

Mechansims for Resolving Divisive Issues in Constitutional Negotiation

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Constitution-making in Focus: Issue Paper

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1. Introduction

Constitution making is a divisive process, and it must be so. In any healthy constitutional negotiation, issues will be brought to the table on which the interests of the negotiating parties diverge. Parties to constitutional negotiations are thus faced with the challenge of developing a final document in which each group within the nation can take pride and ownership, even though with respect to many divisive issues that group will not have obtained what it wanted. There can be no fool-proof algorithms for resolving divisive issues to achieve this end, but there are mechanisms with which every negotiation process should be equipped.

1.1 Divisive issues must be addressed

A view of constitution making endures in which the constitution is seen primarily and fundamentally as an assertion of sovereignty. The nineteenth century saw the creation of many constitutions that were exactly that. They proclaimed national identity, often by way of a rupture with the former colonial power. Such a constitution is socially reconstitutive: it defines the self of the nation in opposition to the other—a colonial power or rival state—but does not address and is unaware of divisions within its own society. In celebrating the people of the nation, the constitution blurs the distinctions between them.

Many societies riven by fault lines of race, ethnicity, religion, or language became states in the nineteenth and early twentieth centuries under constitutions that ignored these divisions. Even in Italy, a country of relative linguistic, religious, and cultural homogeneity, Garibaldi recognized that the creation of the unified state in the late nineteenth century did not automatically give rise to a national identity: “We have made Italy,” he proclaimed, “now let’s make Italians!” In much of Europe, of course, centuries of warfare had sculpted more or less homogenous societies. The task of nation building in Italy seems far less daunting when compared to that in societies of far greater diversity, such as South Africa or India.

As the twentieth century advanced, sovereignty-asserting constitutions of an earlier age proved inadequate to the task of holding together the rifts in many societies. Today, wars between states—wars against the external “other” by which such constitutions defined the nation—are less common. State-internal, identity-driven conflicts, those in which communities are mobilized for violence based on some shared element of identity, now make up the preponderating share of conflicts worldwide. Where identity is at the core of conflict, civilians become targets: the percentage of war-time casualties made up by civilians rose from 5% at the beginning of the twentieth century to 80% at its close.

A constitution drawn up today in a heterogeneous society cannot, therefore, simply assert sovereignty and national identity. It will also seek to redefine the social contract, to acknowledge and make constitutional sense of the divisions and differences in the society while building national identity around what is held in common. National identity always exists in common with various other, competing identities. A modern constitution does not try to supplant those identities with the national identity, but looks to shared values and common destiny as the basis for cohesion. In countries where group identity complete-

ly overwhelms national identity, constitution making will be more difficult. This is often the case for countries that are emerging, not from wars of independence, in which national identity can be solidified, but from civil wars, in which any pre-existing national identity is undermined and fragmented.

It is thus necessary that constitutional negotiations deal with difference, and that the parties at the table resolve how the constitution will acknowledge, protect, or reconcile the differences that identify them. A constitution resulting from a process that ignores difference and avoids divisive issues will not prove capable of building a national identity.

1.2 What is a divisive issue?

The most divisive issue in constitutional negotiation is not substantive, but procedural. It is the issue of how the parties will deal with divisive issues. Process was not particularly emphasized in earlier constitution making of the kind described above as sovereignty asserting. In the creation of a postcolonial state, for instance, negotiations occurred between the departing colonial power and the local elite. Kenya's independence constitution, for instance, was negotiated in London in 1961–2 between one Kenyan delegation, headed by Jomo Kenyatta, who would be elected the country's first president, and the British. All that was needed was an agreement that would hold between the two sides. Where parties representing the various groups within a society are participants in the negotiations, however, procedure becomes very important. If there is no agreement on the means by which inevitable differences will be worked through, then each such difference can potentially derail the negotiations.

1.3 The risks of failing to resolve divisive issues

As in any negotiation, the possibility of deadlock arises in constitutional negotiations whenever a divisive issue is broached. If there is no mechanism to either resolve the issue or defer it, then the negotiations may grind to a halt. Maintaining momentum in constitutional negotiations is of critical importance: progress begets progress, and one agreement induces another. By the same token, breakdown or stasis in the negotiations does not simply delay progress but can actually undo it. While negotiations are suspended, parties are more likely to entrench their positions on divisive issues. The personal chemistry between the negotiators is eroded. The process may be discredited in the eyes of the people, and developments outside of the negotiation room may further retard progress as the parties are not in a position to react to them in negotiation.

The South African constitutional negotiations were suspended after CODESA II (Convention for a Democratic South Africa), in the wake of the Boipatong Massacre in June 1992. What began as a principled withdrawal by the ANC from negotiations, based on the government's presumed complicity in the violence, came to be seen as a mistake, as the security and political situation in the country deteriorated sharply while the parties were away from the negotiating table. Points of contention to which the parties had not formerly been committed became entrenched, and were incorporated into street slogans.

The ultimate threat of divisive issues is that they will cause the negotiation process to

collapse altogether. In April of 2003, the Liberation Tigers of Tamil Eelam (LTTE) suspended the Norway-mediated, formal, face-to-face peace talks in Sri Lanka (which, in proposing a federal structure for the country, amounted to constitutional negotiations), citing their displeasure with how certain issues were being addressed. Although channels of negotiation remained open in spite of this breach, and formal negotiations resumed after the 2004 tsunami, the parties never resolved the divisive issues that stood in the way of agreement. Open war between the government and the LTTE erupted again in 2006, with the defeat of the LTTE coming in May of 2009. Currently, to the degree that the conflict in Sri Lanka has been resolved, it has been by military means, rather than constitutional negotiations.

1.4 Avoiding unnecessary division

While the airing of some divisive issues during negotiations is inevitable, and indeed necessary, certain types of disunity can be avoided altogether if the parties follow certain steps before and during the negotiations.

1.4.1 Before negotiations

Good faith

The first prerequisite for effective and useful constitutional negotiations is that all parties be acting in good faith. It is NOT necessary for all parties to be near an agreement for negotiations to begin—indeed, the purpose of negotiations is to effect a narrowing of wide differences—but it is crucial that the parties at the table be sincere in their desire to effect a solution. If a party enters negotiations only for ulterior motives—to appease donors, international opinion, or investors—more harm than good will result. Premature negotiations, occurring before there is sincerity in the parties, will lead to frustrations, mutual vilification, and increased levels of distrust, and could very well undermine any prospect of a successful negotiated settlement in the future, once circumstances have ripened. The memory of failed negotiations can make parties and their constituents leery of committing to a new process, even under much more propitious circumstances. Good faith is so crucial to constitutional negotiations that, in spite of the danger associated with interrupting the process and losing momentum, a party to negotiation should walk away from the table if their opposite is not negotiating in good faith.

Where constitutional negotiations are mediated by a third party (see below), that mediator should also walk away from the table if it becomes apparent that one or more parties is trying to manipulate the mediator. Failure to disengage in the face of bad faith will severely weaken the mediator and open the process to abuse.

Agreeing on rules of process

Who participates?

Given the basic prerequisite of good faith, the first step to be taken in order to avoid unnecessary division during negotiations is to agree on the rules of process. This should always be done before substantive negotiations begin, due to the difficulty of determining or re-negotiating matters of process once a dispute has broken out. In the context of a

specific disagreement, each party is likely to insist on a procedure for resolution that will protect its position on that particular issue. It may be impossible to re-negotiate rules of process once a dispute has broken out, especially if a new rule appears to favor one side in the dispute. It is far better to agree on the rules of procedure and the obligations of the parties with cool heads at the outset, rather than in the heat of debate once the process is well under way.

The first issue of process to be decided is that of which parties should be present at the negotiating table. Under-inclusion risks leaving certain groups unrepresented in the negotiations, and uninvested in the resulting constitution. On the other hand, the presence of too many parties at the table can lead to inefficient and chaotic negotiations in which representatives of very small segments of society delay or derail negotiations. Both extremes are undesirable: the former prevents divisive but crucial issues from being aired, leading to problems down the road, while the latter risks flooding the negotiations with a myriad divisive, but relatively less important, issues.

It may sometimes not be possible for constitutional negotiations to be inclusive. Where such negotiations are occurring as part of peace talks, for instance, the belligerent parties may feel that the presence of parties who were not participants in the conflict will derail the process. This was the case during the 2003–4 negotiations to end the conflict between the north and south in the Sudan, for instance, in which the only parties to the peace talks were the Government of Sudan and the Sudan People's Liberation Movement (SPLM), the principal southern rebel movement. Inevitably, the peace talks dealt with constitutional issues, but both parties insisted that any other presence at the negotiating table, however valid its interest in the constitution of the country, would be a spoiler to the peace talks themselves. In this situation, it fell to the mediators of the process to pressure the two parties to make the resulting Comprehensive Peace Agreement as inclusive a document as possible, enshrining multi-party involvement into the processes contemplated by the agreement. This is not an ideal situation, since it relies on the strength of the mediator (provided the negotiations are even mediated, which will not always be the case) to speak for unrepresented interests.

In heterogeneous societies, there will be a great diversity of groups clamoring for a voice at the negotiating table. A balance must be found between efficiency and representativeness to ensure that negotiations are both functional and legitimate. An inclusive process provides a better platform for stability, acceptance of the new political order, and loyalty to the nation. Even a small minority standing outside the political framework can seriously destabilize and disrupt a new constitutional state. Effective negotiations involving twenty or more voices at the table, however, will be very difficult to achieve.

The formation of umbrellas, groupings of parties with similar aims, provides a solution to this dilemma. In the South African negotiations, such umbrellas formed naturally, centered around the two main parties, the African National Congress (ANC) and the National Party. These two lead players negotiated with each other, and then each took the responsibility of ensuring that deals struck between them would be accepted by the alliance partners falling under their respective umbrellas. Where the parties do not form these

umbrellas on their own, it may fall to a mediator to impose them. During the peace negotiations in Burundi in the late 1990s and early 2000s, more than 20 parties sat at the table, many of which were merely creations of the ruling elite—parties representing no real constituency, but vested with the power to destroy a consensus and hold up negotiations. As the mediator of these negotiations, faced with the prospect of dealing with over twenty positions at the table, Haysom divided the parties into three umbrella groups on his own initiative, based on their broadly shared political positions. There was resistance to the idea, but he insisted that each group jointly present papers detailing their position. This is a solution predicated once again on the presence of a mediator, and highlighting a situation in which such a figure can be of use.

A final issue of inclusiveness concerns the internal composition of negotiating teams themselves. Each party should ensure that its various constituencies are represented in the team it sends to the negotiating table. If this representation is lacking, divisions may arise within the party itself. A constituency that feels it has been left out may instigate a rupture in the party, undermining the validity of whatever agreement that party has signed on to. Each party is valuable to the others in so far as it can “deliver” its constituencies by guaranteeing their acceptance of the final agreement, and so there is no benefit to anyone at the table in seeing one party schism. Each party should thus encourage the other players to adequately represent their bases at the table, and to maintain frequent consultation with them (see below).

Decision-making formulae

Following from the decision of who will be at the table, the parties must agree on a decision-making formula (or formulae) for the negotiations. There is an enduring tension between breadth and depth in this area. A formula that prioritizes depth will have each decision require majoritarian support, the backing of the majority group. One that emphasizes breadth will instead require support from parties representing the different groups and interests in the country. Each has its problems. A process with too much emphasis on depth risks seeing minority voices overwhelmed and disenfranchised in the constitutional process. On the other hand, majoritarian support is required for the legitimacy of the final agreement, and too much insistence on breadth, as in a system where consensus amongst all parties is required for agreement, will allow minorities to hold the process hostage.

In South Africa, the concept of “sufficient consensus” was used during the negotiations for the adoption of the Interim Constitution, which was in force from April 1994 until the Final Constitution came into effect in February 1997. Whereas consensus demands that all parties at the table be in agreement, sufficient consensus, as its name suggests, requires only that a sufficiently large grouping of parties be in agreement in order for an issue to be decided. In the South African process, the size of that grouping was nowhere explicitly defined. The forum which produced the Interim Constitution, the Multi-Party Negotiating Process (MPNP), consisted of all manner of parties, large and small, nationally and locally based, from across the country. In practice, if either the National Party or the ANC—the two largest parties—did not agree on an issue, then there was no sufficient

consensus on that issue. If one or two smaller parties, however, were the holdouts, then there was still sufficient consensus and the issue was considered agreed upon.

Sufficient consensus was later adopted, with more concrete criteria, in the negotiations leading to the 1998 Belfast Agreement in Northern Ireland. For there to be sufficient consensus on any term of that agreement, not only did a majority of the parties at the negotiations have to agree to the term, but a majority within each broad faction—unionist and nationalist—would have to agree.

In determining the mechanisms for the formulation of the Final Constitution in South Africa, enshrined in the Interim Constitution, the MPNP used a two-pronged approach to balance breadth and depth. On the one hand, it decided that the Final Constitution would be drafted and approved by an elected constitution-making assembly, with a two-thirds majority required (see below). On the other hand, the MPNP enshrined constitutional principles in the Interim Constitution that the Final Constitution would have to adhere to, and these principles were determined by consensus of all parties in the MPNP, each of which could exercise a veto on any principle. This balance was necessary to achieve a compromise between the ANC, which as the party with an overwhelming majority of support in the country had an interest in leaving the Final Constitution entirely up to an elected assembly, and the National Party, which had an interest in negotiating the entire Final Constitution up front before elections, while it still retained power disproportionate to its public support. The Final Constitution would thus be what the elected majority agreed upon, guided by the principles acceptable to all parties (it fell to the Constitutional Court to confirm that the Final Constitution did in fact adhere to those principles; see below).

Mediators

The need for a mediator is another subject that must be decided before substantive negotiations begin in order to avert unnecessary division. Where international mediation is present, it will have a role to play in preventing unnecessary divisions from appearing in negotiations. The mediator cannot make decisions on matters of substance, but will be the master of the process. There are strong arguments to be made that negotiations without mediation are preferable. The parties to an agreement may balk at mediation, feeling that they are being told what to do rather than deciding it for themselves. Where parties negotiate with each other directly according to a process that they mutually agreed on, there will usually be a greater sense of ownership, and thus likely a greater commitment to the process and the agreement that results from it.

This was one of the problems with the Sri Lankan peace negotiation process of 2002–6: Norway took ownership of the process as the mediator, but the parties to the negotiations considered the endeavor more Norway's than their own. This stands in sharp contrast to the unmediated South African negotiations in the early 1990s, in which the National Party, although in effect working towards an agreement to abandon its monopoly on power, was heavily invested in the process because it had ownership of it.

There will be situations, however, where mediation is advisable: where the legacy of inter-

group conflict prevents groups from speaking directly to each other, let alone compromising with each other; where the power imbalance between the parties is so great that one or both will not negotiate; or where the agreement must be buttressed and supported by international guarantees.

Negotiation training

A final important consideration prior to entering upon constitutional negotiations is to ensure that all parties' delegations are trained in negotiating. A party that has negotiation experience may imagine it has the advantage over a party that does not, but in reality negotiations between such parties will not advance and will benefit no one. A delegation with no negotiation training or experience will lack confidence, and as a result it will take no risks and balk at entering serious negotiations. Specifically, an untrained party will not know how and when to concede, making it very difficult to work through contentious issues. The fear of making a mistake in a process with enormous consequences can be paralyzing to a party without training.

In addition to the training or experience necessary for a party to be comfortable at the negotiating table, an appreciation of the basic rules of conflict mediation is required. There must be a shared understanding that once a point has been agreed to, no one will go back on it and try to reopen discussions.

All parties at the table should also have a good working knowledge of the issues themselves, of course, and this applies to mediators where present as well. During the constitutional negotiations in Sri Lanka, Norway, a non-federal state, was in the position of mediating the debate on the proposed federal constitutional structure of the country. In such a situation, it is crucial that the mediator become informed as to the issues being negotiated; otherwise, not understanding the implications of potential concessions and decisions, it will be unable to act fairly between the parties.

1.4.2 During negotiations

Setting the agenda

Once negotiations begin, there are certain principles that, if adhered to, will avoid unnecessary division. Two of these principles relate to the agenda of the negotiations.

First, it is important to avoid single issue negotiations, in which the outcome must be either "yes" or "no" on a particular issue. Negotiating an issue in isolation does not allow for compromises, trade-offs or bargaining. One side must simply concede, and will likely be unwilling to do so, if only because of the appearance of defeat. It is thus preferable to enter into negotiations with an agenda covering many issues. This allows for "package bargaining," where concessions on one issue can be matched by victories on other issues. Where there is a single issue of substance to negotiate, it can be useful to break it into component parts and present it as a set of issues.

Second, parties should not insist on agenda sequences. It may be instinctive for one or more parties to demand that issues be dealt with in a particular order. Where this order is inflexible, however, each issue becomes a deal-breaker. Insistence on a sequence can be born from a genuine concern: a party may feel that if it does not get clarity or resolution on

the first issue, it will not be in a position to negotiate the second one. It may, conversely, be disingenuous: an insistence on the sequence may serve to slow the process by forcing the negotiations to work through an intractable issue. As in single-issue negotiations, bargaining and trade-offs are difficult when there is only one issue up for discussion at a time. By agreeing to keep the agenda flexible, the parties keep open more options for resolving contentious issues (see below), thereby preventing issues that could be dealt with relatively easily by such means from becoming divisive roadblocks.

Developing a single text

Once negotiations begin, it is helpful to consolidate proposals into a single text at an appropriate moment. Initially, each party may present its own text, and this may in fact be necessary to get all the parties invested in the process. After a certain point, however, the proliferation of texts becomes an obstacle and a source of division. Parties address only the points made in their own proposals, and thus end up talking past each other. They become entrenched in the formulations they originally proposed and the text they know and are comfortable with. Consolidating to a single text allows all parties to focus on the same proposals and engage in meaningful negotiation. As discussed below, third party involvement may be useful in creating a single text.

Communication

The quality, or lack thereof, of communication in constitutional negotiations, both between parties themselves and between parties and the public, can play a large role in preventing or fostering division. Communications between negotiating parties should always be respectful. It is important to avoid triumphalism at the conclusion of an agreement, which can make the other parties suspicious about the agreement or at the very least agitate their supporters. Claiming victory is not conducive to the process of building joint ownership of the new constitution: all parties must have “won” something from the agreement, and must be seen to have done so. One of the present authors (Haysom) has experienced first hand the dangers of triumphalism. During the South African constitutional negotiations, he was overheard by a National Party member boasting that the ANC, whose delegation he was part of, had “won” every issue that was set before them on a particular topic. This member complained to his delegation, some of whom wanted to break off the negotiations. It was a lesson in the need to avoid triumphalism: the moment one side acts as the victor, it necessarily makes the other side feel like the loser and takes away their sense of ownership of the agreement.

Communications between parties and the public—both their bases of support and other groups in society—should also be managed in such a way as to avoid unnecessary division, especially in countries with developed media that can carry a message directed at one group to the radios and television sets of members of other groups. If one party talks up its own performance at the negotiations too much for the benefit of its supporters, this may create great pressure on the other party from *its* supporters to leave the negotiations. By the same token, however, each party will need to justify its performance at the negotiations to its constituents, and so parties must avoid taking unnecessary offence at such statements. Clear lines of communication between adversaries are needed to prevent misunderstand-

ings about statements that may in reality be mere public relations exercises, rather than actual representations of views about the negotiations. Parties can avoid making their public communications into sources of division if they find a way to speak to the other party's supports at the same time as their own; this was something the ANC learned to do effectively during the South African negotiations.

Divisions may also arise when parties fail to adequately and consistently obtain the views or consent of their constituents. It is important for grassroots and leadership alike to appreciate that negotiating with an adversary does not constitute capitulation, or selling out. This is a key concern in situations such as that in South Africa where a popular movement was relying on the ANC to give it voice at the negotiations, while the ANC had to deal with political realities that required concession and compromise with the government. Keeping one's base informed affords an opportunity to introduce supporters to strategic considerations, allowing them to appreciate the nature of the negotiations and preventing suspicion of the process.

To ensure that the other parties in a negotiation can “deliver” their constituents, it may be wise for each party to insist that the others regularly consult their constituents. More generally, it is not in any party's interest to do anything to separate an opposing party from its support base, because then that base becomes a constituency that no one at the table can deliver. This became a problem in the Sri Lankan peace negotiations, where no one could truly deliver the south for the LTTE—not because of LTTE disruption in this case, but due to southern politics. In the lead up to the April 2004 Sri Lankan election, the party of the President attempted to undermine the Prime Minister's party, culminating in the President's dissolving Parliament. Far from benefitting from the south's political disunity, the LTTE found that this disunity made it difficult to be confident in assurances and concessions made by the government.

Decisions will have to be made as to which negotiations should be held privately, and which should be held in the public eye. Privacy will be necessary in some circumstances, but in others it can arouse suspicion unnecessarily in the public. Public negotiations, however, risk causing division, as they frequently give rise to posturing and are used as public-relations exercises rather than means to advance the process. Parties in public may speak to their own constituencies rather than each other, preventing compromise. It will often be advisable to separate negotiations into two processes: one where real negotiations take place in private, and the other where an agreement is publicly recorded.

Leaders and Messengers

Having the party leaders sit at the negotiation table is a risk that can lead to entrenched divisions. If negotiations break down on an issue while the leaders are present, their parties can no longer move. When a leader digs in on a position, it cannot be easily changed without loss of face. Conversely, there is value in keeping the leaders away from the table, so that they can be preserved as the ultimate arbitrators in the case of a particularly difficult dispute. While leaders may dictate their parties' tough lines from behind the scenes, they can be called upon to play the role of the elder statesman in public. This was the case in the negotiations for the Sudan Peace Agreement: when there was a breakdown in

negotiations over certain technical issues, Vice President Taha and SPLM leader John Garang came together to find a resolution, although they had been backing their respective sides' positions and were thus partly responsible for the initial breakdown.

While it is not ideal to have the leaders at the negotiating table, it is also unhelpful to be dealing with non-committal messengers instead. A messenger is a person who has no real authority to negotiate: he or she is only authorized to relay messages back and forth from the leader. Where messengers are at the table, the real negotiators are not present in the process, are not subject to its pressures, and may have limited commitment to the success of its outcome. This undermines confidence in the process, making ownership more difficult to attain. A party will not be enthusiastic about investing effort into convincing their opposite at the table, if the real person who needs convincing is in the back room. While it may be undesirable to have leaders at the table, then, it is important to seat persons with the authority to make decisions.

1.5 Mechanisms for resolving divisive issues

Even where all the proper steps are taken before and during negotiations to prevent unnecessary division, there will arise contentious issues that must be dealt with. A variety of mechanisms are available for resolving such issues.

1.5.1 Informal negotiation

People rarely change their mind in the course of a formal debate. Positions are set before the debate starts, and even the most eloquent speaker is unlikely to persuade his opponent to side with him in such a venue. This sort of formal process has its place: it can serve to put the parties' positions on record as a starting point, and can also serve to solemnize pacts once they have been negotiated. The real movement, however, in constitutional negotiations takes place in between the formal debates, in more informal gatherings. Much productive work is actually done away from the negotiation table entirely. There should be an external venue that can serve as a forum for negotiators to spend time with each other away from the pressures of the actual talks, and share ideas. Such venues proved useful in both the South African and the Sudanese processes. In Burundi, on the other hand, there was initially such acrimony between the parties that delegations refused to mix socially for the first year of the talks.

1.5.2 Technical committees and third parties

Technical committees

A technical committee, or committee of experts, can be of great use in resolving contentious issues. Where the text of the agreement itself is contentious, because it is perceived as being too much the work of one party, for instance, the negotiating parties can ask an impartial technical committee to produce a draft text instead as the basis for negotiations. In South Africa, there were two failed sets of negotiations: in the first, multiparty talks resulted in entrenchment of positions, while in the second, cameras were present in the room and parties spoke to their constituents. After these failures, the sides chose lawyers to jointly form a committee of experts, which drafted proposals and submitted them to the parties as a body. This changed the dynamic from one of enemies talking to each other, to

one where a body of experts produced proposals to be considered by a body of parties.

Specific issues can also be referred to a technical committee in order to de-politicize them. All issues have a political element to them, but if a contentious issue can be recast as a technical question, then the committee can find objectively verifiable markers to indicate where a correct solution lies. All parties can agree to a technical decision of this sort with far less loss of face than in the case of a concession during a political debate. Some issues, of course, will not easily be recast as technical: the issue of how representation will work in the government, for instance, is so deeply political that it will be impossible to refer it to a technical committee.

The feasibility of the use of a technical committee, with appointees from all parties, to diffuse difficult issues depends in part on the availability of intellectual capital in the country. It will be more difficult for Nepal, for instance, to take advantage of technical committees in its constitutional negotiations than it was for South Africa. Nepal's long history of monarchical rule up until 2006 meant that there was no experience of living under, and working with, constitutional processes until very recently. Where experts are wanting, as in Nepal, it may be necessary to have third parties fill this role instead of homegrown technical committees.

External third party referees

Agreements forged between parties without any external assistance are likely to engender a greater sense of pride and ownership. Constitutional negotiations should be approached as an opportunity for nation-building and the promotion of a common culture of national self-reliance. In some cases, however, use of third parties can be either a strategically important tool in forging consensus, or a necessity imposed by the conditions under which negotiations take place. The latter relates to the role of an international mediator, described above. From a strategic point of view, the most important task for third parties is generating proposals and propositions in circumstances where the parties themselves could never accept, or be seen to be accepting, proposals emanating from the enemy. During the constitutional negotiations in Burundi, Nelson Mandela was invited to serve as a mediator. When the parties were reluctant to live up to their commitment to accept the agreement generated by the process, Mandela was able to exert moral pressure and help bring about acceptance. It was easier for the parties to be seen to be bowing to pressure from Mandela than to pressure from a process which they shared with bitter rivals.

Courts

In addition to external third parties, the national court can be used as an arbitrator to resolve legal questions and disputes arising from the negotiations. The court acts in a manner analogous to a technical committee: it depoliticizes the issue by considering it not from a political standpoint but from a legal one.

In South Africa, the MPNP decided that the Constitutional Court would have to certify the Final Constitution created by the elected Constitutional Assembly before it came into effect, to ensure that it abided by the principles set out by the MPNP (see above). This certification could not have legitimately been left to the political process. The Court

actually refused to certify the first draft of the Final Constitution, which had been approved in May of 1996 by 87% of the Assembly's members, because it found that nine elements of the draft did not accord with all of the certain constitutional principles.

While the use of the courts can be preferable to resorting to a foreign arbitrator, since it avoids the perception of a solution being imposed by outsiders, the feasibility of court involvement will largely depend on the perceived legitimacy of the judiciary in the country. Thus in South Africa, where the people had faith in the courts, it was possible for the process to rely extensively on them to resolve legal issues. In Burundi, conversely, this was not possible because faith in the judiciary was lacking.

1.5.3 Deferring the issue

Issues will arise that prove very difficult to resolve at the time, but which may become more tractable later, either once other issues have been resolved, or due to changes external to the negotiations. There may simply not be a sufficient level of trust early in the negotiations to allow for certain issues to be resolved, or lingering acrimony may not have been sufficiently diffused. The parties should maintain a flexible agenda, and be prepared to defer such an issue to a later time. Negotiators should look to areas where they are likely to find agreement, and should pass over areas where no consensus can be reached, in the interest of making progress and maintaining momentum in the negotiations.

In Burundi, the constitutional negotiations were hampered by the antipathy between the parties, and many issues could not be resolved at first simply because of the inability of the parties to overcome the bad feelings between them. These issues were deferred, and were taken up again once the national unity government had been created. By this point, the parties had been working with each other in government, and the antipathies had largely dissipated. They were able to reach agreement on issues that were previously intractable.

As a general rule, parties will reach consensus on issues of principle, such as matters concerning human rights, more easily than on practical questions of how power will be distributed in the state. There is now a broad international consensus on the need for a bill of rights in a national constitution, and on what core rights must be protected in that bill, and so debates over bills of rights cover a relatively narrow range of options. Questions of the distribution of power—how power will be divided in a federal system, for instance, or how the executive will be structured—will be more difficult to reach consensus on, both because they will be very specific to the national context and because they speak to the core interests of all parties. The negotiations leading up to Iraq's 2005 constitution are a paradigmatic example of the relative ease of finding consensus on issues of human rights: the text of Iraq's bill of rights was agreed to with a minimum of controversy, while the character and scope of Iraq's federal structure and the organization of executive and legislative power in the central government generated much debate. It is thus rational to begin the constitutional process by negotiating and reaching consensus on a bill of rights,

building confidence and trust before engaging more difficult issues.

1.5.4 Conditional bargaining

A party to constitutional negotiations will often be hesitant to compromise for fear that this might weaken or diminish their negotiating position without the gain of any corresponding concession from their adversary. In such cases, both parties should be encouraged to offer conditional compromises, those which do not come into force unless conditions regarding matching compromises are also met. In this way, parties preserve their overall position and are encouraged to enter the bargaining process without losing any ground.

1.5.5 Interests vs. Positions

As in all negotiations, the cardinal rule for effective constitutional negotiations is to distinguish between interests, which are the objectives each party seeks to achieve, and positions, which are the exact mechanisms, formulations or propositions advanced as the means to those objectives.

Parties will frequently lose sight of the interests informing their positions, and this confusion is the most common barrier to effective negotiations. A party's campaign or struggle slogans will often attach to a position or tactic rather than an interest, forcing the party to then defend the position, which is only a means to an end.

During the negotiations in Sudan, the SPLM demanded that Sudan become a secular country, while the North insisted that Sudan remain officially Islamic. These were positions, but the interests behind them were each side's desire to have their own part of the country be secular and Islamic, respectively. The Interim Constitution circumvented both parties' positions, which were incompatible, and instead addressed their interests, by providing that a southern state could opt out of legislation based on Islamic law (this was the practical effect of provision 5(3), which allowed any state whose majority did not practice a religion to enact alternative legislation to any national law based on that religion).

1.5.6 Sunrise and sunset provisions

Negotiations frequently run up against issues in which a certain outcome is of fundamental importance to one party, but unacceptable to another. Sunset and sunrise provisions can sometimes help resolve such issues.

A sunset provision is one that will lapse after a period of time—say five to ten years. This allows both sides to claim an advantage from the measure. The side insisting on the provision has its way in the short term, while the other side, though forced to accept the undesirable provision for a time, knows that it will not endure in the long term. Such a provision can be used, amongst other things, to control the transition from minority to democratic rule.

The Interim Constitution of South Africa contained a sunset clause providing for a government of national unity, whereby any party with a minimum of twenty seats in the national Assembly could claim a seat in the Cabinet. This executive power sharing was to

last five years from the coming into force of the Interim Constitution in April 1994. In practice, although the government of national unity could have run until 1999, the National Party, the main beneficiary of the clause, withdrew itself from the cabinet one day after the adoption of the Final Constitution by the National Assembly, in May of 1996.

A sunrise clause, conversely, is one that will only come into effect after some time. Implementation is deferred temporarily in the interests of creating the proper conditions for its activation. Once again, both sides can claim an advantage.

1.5.7 Ambiguity

Addressing a divisive issue in ambiguous terms in the agreement can be a useful means to avoid having it derail negotiations, but there are circumstances in which such ambiguity is dangerous.

“Creative ambiguity” is a feature of an agreement that includes terms that are general enough to embrace the different understandings and demands of various parties. In certain circumstances it will be impossible for the negotiating parties to have the same understanding of an issue. In the Burundi constitutional negotiations, for instance, the parties were required to reach an agreement on the history of the country. The final statements solidifying this “agreement” were necessarily ambiguous, to allow each side to read in its own understanding of that history. There are also situations where an issue can be resolved in ambiguous terms for the time being in order to allow negotiations to advance beyond it.

Some issues cannot be ambiguous, however. Creative ambiguity can be useful for constructing grand statements about the direction of the society in question, but can lead to disaster when involved in an issue such as ceasefire. There can be no ambiguity as to the timelines, geographic details, and logistical requirements of a ceasefire: different interpretations of such matters will almost certainly lead to unnecessary deaths, and possibly undermine the entire ceasefire.

1.5.8 Imposing penalties for deadlock

Mechanisms for penalizing deadlock should be decided upon before negotiations begin, and then used as appropriate where the sides are unable or unwilling to reach a compromise on certain issues. The system should be constructed in such a way as to penalize parties for being unreasonable. Different mechanisms will be needed as part of this system, since a mechanism that would penalize one party might actually work to another’s profit.

Referendum and reduced majorities

One way to penalize deadlock is to remove decision making on the contentious issue from the negotiating parties, and put it to a popular referendum. Generally, of course, this mechanism will yield a result favorable to the majoritarian party, and so it will not be an effective deterrent to intransigence on its part. Similarly, a mechanism that reduces the majority required to resolve an issue will benefit the majoritarian party.

In South Africa, both mechanisms were incorporated into the Interim Constitution as means to deal with potential deadlock over the Final Constitution. The basic requirement for the adoption of a text as the Final Constitution was that, within two years of the

sitting of the Constitutional Assembly elected under the Interim Constitution, the text be passed by the Assembly with a two-thirds majority and then certified by the Constitutional Court. In the event that the text not receive the required majority within the two year time frame, then a simple majority would suffice to refer it to a panel of constitutional experts, who would recommend changes and send it back to the Assembly. If, however, the panel was not unanimous in its recommendations, or the Assembly did not approve the modified document, then the Assembly could once again approve the text by simple majority. This text, once certified by the Constitutional Court, would then be referred to the public in a national referendum, requiring approval by 60% of the votes cast.

If thus approved in referendum, the text would become the constitution. If the 60% threshold was not met, however, then the President would dissolve Parliament and call an election. The newly elected Assembly would then begin the process again, but instead of a two-thirds majority requirement, only 60% of all Assembly members would be needed to adopt a Final Constitution (subject, as always, to certification by the Constitutional Court). It is noteworthy that the 60% figure was a compromise between the two major parties' initial positions: the ANC had wanted deadlocks over the constitution to be breakable by simple majority, since it was assured of such a majority in the Assembly, whereas the National Party had wanted a higher threshold, to ensure that the ANC would not be able to ram through a constitution without its support. These positions highlight the majoritarian party's interest in reduced majorities as a deadlock-breaking mechanism.

Penalizing by time

Another mechanism involves a cooling off period: parties are punished for deadlock by having the process delayed, by six months for instance. It will often be the case, however, that one party—usually the party representing the current government as was the case in Burundi—wants the status quo to continue, and such a party may thus look for excuses to create deadlock if this mechanism will be used to “punish” such deadlock.

Remove determination of the issue from the parties

Arbitration and the use of the courts have already been discussed. While the negotiating parties may sometimes mutually agree to refer an issue to a third party, this mechanism can also be decided upon before negotiations as an automatic penalty in the event of deadlock. The prospect of having the decision removed from them may give the parties greater incentive to work around contentious issues.

2. Conclusion

There is no algorithm for resolving divisive issues in constitutional negotiations. Such issues will inevitably come up during any healthy constitutional process, and the manner of their resolution must be flexible to the issue itself and the circumstances of the negotiations. As has been shown, however, there are measures that can be taken by the parties involved to prevent unnecessary divisions from occurring during negotiations, leaving more time and energy to be devoted to those issues that are truly difficult to resolve.

Appendix A: Authors

Appendix B: About Interpeace's Constitution-Making Program