	Pressure for Change	Interim constitution (where relevant)	Constitution design process	Approval process	Role of constitution building
Transitions from autocratic regimes					
Hungary 1989 - current	Initiated by intellectual revolutions tapping into popular discontent	The constitution acted both as the interim structure and the final constitution.	The National Round table was a negotiation forum between the state-party, the opposition roundtable and the ‘Third Negotiator’ formed of seven leftist groups. The broader part of society did not participate, other than in a few demonstrations. It was an elite negotiation, representative, but not participatory	The act was passed by the legislature without amendment. It was a formality.	Negotiated regime transition between elites Compromise by government in power to deflect rising tensions Blueprint for future regulation of power and/or transfer of power
Chile	Initiated by popular		Initial negotiations between the democratic opposition, the government, and political parties	Plebiscite	A form of co-opting to reduce

1989-current	<p>discontent and electoral results pressure, influence of courts.</p> <p>Recent amendments driven by the interests of the institutional actors, mainly the political parties present in Congress</p>		<p>that represented the military government. Resulted in compromise solution which still favored military and right.</p> <p>Further incremental reforms achieved through the legislature.</p> <p>It was an elite negotiation, representative but not participatory</p>		<p>anticipated tensions in population</p> <p>Negotiated regime transition between elites.</p> <p>Compromise by government in power to deflect rising tensions</p>
Fiji 1995-1997	Initiated by elite and constitutional review provision	1993 government appointed cabinet committee to examine modalities of reform. To enhance credibility included leaders of opposition parties. Agreement took 2 years on terms of reference on a commission to consult with population and draft constitution.	<p>Appointed Constitutional Commission relatively representative of main division but not of other interests (eg women).</p> <p>Did undertake some consultations through public hearings but undertook little public education and public debate.</p> <p>A draft was negotiated by the joint parliamentary select committee. A compromise was negotiated.</p>	Passed by the legislature as an amendment to the constitution.	<p>Blueprint for future regulation of power and/or transfer of power</p> <p>Compromise by government in power to deflect uprising tensions</p>
Indonesia 1998-current	Initiated by dictator's retirement in response to popular pressure		<p>Incremental series of amendments by new elected legislature.</p> <p>Not participatory</p>	Legislature	<p>Compromise by government in power to deflect rising tensions</p> <p>Blueprint for future regulation of power and/or</p>

					transfer of power
Nigeria 1999 -	Initiated by military perhaps in response to international and domestic pressure to transition to civilian government		<p>The 1999 constitution was drafted by 25 men appointed by the military government.</p> <p>It was not representative and did not adopt a participatory process.</p> <p>Dissatisfaction with the process and outcome continues and civil society is seeking a 'Sovereign national conference' although the government proposes to use the procedures in the 1999 constitution.</p> <p>The presidential review committee selected in October 1999 includes the three main political parties and was chosen by the president. It has not produced a draft although claims to have collected 2 million written memoranda and 11/2 million oral submissions, in one month consultations.</p>	Adopted by the military government.	<p>Symbol of new beginning</p> <p>Blueprint for future regulation of power and/or transfer of power</p>
Bahrain 1999-2002	Initiated by emir in response to loss of power and popular discontent	<p>The Emir appointed a national charter committee comprising the government and Islamist opposition and independent intellectuals. The opposition resigned during the process however.</p> <p>The Emir then ordered a public education campaign and process of</p>	In 2002 the principles in the charter were developed into a constitution which was redrafted by the executive branch of the government without consultation or inclusion of the opposition or public. The government claimed that the referendum on the charter gave them the authority to do so.	Adopted by the executive	<p>Attempt by Emir to reestablish his power and transition to constitutional monarchy</p> <p>Blueprint for future regulation of power and/or transfer of power</p> <p>A form of co-opting to reduce anticipated tensions in population</p>

		consultation (primarily attended by the opposition). He acted on some requests and the Charter was adopted by referendum.			
Kenya 2000-2004	public pressure	A negotiated agreement between President Moi and the opposition provided for wide ranging review after the 1997 general elections. This agreement was enacted in the Constitution of Kenya Review Act (1997).	<p>Review Committee nominated by government after breakdown of talks with opposition.</p> <p>The civic groups appointed their own people's Commission of Kenya to collect view of the public.</p> <p>Chair of the committee insisted on a more representative committee and changed to include 10 members from the People's Commission and 2.</p> <p>Extensive process of education and consultation in constituencies. The draft was then subject to public discussion. Over 37 000 submission were received</p> <p>Representative national constitutional conference was to vote on the draft. But hampered by self-serving politicians using the ethnic card to cause divisions.</p> <p>Not representative but guided by a chair determined to be participatory.</p>	<p>To be adopted by the legislature and following court case to be submitted to referendum.</p> <p>The National Assembly dominated by self-serving politicians.</p>	<p>Compromise by government in power to deflect uprising or tensions</p> <p>Symbol of new beginning</p> <p>Symbol of new form of political governance</p> <p>Blueprint for future regulation of power and/or transfer of power</p>
Transitions from civil conflict					
Colombia 1991	Initiated by popular pressure for peace - via referendum	The 1991 process was initiated by the students and young citizens who marched in the	Constitutional assembly elected on a national wide basis. Representative body including civil society and guerrilla members who had agreed to give up violence. Members of congress could	Adopted by the Constitutional Assembly	<p>Conflict negotiation</p> <p>Creation of consensus on the</p>

		streets and came up with a ballot which would ask for the convoking of a constitutional assembly.	not run. Active insurgents were excluded. Participatory process with citizen's working sessions were organized around the country, their conclusions were submitted to the constitutional assembly.		way forward Symbol of new form of political governance
Guatemala 1997-1998	Initiated by popular pressure for peace accords	Grand National Dialogue in 1989 initiated process of discussion of issues with civil society, led to negotiations between National Reconciliation Council and insurgency umbrella group, followed by meetings with sectoral groups of civil society. Official peace negotiations between 1991-1996 led to 6 substantive and 5 operational accords.	Appointed representatives fairly representative Appointed commissions but representative as formed by persons with special expertise and partly drawn from civil society and partly from government. Prepared a package of 13 reforms sent to congress. Congress then added 37 new provisions that aimed to give political elite partisan advantage.	Needed to be approved by 2/3 majority of congress, then by electorate in referendum. Rejected at referendum following a successful no campaign by conservatives and military.	Conflict negotiation Creation of consensus on the way forward Symbol of new form of political governance
East Timor 2000-2002	Initiated by international community supported end of Indonesian occupation	The process was negotiated between the National Council (dominated by Fretilin) and the	Elected Constitutional Assembly to draft and adopt the constitution. Although elected by mixed PR, dominated by one party. Not participatory. A 10 day period was mainly about providing information about the draft	Adopted by the legislature 2/3 vote. Opposed by the UDT, PD (youth resistance movement) and PSD – which	Birth of a nation, symbol of new beginning Blueprint for future regulation of power and/or

		UN.	rather than hearing input.	declared that this was a Fretilin constitution.	transfer of power
Afghanistan 2001-2004	Initiated by war on terror and internationally assisted overthrow of Taleban	Bonn agreement Elite negotiation between warlords, excluding the Taleban. Not participatory	Appointed Expert Constitutional Drafting Commission and Constitutional Review Commission. Some public education and consultation. Amendment through negotiation in Constitutional Loya Jirga This was an elite representative negotiated process. It included a small participatory element.	Adopted by 2/3 vote of Constitutional Loya Jirga	Conflict negotiation Birth of a nation, symbol of new beginning Creation of consensus on the way forward Blueprint for future regulation of power and/or transfer of power
Rwanda 2002-2004	Initiated and dominated by ruling Tutsi party, winner of war		Legal and Judicial and Constitutional Commission appointed. Not representative only allies of RPF. Undertook a very participatory process including extensive education and popular consultation in provinces. 6 mths with thousands of trained assistants. Also included a questionnaire. Followed by debate in the legislature and amendment of draft.	Adopted first by the interim legislature (appointed), and then passed by referendum after and 6mths education campaign.	Creation of consensus on the way forward Symbol of new beginning Reconciliation and healing process

Table 5: Constitutional, Regime and Institutional history

Case	Constitutional history	Political history	Institutional background
Transitions from authoritarian rule			
<p>Hungary 1989 - current</p>	<p>First written constitution 1949 based on the constitution of the Soviet Union.</p> <p>The 1989 constitution was formally an amendment but in effect it created an entirely new constitution.</p> <p>The constitution was amended nine times between 1989-1990 but Act XXXI of 1989 effectively created a new constitution.</p> <p>The new constitution has been in place 15 years. It was negotiated after 40 years of communist rule.</p>	<p>Hungary was under a socialist regime between 1949 and 1989. The system was based on one party and the legislature did not act as a legislative body nor supervise the executive.</p> <p>In 1989 a national roundtable was formed between the opposition and the government (and third negotiator) to negotiate a new constitution.</p> <p>The 1989 constitution created a number of new institutions such as the Constitutional Court and State Audit Office.</p>	<p>Despite an extended period of corrupt autocratic regimes, the Austro-Hungarian regime did have a strong rule of law culture.</p> <p>Under communist regime was relatively high level of education and institutional capacity.</p> <p>Political parties had been banned between 1949 – 1989 but there had been political activity among the intellectuals dating from as far back as 1959, and during the 1980s the socialist model had softened to some extent and a number of socialist lobbies had formed.</p> <p>The political opposition was formed of a coalition of many different pro-democracy groups which came together in an alliance in 1989. Also within the Party two groups evolved, one pro-reform and one opposing it.</p>
<p>Chile 1989-current</p>	<p>1925 constitution: liberal and democratic document</p> <p>1973 coup overthrowing the Allende government led to derogation of 1925 constitution. Military junta appointed constitutional commission prepared a new draft constitution between 1973-</p>	<p>Chile had a strong history of constitutional democracy prior to 1973. Under the 1925 constitution, there were 8 democratically elected presidents and 11 congressional elections.</p> <p>The coup of 1973 led to a period of seven years of emergency state, with</p>	<p>Chile has a long history of rule of law, and even a legalistic culture. The military dictatorship constituted a major break in this, but even the military regime sought to operate through rules and constitutional legitimation.</p>

	<p>1978. This was reviewed by General Pinochet's appointed State Council between 1978-1980. The Junta then approved the 1980 constitution. It was adopted by plebiscite one month after its announcement under a repressive political environment.</p> <p>The constitution aimed to institutionalize authoritarian anti communist and neo-liberal ideology. It contained minimal democratic and institutional safeguards that were later used to initiate the transition to democracy.</p> <p>The 1989 reform have been followed by further 17 reforms. The 2004 attempt is most likely to dismantle the autocratic enclaves.</p> <p>The process is ongoing but began 16 years ago. The constitutional negotiation began 16 years after the coup, which provided substantial time for positions to soften and modify and reaching of possible compromise.</p>	<p>restricted political liberties, banned political parties and harsh violent repression carried out by secret police.</p> <p>It was accompanied by deep economic and constitutional transformation. Fiscal reform, privatization, labour market, education and health system reform and privatization of the pension system.</p> <p>This was followed by a 1981-1990 period of transitional military rule. During that period however the government was under intense economic, social and political pressure as the opposition coordinated popular resistance. It reacted with a mixture of repression and political maneuvering.</p> <p>Leading up to the presidential plebiscite in 1988 the opposition chose to fight within the 1980 constitutional framework to campaign against Pinochet's election.</p> <p>Between 1990 – 2005 the right successfully vetoed any major changes in the constitution. However, it is now open to constitutional reform due to a changed political dynamic whereby the entrenchment provisions are now beginning to favor the leftist government in power.</p>	<p>The judiciary, police and public auditor were professional and uncorrupt.</p> <p>There existed a strong institutionalized and deeply rooted party system prior to military dictatorship which was able to re-form despite oppression. Except the communist party which was largely destroyed by assassination.</p>
<p>Fiji 1995-1997</p>	<p>On independence in 1970 acquired a post-colonial constitution which adopted a racially structured legislature favoring the indigenous Fijians but also incorporating some cross voting seats.</p> <p>Following the coups in 1987, the</p>	<p>Following colonial rule by the UK during which the racial composition of the island was modified through the import of an Indian work force, an indigenous Fijian government held power for 17 years under the 1970 constitution which had an elected</p>	<p>The rule of law culture is variable. The courts have rejected the post 1997 coup declaring it illegal. This decision was enforced, which suggests a relatively strong rule of law culture.</p> <p>There is respect for the higher courts</p>

	<p>military imposed government undertook a process of constitutional review by appointed committee of politicians. The result (the 1990 constitution) was even more racially based and entrenched indigenous Fijians dominance.</p> <p>In 1993-1995 a negotiation about the constitutional reform commission and terms of reference took place in a committee formed of representatives of the government and 2 opposition leaders.</p> <p>A constitutional reform process then took place between 1993-1996 initially by a 3 member reeves committee and then debated in the legislature.</p> <p>The 1997 constitution resulted from negotiations which created a consensus compromise document, mainly negotiated at the top of the political structure (especially by the PM and the former PM who had been overthrown in the coups). It was passed by a unanimous legislature.</p>	<p>though racially constructed lower house and a an appointed indigenous dominated senate. Under this model the army and most senior government posts were dominated by the indigenous Fijians.</p> <p>In 1987 the first indo-Fijian coalition government was overthrown by military coups. By 1990 it had handed over to an appointed civilian government.</p> <p>In 1992 despite these disadvantages the opposition participated in elections under the 1990 constitution and won sufficient seats to demand a constitutional review.</p> <p>The society was highly racially segregated.</p> <p>The first elections under the 1997 constitution led to the victory of Chaudhry's labour party and an indo-Fijian government. This was overturned by coup again, this time the courts declared the coup unconstitutional and ordered a new election. The new election brought to power a Fijian government. The electoral system that was supposed to encourage moderation instead worked against the parties that tried to work together in the spirit of cooperation. The election in 2001 brought to power a strongly Fijian party.</p>	<p>generally, but some unease about the attitude of the government to judicial independence.</p>
<p>Indonesia 1998-current</p>	<p>1945 post colonial constitution</p> <p>1949 roundtable agreement with the Netherlands produces a draft</p>	<p>In the post-colonial period Indonesia's governance has been characterized by executive centered, quasi military regimes operating under emergency</p>	<p>Weak and corrupt beaurocracy inherited from colonial times.</p> <p>Civil society was destroyed under</p>

	<p>constitution that is repudiated by the upper house in 1950 which substitutes a temporary constitution and calling for the creation of a constituent assembly to enact a permanent constitution.</p> <p>1955 elected constitutional convention unable to reach consensus</p> <p>1959 dissolved by Sukarno who reinstates the 1945 constitution</p> <p>Since 1998 a series of constitutional amendments, statutes and evolving procedures are providing an incremental form of reform.</p>	<p>powers.</p> <p>1957-58 regional rebellions and mutinies and strength of Communist party invoked by Sukarno to invoke martial law and introduce the concept of guided democracy. The legislature was partly elected and partly formed of 'functional groups' including the military, teachers, lawyers.</p> <p>1965 violent rebellion precipitates crackdown on the left and banning of Marxist parties</p> <p>1966 Sukarno gives General Suharto emergency powers to restore order.</p> <p>1967 an emergency appointed upper house strips Sukarno of power and appoints Suharto</p> <p>1976 all political parties other than the 3 government ones are banned.</p> <p>1998 Suharto resigns and is replaced by Vice President Habibie who agrees to call new multi-party elections in 1999</p> <p>Suharto was toppled in 1998 by the <i>reformasi</i> - a loose coalition of groups.</p>	<p>Suharto including the traditional governance networks. The 2 moderate Muslim social networks alternated between silence and activism during the Suharto years. They have yet to play a significant role in the <i>reformasi</i>.</p> <p>Women's groups formed in the 1980s have been a key group in the <i>reformasi</i> coalition.</p> <p>There remains a weak rule of law tradition. Despite an overhaul of the court system justice is unpredictable and lawyers, police and prosecutors inspire little confidence. Police corruption is widespread.</p>
<p>Nigeria 1999</p>	<p>Independence constitution in 1960.</p> <p>The military regimes have been the primary instigators of constitution building. The efforts have been top-down affairs.</p> <p>1979 constitution was the result of the 1975 military regime transition to civilian government and was drafted through a participatory process and</p>	<p>Granted independence in 1960. In 1966 first military coup d'etat. In 1967 Biafran war of independence. Followed by many coups and counter coups.</p> <p>Nigeria has spent longer under military rule than civilian rule. It has also undergone many transitions to civilian rule, frequently through a new constitution.</p>	<p>Civil society has become more established in recent years and has received international funding. It is vocally contesting the 1999 constitution and is leading the attempts at reform.</p> <p>The parties are all very closely aligned with the military, and formed of many retired military officers.</p> <p>The institutions have very little history</p>

	<p>voted on by elected representatives, although the final content was set by the military.</p> <p>The 1999 constitution was imposed by military government without debate or consultation. It has been rejected by the majority of the people.</p>	<p>As the civilian elite and military officers are often one and the same the civilian governments have had close connection to the military. The current civilian head of state, Olesegun Obasanjo, headed the military regime between 1976-1979.</p>	<p>of democratic rule and are corrupt and ineffective. The Electoral Commission was involved in the controversial decision in 1975 supported by the courts. Subsequently the courts have been involved in a negative fashion. The high court sought to prevent the elections for president in 1993, declaring the appointed transitional government illegal and setting the stage for the military to retake power. They have also been involved of building convictions in politically motivated trials.</p>
<p>Bahrain 1999-2002</p>	<p>In 1972 The Emir established a constituent assembly and mandated it to draft the first constitution. Only men were entitled to vote or run for election. The constituent assembly endorsed a new constitution and submitted it to the Emir who ratified and promulgated it.</p> <p>The constitution of 1973 only provided for voting by men, banned political parties and formed a legislature of 30 elected representatives and 14 ex officio cabinet members. It was not able to initiate or enact legislation but only to give advise and consent to laws proposed by the Council of ministers. In 1975 after a struggle over legislation that would allow detention of political suspects for 3 years without charge or trial led to the Emir dissolving the legislature and refusing to reinstate it. It was finally reinstated in 2002.</p>	<p>Bahrain has a history of autocratic and rigid regimes.</p> <p>In 2001 the political elites set in train a process of political reform voluntarily though in response to popular pressure.</p> <p>Bahrain became independent in 1971 having been a British protectorate. The Al Khalifa family took control of the country although the departing British insisted that the ruler had to grant limited participation in the political affairs to the public.</p> <p>It had a very short lived and limited experience with an elected legislature, but has been primarily under authoritarian rule. The rights provisions of the constitution were suspended and the emir ruled by decree in a repressive fashion. This alienated the Shiite community and led to widespread unrest and hostility towards the government. In 1994 clashes led to many dead and exiled. The state was</p>	<p>During the 1972-1975 time frame there were no political parties with a strong social base. Political parties are still outlawed.</p> <p>The institutional and organizational capacities of the members of the legislature are very low as they have not had any for many years</p>

		both authoritarian and repressive.	
Kenya 2000-2004	Independence constitution 1963 negotiated to promote democracy and human rights, devolution of power and checks and balances but was amended rapidly to dismantle freedoms.	Since soon after independence, Kenya has been a dictatorship with one party rule and a highly centralized presidential system.	Weak rule of law. The tenure of judges was subject to the whim of the president. Very corrupt – to the point that the judges actually went to court to seek an injunction to stop the constitutional convention from dealing with the judiciary. Police were oppressors Institutions became means to support the president or rendered toothless (eg the Auditor General)
Transitions from civil conflict			
Colombia 1991	Colombia has a history of constitutional assemblies which have marked a foundational event, sometimes to overcome conflicts and sometimes to consolidate advantages and privileges by those who are in power. Since 1810 when Colombia declared independence there have been 11 constitutions. The constitutional assemblies of the nineteenth century were chosen by political dominant groups of the major cities exclusively representing the interests of the powerful. The 1991 process came out of a conflict that was not won. The 1991 candidates	Ever since the conquest Colombia has been characterized by the politics of imposition and exclusion and has a long history of political struggle and civil war. During the C19 th and first half of C20 th the wars were promoted by political elites seeking to cement their power and accumulate privileges. The latter half of the C20 th the wars were initiated by the marginalized social sectors rebelling against injustice, discrimination and arbitrariness. Government has been dominated by the white elites and there is deep seated racism. Until 1954 women were not	The judicial branch was politicized through the National Front pact. There is only weak rule of law and even though it has more independence since the 1991 charter it continues to be besieged by the administration and legislature. The administration also became corrupt during that time. The political environment repressed political dissent and ultimately led to the creation of the FARC and ELN during the 1960s and 1970s. The Supreme court acted in line with the establishment to stop constitutional reform in a number of instances but did not oppose the setting aside of popular

	<p>were elected from not only political parties but also citizens' constituencies. It was the first time that Indians were represented by their own.</p>	<p>able to vote, and until 1936 only those men who could read and write could vote.</p> <p>Long history of electoral fraud. The Guerrilla group M-19 was formed after the presidency was stolen from Gustavo Rojas Pinilla in 1970.</p> <p>The civil conflict since 1948 originated in injustice and social and political exclusion but became fuelled by money from illegal business and adopted terrorist tactics.</p> <p>In 1952 the army staged a coup which was overthrown four years later in ongoing violence. The pact known as the National Front (1957) determined that state power would be shared by only 2 political parties. In 1968 the National Front was dismantled without facing the problems it had created.</p>	<p>consultation enacted in the 1957 plebiscite when faced with the widespread popular demand for it.</p>
<p>Guatemala 1997-1998</p>	<p>1984 the military called a National Assembly to pass a new constitution. The elections were undertaken in a repressive climate with restricted debate and excluded the left. The constitution did create an ombudsman and constitutional court but protected the military from prosecution and protection of prerogatives and failure to reform judiciary and recognize indigenous culture and rights.</p> <p>In 1993 constitutional amendments were passed by referendum with little participation in the vote.</p>	<p>A Spanish heritage elite has dominated the state and denied the diversity and oppressed the indigenous majority (60 percent Mayan People and the other 2 main peoples).</p> <p>Authoritarian and military dictatorships until 1984.</p> <p>Civil conflict began in the 1960s initiated by a failed coup but joined by communist and later Mayan activists. The government responded with a scorched earth policy and villages were decimated. Political opposition and activists were assassinated or exiled.</p> <p>In 1984 the military handed over to civilian rule in presidential and general</p>	<p>Institutional weaknesses after 30 years of civil conflict.</p> <p>Leftist activists had been successfully eradicated and hence in 1980a political parties were all anti-left and military led and based on clientelism.</p> <p>By 1993 institutional breakdown and corruption were so bad that president dissolved congress, suspended the rights provisions of the constitution, and dissolved the supreme and constitutional court. The Constitutional Court declared his actions unconstitutional and called for a new president to be elected by congress. Thus the constitutional court and</p>

		elections won by the most progressive centre right Christian democratic party.	ombudsman have now a good reputation. The rest of the judicial sector is weak however and there is wide impunity for human rights.
East Timor 2000-2002	None.	ET had been under two periods of colonial rule. First Portugal and then Indonesia. In 1975 when Portugal left, Fretilin declared ET independence following a short civil war. Indonesia then invaded and 25 years of vicious struggle resulted between the Indonesia army and the ET Resistance. Following the pro-independence vote in 1999 the Indonesian army went on a rampage killing many political and religious leaders and burning villages to the ground.	Under the Indonesian occupation all of the senior administrative posts and professional positions had been held by Indonesians. These all left and there was close to no professional expertise left (eg. one doctor in Dili and no judges). There is a very weak rule of law tradition under Indonesia's occupation, reliant on bribes. This has been followed by inexperienced and overwhelmed East Timorese. There was an administrative and legal vacuum but not a political vacuum as the CNRT had existed since 1998 as a broad popular front representing all political factions. Several political groups had a long history of organizing in ET since the 1974 - before and under Indonesian rule. Fretilin and Falintil had deep recognition as part of resistance movement. The Church was an active member of civil society.
Afghanistan 2001-2004	Constitutional history: Afghanistan has had 6 constitutions since the 1920s prior to the 2004 constitution. The constitutional model adopted was that of a constitutional monarchy with an elected legislature. However, Afghanistan does not have a strong history of constitutionalism. The	Long standing conflict. No history of modern government. Afghanistan has been ruled by monarch, then by warlords of various types, including the Taliban.	There is little to no tradition of rule of law in Afghanistan, both because of the extended period of conflict and associated crime and violence and because Afghanistan has never had a modern legal system. There are no true political parties and a

	<p>constitutions did not reflect the real power structure: the royal family held all the power and the institutions created under the constitution were illusory. Power was based on a patronage system.</p> <p>The Bonn convention initiated the constitutional reform process in December 2001.</p>		<p>very weak civil society.</p> <p>There was at the time of the constitutional building process no formal institutional government and little institutional capacity.</p>
<p>Rwanda 2002-2004</p>	<p>Although Rwanda has had a number of constitutions it does not have a history of constitutionalism with Presidents changing the constitution as they saw fit and centralizing all power in their hands.</p> <p>The 1962 constitution was an independence constitution drafted by the colonial power. It envisaged a pluralist system but a one party system was quick to emerge.</p> <p>The constitution was suspended during 5 years after the 1973 coup. It retained the human rights provisions but cut the provision for judicial review and abolished the multi-party system.</p> <p>In 1990 the pressure by internal and external opposition forced President Habyarimana to adopt a constitution recognizing multi-party system. The 1991 constitution was amended by the Arusha peace accords and the Protocols on Rule of Law.</p> <p>The 2004 constitution was made through a participatory process between 2003-2004.</p>	<p>Post independence Rwanda has been characterized by discrimination and division. During the pre-colonial era and until 1962 the political leadership was dominated by the Tutsi monarch. The First republic (1962-1973) was predominantly a Hutu state and treated Tutsi as outsiders. The second republic (1973-1994) came about through a coup which brought to power a second Hutu. This regime abolished the Tutsi monarchy and established a one party state, although the Tutsi were recognized as a Rwandan ethnic group.</p> <p>In 1991 the Rwandese Patriotic Front based in Uganda allied themselves with the opposition and forced the government to enter into a peace agreement providing for power-sharing. The genocide started soon after when the President's plane was shot down.</p> <p>In 1994 the RPF overthrew the genocidaires. A peace accord (Arusha) was entered into that provided power-sharing government between 3 parties. It banned any individuals involved in the genocide and the Mouvement</p>	<p>The judicial sector has been weak and unable to uphold the rule of law or to protect the rights of citizens.</p> <p>The Hutu political parties were turned into empty shells by the suspicion of any form of Hutu politics following the genocide.</p> <p>The RPF has dominated in an extreme fashion.</p>

		<p>Revolutionare National pour le Developpement from participating in government.</p> <p>In the transitional legislature the 8 political parties that had not participated in the genocide each received 13 seats and 6 seats were allocated to the army.</p> <p>The RPF had total control of the political sphere during the 1999-2003 transition period. It curbed the activities of political parties, the media and civil society. It sought to restructure the political culture through popular education and development of a more consensual form of political participation.</p> <p>In addition it created the Forum of Political Parties to enhance political consensus which a power to recall members of the legislature. It was seen by some as an instrument of RPF domination. Government and RPF were dismissive of opposition views labeling them 'divisionist' which equates with genocidal sympathies.</p>	
--	--	---	--