

Framing the State in Times of Transition

Case Studies in Constitution Making

Laurel E. Miller, editor



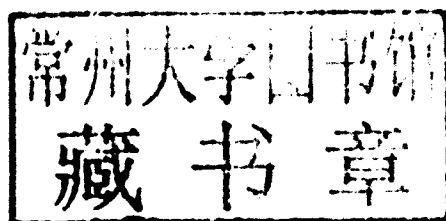
Peacebuilding and the Rule of Law

Framing the State in Times of Transition

Case Studies in Constitution Making

Laurel E. Miller, *editor*

with Louis Aucoin



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The editor also wishes to thank the members of the working group, and particularly the group's chairman, Bereket Habte Selassie, for their valuable work in advising on

the study's methods and structure, the selection of case studies, and the initial guidance provided to contributing authors. The working group included Andrew Arato, Louis Aucoin, Jamal Benomar, Andrea Bonime-Blanc, Gérard Conac, Francis Deng, Clarence Dias, Jon Elster, Owen Fiss, Vivien Hart, Jerry Hyman, Neil Kritz, Victor LeVine, Makau Mutua, Melanie Beth Oliviero, Herman Schwartz, Ann Seidman, Robert Seidman, Bereket Habte Selassie, Timothy Sisk, Mark Tushnet, Jennifer Widner, and William Zartman.

Finally, the editor appreciates the work of the late Vivien Hart and J Alexander Thier in reviewing portions of this volume, as well as Brian Slattery's excellent copyediting and other editorial help.

While this study was a collaborative one in many ways, the views expressed in the chapters of this book are the individual authors' own.

Foreword

Richard H. Solomon

President of the United States Institute of Peace

Constitutionalism has long been regarded as an essential foundation of the rule of law. In many countries seeking to reconstruct—or construct for the first time—a democratic system of governance based on the rule of law, one of the first steps undertaken is the adoption of a new constitution. This document may articulate a shared vision of the state and society, define the fundamental principles guiding governance of the state, and seek to distribute power equitably on some territorial or social basis. In meeting such objectives, the newly crafted constitution can contribute to building peace and achieving national reconciliation.

The experiences of societies emerging from periods of conflict, authoritarianism, or political upheaval have repeatedly demonstrated the importance of building the rule of law in order to consolidate peace and establish democracy. Countries transitioning from war and despotism cannot maintain peace over time unless the population and former antagonists are confident that their grievances will be addressed through legitimate structures and justice administered fairly. The extent to which a society succeeds in consolidating peace, democracy, and the rule of law depends on myriad factors, including the quality of a constitutional text and the respect accorded to the constitution.

Framing the State in Times of Transition tests the notion that an additional factor

must be given weight: the manner in which a constitution is constructed and ratified. By examining nineteen cases of constitution-making processes and analyzing international norms that apply to constitution making, this volume demonstrates that well-conducted processes can, indeed, contribute to building stable, peaceful states, whereas poorly conducted processes most certainly undercut such efforts. This volume, which arose from a collaborative project of the United States Institute of Peace and the United Nations Development Program, offers a wealth of information about how countries have faced the challenges of constitution making in vulnerable and unsettled times, suggests ideas about ways to approach the political and technical aspects of constitution making, and gives practical considerations that will be of interest to those responsible for designing future constitution-making processes.

This comparative study also confirms a lesson that has become apparent to those concerned with state building and promotion of the rule of law: There are no one-size-fits-all formulas or models. Rather, each nation must find its own way, and those advising and supporting constitution makers must respect the particular context and the paramount role of national decision makers. In addition, the volume reveals once again that political will—the desire of those who hold power to create democratic societies in earnest and to put public before personal or

parochial interests—is an essential ingredient for success.

Framing the State in Times of Transition illuminates the complexity of the process of constitution making. We hope that future

constitution makers will draw both knowledge and inspiration from this volume as they seek to secure peace, justice, and democracy for their peoples.

Introduction

Louis Aucoin

At any constitutional moment in a country's history, political actors must make pivotal decisions that affect the country's future, defining the allocation of state power and enshrining in the constitution fundamental principles intended to guide society and the state. When constitution making is undertaken in the aftermath of violent conflict or in the context of a dramatic political transition or institutional crisis, the stability of a society and its prospects for future peaceful resolution of political and social conflict depend at least in part on these decisions. A constitutional text that articulates a new, broadly shared vision of society and organizes the system of governance in a way that respects and protects the interests of diverse groups can play a crucial role in consolidating peace and strengthening democracy. This is particularly true in societies riven by ethnic, religious, or other divisions. This volume explores the ways in which the *process* of arriving at a new constitution under conditions of serious political and social stress also can play—and sometimes fail to play—such a role.

In its focus on process, this book diverges from the bulk of the voluminous literature on constitutions and constitutionalism, which concentrates largely on substantive themes, such as constitutional design, human rights, and decentralization, to name just a few. This book responds to the growing attention that practitioners of constitution making, and

experts, foreign assistance providers, and international organizations supporting their work are paying to the potential advantages and implications of procedural choices in the constitution-making process. It is intended to contribute substantially to the intellectual foundation for designing constitution-making processes that can build a durable consensus on the structure of the state and foundational principles, embed peaceful modes of political competition, and foster reconciliation among diverse elements in society.¹

This volume uses case studies—nineteen individually selected episodes of constitution making across a broad range of cultures, political contexts, and geographic regions—to advance a detailed understanding of the nature of constitution-making processes. The case studies, along with a concluding chapter that synthesizes and draws lessons from them, illuminate the procedural options available to constitution makers, the effects of employing those options in varying circumstances, and key issues that those designing constitution-making processes should consider. This book also offers analysis of an emerging international norm that constitution-making processes should be democratic, transparent, and participatory; illustrates concrete manifestations of that norm; and demonstrates how those attributes of a constitution-making process are pragmatically desirable.

The overarching point of view of this volume is that process matters, a perspec-

tive that developed out of observations of constitution-making processes particularly in countries emerging from conflict. While the term *process* contains a multitude of elements, we use it principally to encompass the methods of negotiating constitutional questions, the character of the institutions used to draft and adopt constitutional texts, the designation of decision makers and the decision-making procedures they use, and the mechanisms for allowing diverse perspectives to be aired and incorporated. Fundamentally, the material in this study explores the ways in which process matters, for good and for ill, depending on the choices made in various contexts. While practical attention to constructing effective constitution-making processes is increasing,² a deeper exploration of the nature and implications of process choices has been absent. This book intends to help remedy that deficit.

Development of this Study and Case Study Selection and Structure

The study presented in this volume is a product of the United States Institute of Peace's (USIP) Project on Constitution-Making, Peace-Building, and National Reconciliation. The United Nations Development Program co-sponsored the study, and collaborated in the formulation of its approach. This author designed the study to provide a practical perspective on the process of constitution making, informed by the insights of a group of writers who had direct experience in constitution making, relevant academic expertise, or both. To benefit from a variety of disciplinary viewpoints in developing the study, a working group was formed to advise on the study's methods and structure; the group included experts in comparative constitutional law, conflict resolution, economic development, political science, and sociology, as well as representatives of the foreign assistance community who had experience supporting

constitution making.³ This working group—chaired by Professor Bereket Habte Selassie of the University of North Carolina, the former chair of the constitutional commission of Eritrea—participated in selecting case studies and preparing the initial guidance for authors. For most of the case studies in this volume, working group members, joined by relevant country and regional experts, also met with each author to review a preliminary draft and discuss key issues.

Several criteria guided the selection of cases. In general, the instances of constitution making included in this volume were chosen because working group experts knew them both to provide rich bases for insights into the nature of constitution-making processes and to be of likely interest to future constitution makers. More specifically, representing a variety of contexts was a key factor in case selection. The USIP project is particularly focused on the role of constitution making during periods in which countries are emerging from conflict, and almost half of the selected cases reflect that focus. But for purposes of comparison and to broaden the reach of the study, the remainder of the selected cases concerns constitution making during periods of transition from autocratic rule to democracy, or during periods of institutional crisis or major governance reform. In addition, diversity of regional, cultural, and economic settings was an important criterion, to ensure that conclusions drawn from the study would be broadly applicable and that the study would contain material that might resonate with the experiences of future constitution makers throughout the world. Cases were selected also to represent a range of time periods, from 1978 to 2005, though the study's focus on contemporary modes of constitution making, given its practical orientation, constrained the range.⁴ Some cases were chosen partly because they were expected to offer useful information and analysis concerning public participation procedures, as the work-

ing group was aware of growing interest in that aspect of constitution-making processes. Finally, attention was paid to including many of the most prominent recent instances of constitution making that also satisfied the preceding criteria, as it was clear that these would be of great interest to practitioners and scholars; two such cases—Afghanistan and Iraq—were added in the course of the study.

To shape the case studies, the working group prepared a concept paper to serve as a research guide for the authors. This paper grouped a series of research questions into eight categories: general issues pertaining to conflict resolution and constitution making; the structure of the constitution-making process; public participation in the process; democratic representation; the timing and sequencing of the process; the role of the international community; the role of international law; and essential issues of substance. Some of the chapter authors adhered quite closely to these categories in organizing their material. Others drew from the categories the questions most relevant to their particular case and addressed them within a unique structure. The variation among the case studies in the specific questions addressed is unsurprising, considering the diverse experiences of the different countries studied.

The purpose of applying a uniform analytical framework across a broad range of cases was to create a basis for discerning the variables that underlie the different approaches to constitution making, evaluating their respective effects, and deriving common lessons from the varying experiences. The concept paper's questions about general issues pertaining to conflict resolution and constitution making, for example, asked the authors to identify the variables that determined the particular approach to constitution making and to address choices such as referring to a former constitution as a starting point versus beginning with a blank slate. This category also included questions

concerning the incorporation of substantive and procedural parameters for constitution making into peace agreements.

The second category of questions, regarding the structure of the process, solicited the detailed information needed to evaluate each case and compare it to others. What were the benefits and detriments, for example, of using a constitutional commission? Was it preferable to use a constituent assembly or an ordinary parliament to adopt a constitution? Who should actually draft the constitution and how should the drafters be selected? And how did the answers to these structural questions pertain to the overarching questions of legitimacy and stability?

The third category of questions focused on public participation. These questions asked authors to consider the benefits and costs of public participation in the constitution-making process, as well as the methods of inviting participation and offering civic education in conjunction with participation. This category included questions concerning the use and timing of plebiscites; the identification of conditions under which a constitution-making process, or some portion of a process, should be more or less participatory; and the relationship between participation and the ultimate legitimacy of the constitution.

The fourth category, dealing with democratic representation, sought in general to find out how and whether the constitution-making process protected a broad range of interests. These questions focused, for example, on the composition of constituent assemblies and issues raised by refusals of particular groups to participate in the processes.

Key questions in the fifth category—the timing and sequencing of the constitution-making process—revolved around the implications of the phasing of the process's steps and the length of the process, including whether a connection could be drawn between the duration of the process and its effectiveness. Questions concerning the use of

an interim charter or some other temporary arrangement during the constitution-making period proved particularly pertinent.

Questions in the sixth category, the role of the international community, centered on the variables that determine the appropriate role for outside actors in the process. Authors were asked to consider the potential impact of foreign involvement on the legitimacy of the processes and the helpfulness of different forms and methods of foreign assistance to constitution makers.

The seventh category, dealing with the role of international law, in the end bore little fruit. We sought to discover whether any of the key players in the constitution-making processes felt compelled by any relevant international norms to make particular choices in connection with the process, but such a dynamic turned out not to feature in the case studies.

The final category of questions, essential issues of substance, also did not make a significant impression on the case studies, though some chapters identify substantive issues that were central to the constitutional negotiations.⁵

In addition to the case studies, this volume includes two thematic chapters that explore, from differing angles, emerging ideas in international law and practice regarding a possible legal norm favoring, or even requiring, popular participation in constitution-making. The late Thomas Franck and Arun Thiruvengadam, legal scholars, address the question whether international law has anything to say about the way in which a constitution is negotiated or drafted; they find that it is not yet clear that anything in international law requires a state to adhere to particular practices, but that there is growing acceptance of the norm that constitutions should be prepared through participatory processes with a high degree of transparency. The chapter by the late Vivien Hart, who was a political sci-

entist, sets forth some building blocks of a case for a right to participation, giving attention to the legal, normative, and practical aspects of democratic constitution making. The subject of these two chapters merited close examination in this volume, in light of increasing attention among constitution-making experts to the value and significance of public participation—and, perhaps, growing popular expectations of participation, at least in democracies.

Using This Volume

The material in this book is intended to be of use to policymakers engaged in designing constitution-making processes, constitutional experts advising those policymakers, and interested scholars. The material may be navigated in a variety of ways. A reader seeking to understand how various countries have shaped programs of public participation, and with what effects, for example, will find material on this core theme under an appropriate section heading in each of the case studies in which participation is featured, as well as in the concluding chapter. Selective review across the case studies of other key structural elements of the processes under examination is similarly possible. In addition, as indicated in the preceding discussion, case study authors proceeded from a common analytical framework. While the specific outline of each chapter varies, common thematic threads run, on the whole, throughout the chapters; by scanning section headings in the chapters, readers focused on particular themes—such as democratic representation, for example—will be able to identify pertinent material easily.

Some readers will no doubt wish to narrow their attention to a particular case study, either because of its inherent interest or because it concerns factual circumstances considered analogous to a new instance of

constitution making. Readers interested in a particular geographic region will find the case studies ordered in the book on this basis. And readers focused on a particular category of circumstances, such as constitution making in countries emerging from conflict, may find the discussion of the nature of the cases in the concluding chapter, and their categorization in table 2 there, a helpful starting point.

Other readers may find it useful to begin accessing the material in this volume by reading the concluding chapter, which analyzes all the main themes in the case studies and thematic chapters, accompanied by references to cases pertinent to such analysis. Readers can use the conclusion to identify themes of interest and case studies on which they may wish to focus attention. The conclusion also identifies common pitfalls to avoid when undertaking constitution making—of interest to perhaps a broad range of readers—as well as contextual factors that should be assessed when designing a constitution-making process.

* * *

The material in this book presents and assesses an array of options for and approaches to processes that constitution makers and those advising them can use to make informed choices in designing processes intended to contribute to settling conflict, promoting social and political reconciliation, and fostering lasting peace. Moreover, because it is impossible in the present to conceive of all the possible lessons that might be deduced from this study in the future, each of the case studies stands on its own as a valuable historical record of how each particular process responded to a unique set of circumstances. Thus, this volume is a rich resource for those who will face challenges similar to those explored in these pages.

Notes

1. A forthcoming review of the literature on constitution-making processes notes that the impact of procedural choices remains understudied. “More than a decade after [Jon] Elster . . . lamented the dearth of theory on constitutional design (and, we would add, systematic empirical evidence), the field retains a frontier quality . . . notwithstanding Elster’s own valuable contributions. Many of us likely suspect that the conditions and rules under which founders write, deliberate, and ratify will be consequential. We just cannot say how they matter, or to what extent, with any authority.” Tom Ginsburg, Zachary Elkins, and Justin Blount, “Does the Process of Constitution-Making Matter?” *Annual Review of Law and Social Science* 2009 (forthcoming) (version of January 15, 2009).

2. USIP has been actively engaged in this type of work. See information regarding its Constitution Making, Peace Building and National Reconciliation project, available at <http://www.usip.org/ruleoflaw/projects/constitution.html> (accessed April 15, 2009). Other organizations involved in such work include International IDEA and Interpeace. See, respectively, <http://www.idea.int/cbp/index.cfm> and http://www.interpeace.org/index.php?option=com_content&task=view&id=44&Itemid=105 (accessed April 15, 2009). See also the 1999 recommendations of the Commonwealth Human Rights Initiative to the Commonwealth heads of government, advancing the idea that the process of constitution making is as important as the substantive content of a constitution, available at http://www.humanrightsinitiative.org/publications/constitution/constitutionalism_booklet_1999.pdf (accessed on April 15, 2009).

3. The working group included Andrew Arato, Louis Aucoin, Jamal Benomar, Andrea Bonime-Blanc, Gérard Conac, Francis Deng, Clarence Dias, Jon Elster, Owen Fiss, Vivien Hart, Jerry Hyman, Neil Kritz, Victor LeVine, Makau Mutua, Melanie Beth Oliviero, Herman Schwartz, Ann Seidman, Robert Seidman, Bereket Habte Selassie, Timothy Sisk, Mark Tushnet, Jennifer Widner, and William Zartman. Working group members were not asked to review this volume, which was independently peer reviewed.

4. The set of cases selected is not intended to suggest that the period since 1978 (the Spain case) should be considered a distinctive era in constitution making. One possibility might have been to include cases covering the period since the end

of World War II, though, given a reasonable limit on the number of cases, this would have stretched the study thin over a long time period. The working group considered 1989 as a possible beginning date for the study's time frame, recognizing that the end of the Cold War was a true milestone of democratic transition. But in the end, Spain, though earlier, was included because the constitution-making process there was an intimate part of the transition from autocratic rule to democracy and the case study was

likely to yield valuable lessons regarding constitution making in transitional settings.

5. One substantive topic that is explored to a limited extent in the study, but which has attracted interest among practitioners and merits further examination, is the incorporation of immutable—or unamendable—principles in constitutional text as a means of definitively securing basic principles and ensuring against the recurrence of past abuses.

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PART I

THEORY AND CONCEPTS

