



CONSTITUTIONAL REFORM

1.1 Overview

Too often, people complain that they have good laws, but they are poorly implemented. At ICLAD, we believe there is no such thing as a good law poorly implemented. A good law is self-implementing. If a constitution looks good on the books, but is not being upheld, or fully implemented, then it may be necessary to amend the constitution to ensure that the state's institutional structure (including its systems for selecting leaders, sharing power, developing policies, and monitoring state action), makes sense in light of country-specific resources, constraints and attitudes. Furthermore, effective constitutional provisions are designed to address very country-specific problems.

ICLAD's affiliates have served as advisors to constitutional drafting, assessment and reform initiatives in numerous nations. However, our constitutional work extends beyond the constitutional development and reform process. Many countries are not seeking to revise their constitutions but, rather, to enforce their provisions. In these countries, we assist colleagues in understanding how to use law instrumentally to realize constitutional precepts and to ensure that the constitution reigns supreme.

1.2 Previous Experience

ICLAD-affiliates have drafted, participated in drafting, or advised people working to reform the constitutions of Namibia, a South Pacific country (on-going/sensitive), and Iraq, respectively. In addition, ICLAD-affiliates have published a number of peer-reviewed articles on constitutional drafting and reform. In particular, see two of Bob Seidman's articles: "Constitutional Limitations on Administrative Law in Nigeria," 2 Nigerian L. Rev. 386 (1965) and "Constitutions in Independent Africa: Form and Legitimacy," Wisc. L. Rev 83 (1969). These articles reflect a theoretical approach to the constitutional drafting process that remains at the core of ICLAD's unique approach to Constitutional Reform to this day.

In 2002, ICLAD's founders participated in the United States Institute for Peace's year-long review of constitutions in a variety of developing countries, which focused on identifying constitutional provisions likely to foster good governance and effective development programs. Participants presented papers relating to specific countries' constitutions and experiences dealing

with questions ranging from issues of federalism to how best to engage community participation in democratic processes to protection of human rights. The Seidmans' contributions to this process also inform our on-going constitutional reform work.

More recently, several of ICLAD's board members, advisors, consultants and research assistants were involved with the Iraqi Constitutional Commission on a variety of levels. ICLAD supported the work of the Iraqi Constitutional Commission by providing trainings in Iraq and by generating a compilation of papers that was translated into Arabic and circulated among the commission members. Our research focused on assessing country-specific facts as a basis for designing constitutional provisions pertaining to: elections (to prevent sectarian rifts), economic development, oil revenue distribution (to promote general welfare and reduce sectarian animosities), and to develop a framework which not only recognized human rights, but which would promote the realization of those rights. The papers were well received, and were referenced during the drafting process. ICLAD-influenced provisions appear in various drafts of the Iraqi Constitution. ICLAD's strong theoretical and practical emphasis on providing for the independence of the judiciary proved persuasive: the Iraqi Constitution includes provisions to protect the independence of the judiciary. Several ICLAD-affiliates spent a significant amount of time working with the Constitutional Commission in Iraq.

We frequently work with colleagues who are interested in developing systems to ensure that constitutionally guaranteed rights, and outlined procedures, are followed. We have also worked with colleagues who live under constitutional dictatorships, and are interested in examining mechanisms for constitutional reform. We are currently in the process of developing a course on Constitutional Reform.

Specific issues of constitutional drafting/reform on which we have consulted include:

- Political parties, elections & representation
- Revenue sharing/distribution within a federal system
- Safeguarding the independence of the judiciary
- Establishing law reform commissions
- Defining federal vs. local powers
- Devising substantive and procedural provisions pertaining to legislative drafting
- Drafting provisions to reconcile state and religious law

1.3 ICLAD's Approach

Respecting Local Responsibility for Institutional Choice

Paradoxically, constitutional framers/reformers who have not been exposed to a broad survey of comparative institutions can replicate familiar institutions that perpetuate existing problems, while those who have been exposed to such a survey (through foreign legal training or through the advice of foreign consultants) can choose institutions that are incoherent, ill-suited to solving the country's local problems, or likely to empower interests enshrined in the country from which the example was borrowed. In either case, constitutional reform is based on factors unrelated to the proposed institutions' likely effects in *this country at this time*. Either approach can preserve the status quo or even exacerbate its challenges.

Instead, ICLAD urges constitutional framers/reformers to begin by identifying their country-specific challenges and interests and considering what problems they seek to resolve. Because ICLAD's approach focuses local framers/reformers on systematic patterns of specific behavior that have proved problematic, it provides a criterion for assessing transparently whether an institutional choice would prove likely to alter that behavior pattern. In short, framers/reformers can decide whether an institution that was effective elsewhere or in the past would address their present needs, or whether a locally devised institutional innovation is appropriate.

This dialog requires time; a rushed process inevitably hampers the effectiveness of new institutions. However, because this approach respects the insight of framers/reformers into their own country's problems and opportunities, and provides them with a straightforward empirical framework for assessing whether institutional choices will solve those problems, it reduces unproductive modes of dialog.

Improving on Rights-Based Approaches

Rights-based constitutional drafting often creates a set of duties and liabilities that may be enforced through the courts. However, reliance on courts necessarily privileges interests with the capacity to prevail in the courts. Additionally, rights-based approaches often promise ends that government cannot meaningfully accomplish in a developing context, making it difficult to hold government accountable for upholding the constitution's requirements.

Instead, ICLAD urges constitutional framers/reformers to identify actors whose patterns of behaviors have threatened the rights these framers hope to enshrine. Instead of drafting in rights-based language, ICLAD's approach guides framers/reformers in devising concrete commands, permissions, or prohibitions addressed to these specific actors whose behaviors undermine others' rights. Such provisions might address the behaviors of government officials (the

executive, the legislature, the civil service), of military authorities, or of social-economic elites, depending on the specific rights framers/reformers seek to uphold.

Ensuring Enforcement of Constitutional Provisions

Under many contemporary drafting/reform approaches, few resulting constitutional provisions are self-executing. Thus, from a positivist perspective, many constitutions are not really law, but aspirational statements. This ambiguity is augmented by the fact that no centralized enforcement mechanisms or institutions exist (or effectively exist).

Instead, ICLAD urges constitutional framers/reformers to draft constitutions that do more than merely stating what rulers hope will occur or what will placate the populace into believing that the government will uphold certain ideals. Effective constitutional drafting goes beyond classical constitutional theory (with its emphasis on appropriate checks and balances) and charters institutions that affirmatively enable citizens to ensure enforcement (for example, a constitutional commission).

Balancing Needs for Affirmative Government Action with Needs for Limits on Government Action

Classical constitutional theory emphasizes the need to limit governmental power as a means of preventing corrupt or abusive behavior by government elites. This approach relies on a neutral state, democratic elections, lines between arenas of governmental power and private rights, checks and balances, and the Rule of Law. Contemporary theories arising from a critique of the classical approach argue that the state is never neutral; elites have disproportionate influence that is reinforced by institutions, structures, and processes that elites can manipulate (e.g. electoral districts are not drawn in value-neutral ways; the civil service can perpetuate interests even when new political forces prevail). Instead, these approaches emphasize the need for affirmative state action to remedy inequities and injustices.

ICLAD urges constitutional framers/reformers to identify the actors whose patterns of behaviors will undermine the functioning of government in ways that respect the rights of all citizens—whether these actors are official, social-economic, or otherwise. Framers/reformers can then make institutional choices that restrain official behavior as necessary, while empowering government to restrain other actors whose behaviors impede on just governance.

Constitutional provisions to ensure popular participation in on-going governmental decision-making can help prevent state actors from developing institutional biases towards one class or region. These provisions might include open governmental processes; easy recall of elected representatives; strong local government perhaps empowering constituencies to bind their representatives on particular issues; and ensuring maximum feasible participation by citizens and elected representatives both in actual administration and oversight. Above all, framers/reformers

must systematically ask, “What are the dangers of excessive power by a select group of individuals, and how can the state limit these dangers?”

1.4 How ICLAD Supports Constitutional Drafting/Reform Processes

a. Devise Mechanisms that Promote Broad Participation in the Drafting/Reform Process

Frequently, the constitutional drafting and reform process remains solidly in the hands of the governing elite. Inviting broad participation allows previously marginalized citizens to consider what role the state should play encourages them to see the state in a new light: as a set of institutions that can be leveraged to obtain communal objectives, rather than as an apparatus for oppression. In areas emerging from oppressive regimes, it is important to build a sense of the legitimacy of state institutions, and to teach people from diverse parts of the country, interests, economic backgrounds, etc. how to engage with governmental officials to address concerns (particularly those of traditionally disadvantaged groups) through non-violent means.

Additionally, if only the elite are consulted during the constitutional drafting process, the resulting constitution may protect the rights and interests of the elite, often at the expense of already disadvantaged individuals and communities. This is obviously inequitable, but it also exposes elites to hazards over the longer term, as citizens grow impatient with unjust or ineffective governance.

Broad participation guided by a problem-solving framework allows reformers/drafter access to facts and logic that will help them critically assess, and improve, proposals. It ensures the possibility of a critical review of proposals by people whose interests might be adversely impacted by the proposal. ICLAD has long experience in assembling diverse groups of stakeholders and facilitating productive discussions centered on solving problems through law.

b. Collaboratively Identify Problems and Challenges in Concrete Terms, and Devise a Reform Process

We begin the process by asking reformers to identify the main challenges a society is facing. Then, constitutional drafters/reformers devise a reform/drafting process that will optimize the likelihood that the necessary solutions will be developed (in detail) and adequately implemented, monitored and evaluated.

In order to ensure the resulting constitutional system has a high likelihood of achieving the intended outcomes, we systematically call on reformers to consider how the different members

of the constitutionally-formulated institutions are likely to act.¹ Understanding how the country's governing institutions have historically functioned, and why people behaved as they did in their previous positions, is key to predicting how people will behave in their future roles.²

These observations highlight the need to marry a constitutional drafting/reform program with corresponding programs to retrain civil servants, strengthen civil society and the media, and work with political parties to prepare them to fulfill their constitutionally envisioned function.

c. Determine the Need for Constitutional Reform vs. Legislative/Administrative/Judicial Reform

Many of our international colleagues express frustration that constitutionally conferred rights are not realized, procedural protections are ignored, and the constitutionally envisaged systems of checks and balances appear compromised.

ICLAD has responded to these concerns in two ways. First, we ask reformers to consider the type of society, and institutional relationships, that their existing constitution was designed to create. What types of problems plagued the governance structure before the constitution was written? How did these deficiencies adversely affect society? They then identify a problem that persists, and is not being effectively addressed, despite the constitutionally enshrined protections (see (b) above). They determine what governmental actors are doing that is perpetuating the problem and what they are doing to identify and address the problem. Once we identify ineffective responses to the problem, we explain the causes of problematic actions by administrative, legislative and judicial officials in light of all of the legal and non-legal factors influencing their behavior.

In many cases, it is possible to respond effectively to governmental unconstitutionality by assessing and amending the jurisdiction's laws and regulations to ensure that they are effectively implementable. Frequently we find that a law has failed to transform the behavior of

¹ For example, if the constitution calls for a legislative body to assess legislation on a wide range of issues annually, what is the legislative body likely to do? Is each member going to read each bill cover-to-cover, subject its provisions to close scrutiny to ensure they are factually-supported and likely to elicit the desired changes, and propose amendments to improve the bill's probable impacts? Are legislators likely to vote according to whether/not they support spending money on a particular topic, without reading the proposed bills at all? Are legislators likely to rely either on each other, relevant ministries, or on interest groups, for suggestions about how they should vote on bills outside areas of personal expertise? In short, will legislative review draw upon the diverse backgrounds of the different legislators, or will legislators simply defer to the ministries, and to colleagues with vested interests in allocating resources to a specific issue/constituency, without critically reviewing whether the proposal reflects a wise use of scarce state resources, has a high probability of working as desired (and indicated), or will result in adverse consequences requiring mitigation?

² For example, civil servants continue to engage in the same types of behaviors, despite a regime change, unless policy makers and key officials outline new institutional relationships, clarify new responsibilities, and create staff retraining and oversight mechanisms that will help identify, and address, instances of non-compliance with the new system.

governmental officials because neither the law nor the implementing regulations considered the nature and causes of the officials' problematic behaviors. A socially transformative law must break an official out of problematic behavioral patterns by ensuring that the official possesses necessary skills, resources, legal authorization and understanding.

In some cases it is necessary to revise the constitution itself. These cases primarily arise after a conflict, when fundamental problems in representation arise.³ While a constitution is an intrinsically intransitive document, it should, like any other framework law, contain provisions to ensure that subordinate laws are drafted to give effect to its purposes. An effective constitution establishes the criteria and procedures that policy-makers must follow in developing new laws and regulations, and in interpreting the law. Furthermore, a constitution should establish mechanisms to monitor progress towards realizing guaranteed rights and towards achieving a just and equitable society and to suggest new laws and governance systems, as needed, to improve governmental efficacy.

To determine what level of reform is needed, ICLAD guides reformers in examining

- mechanisms for constitutional and statutory interpretation;
- systems of “checks” ensuring laws do not actively violate constitutional provisions, and how they are working in practice; and
- systems for ensuring that the government takes prioritized, affirmative action to realize constitutionally-guaranteed rights, and how those systems are working.

d. Prepare for Drafting/Reform by Learning Problem-Solving Tools, Resources, and Techniques

Organizing a constitutional technical assistance program around a problem-solving framework empowers country nationals to use law instrumentally to address their problems. The skills that can be conveyed to lawmakers during the constitutional drafting process will enable them to develop the effectively implementable policies they will need, on an on-going basis, to address national needs.

Using the ROCCIPI tool, drafters/reformers explore the legal, economic, social, and ideological causes of the nation's most persistent social problems, and identify the type of solution needed to address the problem. Rather than developing a detailed solution (as the group would do in a standard legislative drafting project), the group focuses on identifying the constitutional causes

³ In newly independent and post-conflict states it is frequently necessary to revisit the constitution itself in order to rectify power imbalances that led to conflict. When any new government comes into power, there is a “fatal race” between their desire to address social problems and their capture by the seemingly intractable forces of the pre-existing system. Unless we examine the repetitive patterns of behavior that characterized the previous regime, we are, to be trite, doomed to repeat them. Even when looking at a “new state”, it is important to pay close attention to the preceding laws and governmental structure.

of the problem, examining how the constitution laid out a scheme for detecting and addressing such problems, and explaining why the constitutional protections did not work in light of a diverse array of legal and non-legal factors. This process helps the group to understand the way local customs, economic and technological constraints, etc. affect the way a constitution will work in the country, and provides the constitutional drafters with a framework for assessing the suitability of constitutional provisions for structuring state institutions, and guiding their actions, to ensure that pressing needs are effectively addressed in the future.

e. Evaluate Comparative Law and Experience Critically When Considering Institutional Solutions

The first step in evaluating comparative law and constitutional experience is to explain how they have worked in the jurisdictions that have adopted those models.

Next, ICLAD guides reformers in identifying country-specific factors that could undermine the efficacy of the different models if adopted. A constitution shapes state development by outlining the substantive and procedural parameters of state action. A constitution typically contains provisions expressly obligating the state to perform certain services, provisions empowering the government to act in a range of cases (given adherence to specified criteria and procedures) and some absolute constraints on state action. A constitution also guides future state action by specifying which branch of government or level of government will make decisions on which types of issues, via what processes. While all countries share some common objectives (i.e. maintaining security; ensuring peaceful transitions of power; providing a mechanism for peaceful, fact-based conflict resolution; ensuring the equitable implementation of laws; establishing an economic infrastructure within which people can meet their needs; etc.), countries face different challenges in achieving these objectives. A constitution must be rooted in a solid understanding of the nature, and causes, of the country's dominant conflicts – and its historic institutional process for addressing those challenges.⁴

⁴ ICLAD rejects the notion that law can be transferred between jurisdictions. It is often useful for drafters in one jurisdiction to explore how other jurisdictions have addressed similar problems, and with what results. However, all too frequently donor agencies send international legal experts out to lecture about their own legal systems. The Iraqi Constitutional Commission, for example, was subjected to a seemingly endless roster of experts, each of whom said, in essence, "in our constitution, we have 'x' provision." While lectures on comparative law are edifying, they are really only useful after the constitutional commission has identified which problem they need to address, identified the problematic behaviors, and causes of those problematic behaviors, and probable state actions to change those behaviors in sufficient detail to enable the commission to begin thinking about which types of constitutional provisions are likely to facilitate the development of the needed types of programs and to ensure that those programs are having the desired impacts. The commission can only begin considering constitutional provisions (including using comparative law to their advantage) after identifying the key issues the state needs to

f. Assess Proposed Solutions and Draft Constitutional Provisions or Amendments

ICLAD trainers support the work of constitutional drafters by guiding the drafters through the process of identifying the types of institutions that are logically the best suited for safeguarding constitutional supremacy (given the country's history, resources and constraints) and resolving the social problems identified. Through the problem-solving framework, drafters/reformers select institutions from other countries only insofar as the evidence suggests these would be effective.⁵

While teaching technical drafting skills as needed, ICLAD emphasizes the need for effective transitional provisions. The challenge is to keep government operational while reforming its institutions fundamentally.⁶

Finally, ICLAD guides drafters/reformers in including institutions that have the authority and capacity to ensure that the constitution's provisions are enforced through monitoring, evaluation, and reform. We help policy makers design new administrative and judicial procedures, monitoring bodies, and law reform entities that will help ensure that implementing bodies carry out the constitution's aims.

address, and thinking through the types of actions the state will probably need to take (or coordinate) in order to orchestrate the desired institutional transformations.

⁵ During the recent constitutional drafting process in Iraq, a process in which ICLAD participated, the commissioners had access to a large number of experts in constitutional law. Several of these experts flew into the region, and explained their constitutional systems to the Iraqis. Pretty soon, the experts began to notice that the Iraqis were simply ignoring their papers. What went wrong? Two things: first, the expertise was not integrated seamlessly into the constitutional drafting process. The Iraqis were doing their work, then attending academic lectures. What was the connection? Second, there was no framework for assessing empirically which option to choose. Just go with the most forceful advocate? How to identify how the different systems would work in Iraq?

⁶ As ICLAD board member Robert Seidman writes, "running an educational system while desegregating and redesigning its curriculum; a health system while redirecting its main thrust from curative to preventive health delivery, an army and police force, while transforming them from weapons against the people into the opposite."