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Strengthening Governance through Constitutional Reform

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Governance and constitutional reform

Over the last decade, a consensus has emerged among international organizations, governments, and civil society on the vital role that governance plays in economic and social development. Strengthening the four elements of good governance—accountability, transparency, participation, and predictability—can increase government efficiency and impact.

Constitutional reform can be a vital tool to promote good governance by changing the rules to promote more accountability, transparency, participation, and predictability. A constitution defines and protects citizens' rights from governmental abuse. It also limits and balances government powers vis-à-vis other players and institutions, thereby safeguarding minority rights. The constitution is the touchstone for the legality of all other laws and the basis for reviewing executive and legislative actions.

Constitutional reform is the process of reconstructing the constitution and the laws it governs through public consultation and negotiation. It has become a popular method for countries to account for past institutional failures, reconstruct political structures after authoritarian rule, and ensure better governance for the future. More than half the nearly 200 national constitutions in place today are less than 25 years old. In the last decade alone, roughly 70 emerging democracies have completely rewritten or substantially altered their constitutions (see table).

Constitutions Adopted by Region, 1990-2004

Regions	Number of Constitutions Adopted
Asia (ADB member countries)	38 (20)
Africa	54
Europe	17
Americas	13
Total	122

Asia has been particularly affected by the latest constitutional wave. Among the Asian Development Bank (ADB) member countries alone, 18 have changed their constitution just in the last 15 years—in some cases several times. Many more countries, like Indonesia, are currently redrafting their constitutions or—like the Philippines and Taipei, China—plan to undertake reform soon.

The empirical evidence emerging (Greenberg et al. 1993, Sunstein 2001) suggests a two-fold nexus between constitutional reform and good governance. The first lies in the very process of drafting the constitutional document. The more inclusive, participatory, and transparent that process is, the more likely will the political order be seen as legitimate; and a political culture will emerge that fosters the four good governance criteria. The other is through constitutional choices. Constitutional reform demands that critical institutional choices be made in such broad areas as form of government, electoral law, degree of centralization, and judicial and quasi-judicial agencies, to name only a few.

The outcome is that the constitution becomes the cornerstone of a country's governance system. It stipulates where power lies within the state, what the institutions of government are, and how they are intended to operate. Good governance emerges from its structural provisions, such as separation of powers and statement of explicit rights that guard against authoritarian control. As the highest legal norm within the hierarchy of norms, the constitution also becomes a reference point for the legality of administrative and legislative actions. In sum, constitutional reform ultimately embodies governance reform.

Even more than bilateral donor agencies, international financial organizations have been reluctant to engage in the process because of concerns that this could be seen as conflicting with their charters, which specify economic development and cooperation as their mandate. They, therefore, prefer to work to strengthen existing institutions to better carry out their constitutional mandates. Clearly, institutions must be sufficiently empowered to fulfill their constitutional responsibilities—a participatory constitution can make little difference to the lives of people if the courts

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are too weak to fairly enforce the laws. On the other hand, it is also true that strong enforcement of an imbalanced, unrepresentative constitution will do little to promote good governance.

However, the recently developed power and drivers of change approach spearheaded by the United Kingdom's Department for International Development (DFID 2004) has increased awareness of the importance of understanding the constitution and constitutional reform processes and their relevance to development and poverty reduction. The approach involves gaining a deeper understanding of the broader political, social, cultural, and economic issues at play in a country; the power relationships between players and at the societal level; and the incentives of these players to affect or impede change. Analyzing the constitution and constitutional reform processes is increasingly seen as an integral part of any country-specific drivers of change analysis.

Constitutional reform may seem to be a radical change, but it can be fundamental not only for promoting good governance today but also for enhancing future capacity development efforts (Grindle 1997, Schneider and Heredia 2003). The choices available for constitutional reforms are many, but despite the wide array of options available, reform is not easy to design: While the institutional choices significantly affect policy outcomes and the quality of governance, the constitutional framework will claim legitimacy and broad respect only if the major political and social players in each country take ownership of the process and achieve a consensus on the basic rules. Support for desirable institutional choices and a process that lends legitimacy to the choices are both crucial, and must be carefully balanced. Reformers must first shape institutions that address governance needs raised by local political culture and conditions. They must then introduce the reforms through an inclusive and participatory process that gives them legitimacy.

Importance of process

When a country decides to reform its constitution, many questions will arise, relating more to process than to content. Typical, though far from the only, questions are the following: Should the constitution be amended or completely rewritten? Who will draft it? How will they be selected? How much public participation is desirable? Who will decide whether to accept the final draft?

Recent constitution-making in Africa, Asia, and Eastern Europe shows that the process of constitutional reform matters significantly—first to the legitimacy the document can claim, and second to the final content. The process is as important as the outcome.

Until 1990, the process was mainly led by experts and the elite. Today, electing the members of a constitutional convention and ratifying the text by referendum, public hearings, media campaigns, survey research, and solicitation of individual comments increasingly make the public part of the process. Still, countries differ significantly on how much the public participates.

- In South Africa, over two million public submissions in 2 years were received.

- In Thailand, the constitutional drafters went out to the provinces to conduct public hearings and administered scientific surveys to guarantee public input.
- The current constitutional reform process in Indonesia has given only lukewarm support to the demands of civil society groups for greater involvement. So far, the process has been confined to parliament.

Whoever is in charge of the process will try to shape the outcomes to its own interests. Given this scenario, a critical choice is to determine whether the drafting should be left to parliament or an independent group. Questions on how to organize the process can become highly contentious. That is why constitutional reform in the Philippines has stalled. For years, politicians have pushed for a special parliamentary constitutional convention; civil society groups take a firm stand for an independent constitutional assembly. Both sides have strong arguments. Politicians are the elected representatives of the people and have the infrastructure to get the job done faster and at lower cost. Civil society groups point to a contradiction in leaving the reform process to those who are to be reformed.

If the choice is an independent assembly, the next question is how to select its members. Appointment makes it possible to assemble a group of (ideally) respected and highly competent drafters quickly, but it can raise questions of legitimacy. Popular election has higher legitimacy but bears the risk that political partisanship and money politics will interfere, at the cost of losing expertise. The important questions on the process involve trade-offs: An independent drafting assembly and substantial public participation are time-consuming and costly, for instance, but they greatly enhance the legitimacy of the constitutional order.

Importance of institutional choices

Whatever the process, constitutional drafters must make difficult institutional choices that will have far-reaching consequences for governance. Their ability to make and evaluate the effects of these decisions has been greatly enhanced by *institutionalism*, a new field of political science research that focuses exclusively on how institutions affect policy outcomes. The literature covers such wide-ranging topics as the merits of presidential versus parliamentary forms of government and their implications for governmental stability and effectiveness (Lijphart 1992); the impact of sub-institutional arrangements like federalism, judicial review, or the electoral system on economic or democratic performance (Lane and Ersson 2000); and the importance of constitutional agencies of accountability (e.g., anticorruption commissions, election commissions, ombudsman offices, and supreme audit institutions) for achieving better democratic governance (Schedler et al. 1999). At the same time, it cautions against assuming that institutional arrangements necessarily work the same way everywhere. Local social structure and cultural norms are powerful factors that affect choices about institutions. Skillful constitutional engineering adapts institutions to local circumstances; that is easier when the process of drafting the constitution is highly inclusive. Here again, the process and the content choices go hand in hand.

Case study: designing good governance in Thailand

Thailand's 1997 constitutional reform is a particular interesting case study for present and future reform efforts in the region because it demonstrates how constitutional drafters tried to address governance deficiencies through institutional means while employing a highly innovative process for drafting itself.

Process. Thailand's constitutional history has been volatile. Between 1932 and 1996, a total of 15 constitutions were drafted, yet throughout the period questions of how best to draft the constitution were minimal. Most constitutions were imposed without much consultation with the public. Only when demands for democratization gained momentum in the early 1990s and middle-class players and civil society groups pushed for a new democratic constitutional framework did process-related questions take center stage in the public debate, primarily because parliament's efforts to change the constitution were seen as insufficient.

Civil society groups pushed successfully for a drafting mechanism that was independent of parliament. An independent drafting body of 99 members was to be made up of 23 experts appointed from universities and 76 delegates elected to represent the provinces. Parliament's role was to select the expert drafters and approve the final draft. It could not make changes. If it did not accept the draft in its entirety, a public referendum would be held.

The Public Relations Subcommittee of the Constitutional Drafting Assembly reported that in 6 months, close to a million individuals directly participated, along with over 300 professional and nongovernment organizations. The unprecedented degree of public consultation not only enhanced the legitimacy of the draft, but it also created public pressure for parliamentary approval.

In retrospect, the Thai experience offers two important lessons.

- (i) Sweeping institutional change that addresses corruption and political accountability is possible only when drafters are insulated from the political class and can generate public support through public participation.
- (ii) Tying political players into the process, though giving them clear limits, enhances their acceptance of the constitutional framework.

Institutional choices. Faced with a history of governance problems related to weak and unstable civilian governments, repeated military interventions, and persistent corruption, the drafters of the 1997 Thai constitution sought clearly to enhance elements of good governance.

The **accountability** of office holders was increased by strengthening the separation of powers and the checks and balances in the political system. New judicial institutions, such as the constitutional and the administrative courts were created to strengthen the judicial branch and allow it to review legal and administrative acts. To clarify the roles and powers of the executive and legislative branches, members of parliament (MPs) may not interfere with appointments of civil servants; they also must give up their seats in parliament if they join the cabinet. A bicameral structure of parliament with different terms and election cycles for senators and members of the lower house further strengthens checks and

balances. Horizontal oversight agencies were constituted as independent constitutional bodies, most notably the State Audit Commission, National Human Rights Commission, the National Counter-Corruption Commission (NCCC), the Election Commission (EC), and the Ombudsman.

The **predictability** of the political system was enhanced by providing for the greater stability and efficiency of institutions and by strengthening elements of a rule-based system. Disincentives have been placed for party switching and politically motivated censure motions. For instance, MPs must be members of the political party for which they intend to seek election for at least 90 days before they declare their candidacy; given the requirement to hold elections within 60 days after the dissolution of parliament, the prime minister can effectively prevent disaffected MPs from standing for another party in the next elections. To further increase stability, MPs who wish to bring censure procedures must first call for a "constructive vote of no confidence" against the prime minister and then file a case with the NCCC, effectively limiting political misuse of these measures.

The 1997 Thai constitution also seeks to strengthen the basis for a rule-based system. New judicial institutions, such as the Administrative and Constitutional Court, are given specific jurisdiction over matters of maladministration or constitutional infringements. A National Human Rights Commission has been created. Most important, a broad catalogue of individual, group, and community rights and civil liberties seeks to restrain state activity and create space for civil society. Press as well as educational and academic freedoms were reinforced and traditional communities now have the right to preserve their cultures and to work with local authorities in preserving and managing local resources.

Several constitutional provisions were also introduced to enhance the **transparency** of the political process, particularly on vote buying and corruption. Parliamentarians may no longer be given state concessions or monopolies. Ministers must transfer their corporate holdings into blind trusts. Cabinet ministers and senior bureaucrats must file asset and liability declarations upon assuming office, upon leaving office, and one year later. The NCCC is specifically empowered to investigate and charge any official suspected of having unexplained wealth. Similarly the EC regulates both private and state support, whether in the form of cash or other assistance, to political parties. Vote buying is made more expensive by compulsory voting, absentee voting, and extension of the franchise to Thai citizens residing in foreign countries; centralizing the vote count seeks to stem attempts to influence the counting procedure.

Finally, the constitution also enhances the **participation** of Thai citizens in the political process through public hearings and referendums. Even more progressive, it allows 50,000 eligible voters to submit a petition to the president of the National Assembly to consider a draft bill regarding Chapters 3 (Rights and Liberties) and 5 (State Policies), thus bypassing both the bureaucracy and political representatives. It permits a similar number of voters to ask the President of the Senate to remove from office certain senior officials on charges of corruption.

Probably the most ambitious effort to increase public participation is the new chapter on decentralization, which states that "all local government organizations shall enjoy

autonomy in laying down policies for their governance, administration, personnel administration, and finance and shall have powers and duties particularly on their own part (Article 284)". While this will be phased in gradually, it will fundamentally change the traditionally centralized nature of governance in Thailand.

The number of new institutions and of other provisions targeted at good governance clearly reflects the belief of Thai constitutional drafters in the power of institutional design to improve governance. It seems likely that these changes support the marked improvement in Thai Governance indicators noted by the Freedom House Index and the World Bank since the constitution came into force in 1997. Furthermore, since 1997, no Thai Government has been brought down by a coup or a vote of no confidence; and in 2005, Thailand constituted the first single-party Government in its history, providing unprecedented stability.

Yet Thailand also shows that new institutions face resistance from established interests and need time, public support, and, above all, good leadership to carry out their constitutional roles. Whether good governance emerges from constitutional reform is crucially dependent on how well new institutions perform initially and how well politicians and the public accept the new constitutional rules—something that usually occurs painfully over time. However, an open and transparent drafting process, as well as good institutional choices, may significantly enhance the chances for improved governance.

Recommendations

In conclusion, the following are some recommendations for external players interested in supporting constitutional reforms.

- *The process matters as much as the actual outcome.* Who is drafting and how much public participation is involved affect not only the legitimacy of the document but also its institutional outcomes. A good starting point for further investigation is the best practice guidelines for constitution-making articulated in the Durban statement of the Commonwealth in

1999 (see www.humanrightsinitiative.org/programs/ai/const/india/practices.htm)

- *Constitutional rules matter.* The form of government (presidential versus parliamentary, bicameral versus unicameral), unitary or federal structure, choice of electoral system, and creation of horizontal agencies of accountability, to name only a few, all shape the behavior of political players. Institutions not only can affect the quality of democratic governance but also can lend themselves to certain policy outcomes. It is, hence, important for drafters and the wider public to be well informed about how different constitutional rules would affect the process and outcomes of governance.
- *Constitutional engineering, while a powerful tool for improving governance, must be adapted to local circumstances.* To be lasting and effective, institutional arrangements must reflect a country's own history, social structure, and cultural norms and values. The ultimate goal must be to create a culture of constitutionalism that links better governance to the formal constitution. To achieve this, national stakeholders must feel some ownership of the reform process, the public must consider the institutional outcomes legitimate, and reform coalitions must be maintained beyond the period of drafting.
- *Interventions in the constitutional reform process must be chosen carefully.* Constitutional reform is a unique opportunity for external players with limited resources to have major impact. Yet different reform stages require distinct intervention strategies.
 - Where constitutional reforms are now being planned, fostering national dialogue and creating reform coalitions can ensure an inclusive and transparent constitutional reform process.
 - Where constitutional reforms are already in process, the reform process can be facilitated by providing expert advice on reform options, offering insights into the experience elsewhere, and ensuring broad-based participation.
 - Finally, where there is a new constitution, laws must be put in place to make it work, and capacity must be built into the new institutions.

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