Constitutional Reform and Citizenship: Context and Challenges

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Democratic Progress Institute

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Foreword

DPI aims to foster an environment in which different parties share information, ideas, knowledge and concerns connected to the development of democratic solutions and outcomes. Our work supports the development of a pluralistic political arena capable of generating consensus and ownership over work on key issues surrounding democratic solutions at political and local levels.

We focus on providing expertise and practical frameworks to encourage stronger public debates and involvements in promoting peace and democracy building internationally. Within this context DPI aims to contribute to the establishment of a structured public dialogue on peace and democratic advancement, as well as to create new and widen existing platforms for discussions on peace and democracy building. In order to achieve this we seek to encourage an environment of inclusive, frank, structured discussions whereby different parties are in the position to openly share knowledge, concerns and suggestions for democracy building and strengthening across multiple levels. DPI's objective throughout this process is to identify common priorities and develop innovative approaches to participate in and influence the process of finding democratic solutions. DPI also aims to support and strengthen collaboration between academics, civil society and policy-makers through its projects and output. Comparative studies of relevant situations are seen as an effective tool for ensuring that the mistakes of others are

not repeated or perpetuated. Therefore we see comparative analysis of models of peace and democracy building to be central to the achievement of our aims and objectives.

Questions of constitution building and constitutional reform are of paramount importance, particularly when the constitution making process arises in the aftermath of violent conflict or as a transitional arrangement in post-conflict societies. This paper aims to examine the nature of constitution building and constitutional reform. With thanks to Edel Hughes,[1] the author of this paper.

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1 Senior Lecturer at University of East London. Prior to joining the University of East London, Dr. Hughes was awarded an LLM and PhD degrees in International Human Rights Law from the National University of Ireland, Galway. Dr. Hughes was a lecturer in law at the School of Law, University of Limerick, between 2006 and 2011. She is the author of numerous publications, including on International Criminal Law.

Introduction

The constitutional State has since the 18th century been portrayed as the predominant means of protecting the rights of the citizen and establishing the democratic functioning of the State. Constitutions, however, it has been noted, are more than just juridical texts or a normative sets of rules; they constitute 'an expression of a cultural state of development, a means of cultural expression by the people, a mirror of a cultural heritage and the foundation of its expectations.'[2] That being the case, questions of constitution building and constitutional reform are of paramount importance, particularly when the constitution making process arises in the aftermath of violent conflict or as part of a transitional arrangement in post-conflict societies. This paper aims to examine the nature of constitution building and constitutional reform. It will do so through the lens of three relevant case studies; Ireland, Turkey, and South Africa, and begins with some general points on the nature of constitutionalism and the technicalities of the constitutional building/reform process. Particular reference will be made to the involvement of civil society actors in the constitution making process.

2 *P Häberle 'The Constitutional State and Its Reform Requirements' (2000) 13.1 Ratio Juris 77-94, 79.*

I: Constitutionalism and Constitutional Building/Reform Processes

The notion of constitutionalism – that the constitution should define a set of norms that would limit the power of government and enshrine the rights of the citizen – has its roots in the United States Constitution and the French Declaration of the Rights of Man and of the Citizen. The modern global trend towards constitutionalism began after the end of World War II with the adoption of the Japanese Constitution and the West German Basic Law and continued with 'the embrace of constitutionalism in Western European countries such as Greece, Portugal, and Spain, which later spread to such Latin American countries as Argentina and Brazil' and was also manifested in the collapse of authoritarian regimes in Central and Eastern Europe in 1989.[3] The 'realization of the spirit of constitutionalism' it is suggested, generally goes hand in hand with the implementation of a written constitution.[4] That said however, written constitutions do not always conform to the ideals of constitutionalism – there are numerous examples of abuses of power occurring under the guise of a written constitution – whereas there may also be instances where the ideals of constitutionalism prevail without the presence of a codified constitution, the United Kingdom providing an obvious illustration.

3 M Rosenfeld 'Modern Constitutionalism as Interplay Between Identity and Diversity' in M Rosenfeld (ed) Constitutionalism, Identity, Difference, and Legitimacy (Duke University Press Durham and London 1994) 3-35, 3.

4 M Rosenfeld 'Modern Constitutionalism as Interplay Between Identity and Diversity' in M Rosenfeld (ed) Constitutionalism, Identity, Difference, and Legitimacy (Duke University Press Durham and London 1994) 3-35, 3.

Whilst the American Constitution and the French Declaration of the Rights of Man and of the Citizen are of enduring influence, modern constitution builders look also to the International Bill of Rights (the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966) for guidance. Henkin usefully delineates seven principles to which drafters of constitutions who seek to observe the fundamental tenets of constitutionalism must adhere. These include the idea that contemporary constitutionalism is based on popular sovereignty – sovereignty is vested in the people and the people alone can establish the system of government and the constitution; a constitution based on the principles of constitutionalism is the supreme law to which the government must conform; constitutionalism requires commitment to political democracy and representative government; commitments to limited government, separation of powers/checks and balances, civilian control of the military, police governed by law and judicial control and independence of the judiciary must be ensured; the government must respect and guarantee individual rights with only legitimate limits placed on those rights; institutions to monitor and assure respect for the 'constitutional blueprint' must function; and constitutionalism may also imply respect for self-determination and the rights of peoples to change/terminate their political affiliation.[5]

5 L Henkin 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects' in M Rosenfeld (ed) Constitutionalism, Identity, Difference, and Legitimacy (Duke University Press Durham and London 1994) 39-53, 41-42.

The demands placed on constitutions are thus complex and given that constitutional reform or indeed constitution design is often a response to the extensive challenges of peace building and reconciliation, the drafting and implementation of new or altered constitutions can be a long and contested process. Clearly, the organisation of constitutional change is vital. In this vein a study conducted by the Netherlands Institute for Multiparty Democracy, the African Studies Centre, and the International Institute for Democracy and Electoral Assistance identifies four distinct phases in the constitutional reform process: the preparatory phase; the awareness raising and consultative phase; the content deliberation and drafting phase and the adoption and implementation phase.[6] The study asserts that constitutional reform processes can be characterised by 'tensions and a wide diversity of views and interests'; it is therefore important during the preparatory phase to create 'solid foundations' which will protect the deliberations from collapsing as a result of these tensions.[7] Whilst the process of constitutional reform invariably differs in each state, the guiding principles for each stage of the process outlined in the study undoubtedly have broad application. It is recommended that the preparatory phase include: a preliminary agreement that would

6 M van Vliet, W Wahiu, and A Magolowondo 'Constitutional Reform Processes and Political Parties: Principles for Practice' joint publication of the Netherlands Institute for Multiparty Democracy, the African Studies Centre and the International Institute for Democracy and Electoral Assistance, available at http://www.constitutionnet.org/files/nimd_arp2012_english_total.pdf (last accessed 16 August 2012).

7 M van Vliet, W Wahiu, and A Magolowondo 'Constitutional Reform Processes and Political Parties: Principles for Practice' joint publication of the Netherlands Institute for Multiparty Democracy, the African Studies Centre and the International Institute for Democracy and Electoral Assistance, available at http://www.constitutionnet.org/files/nimd_arp2012_english_total.pdf (last accessed 16 August 2012). 9.

outline the reasons for constitutional reform, the main objectives and the main actors; a public statement in which political parties would commit to safeguarding the public interest in the process and affirm their commitment to consensus building; an agreement between the main political actors and civil actors on the guiding democratic principles acting as a benchmark for the reform process; an agreement between political and civil actors on the institutional mechanisms and their mandate during the reform process; a commitment by all political parties to adopting the outcome of the constitutional deliberations; agreement by politicians and civil society on the decision-making process throughout the reform process; agreement by politicians and civil society on the roadmap, timeframe, and budget for the process; an enabling environment in which the public can participate in the reform process; agreement on the principal constitutional issues to be presented to the general public; and agreement on the way popular contributions will be analysed and weighted.[8]

What is identified as the second stage of the process is perhaps the most vital in terms of public ownership of the reform process. The guiding principles emphasise the importance of providing the public with: information on the reform process that is both balanced and accessible; an atmosphere in which people feel they can express their opinions on the reform process freely must prevail; civic education

8 M van Vliet, W Wahiu, and A Magolowondo 'Constitutional Reform Processes and Political Parties: Principles for Practice' joint publication of the Netherlands Institute for Multiparty Democracy, the African Studies Centre and the International Institute for Democracy and Electoral Assistance, available at http://www.constitutionnet.org/files/nimd_arp2012_english_total.pdf (last accessed 16 August 2012), 9-10.

programmes on the main constitutional issues; possibilities for ordinary citizens including minority and marginalised groups to participate; a pro-active role for political parties as intermediaries connecting citizens with constitutional content; and opportunities for institutions to monitor the neutrality of awareness raising and consultative efforts.[9]

The third phase encompasses the more technical aspects of the drafting of the constitutional text. This is of paramount importance as clumsily drafted text can lead to potential misinterpretation of the document or indeed trigger further constitutional amendments. Here too the guiding principles are instructive; they stipulate that this phase should include agreement on the following: a deadlock-breaking mechanism should be reached should the ordinary decision-making process fail to resolve competing viewpoints; the level of inclusivity allowing majority and minority groups participate in the reform process; a statement by all parties emphasising that the constitutional deliberations must serve the public good; a decision-making and consensus-building mechanism that enables the bridging of divergent views; transparent feedback mechanisms between participants and the general public during discussions; creating an environment conducive to deliberations where views can be expressed freely; an external monitoring mechanism for the deliberations; institutional guarantees that provide a degree

9 M van Vliet, W Wahiu, and A Magolowondo 'Constitutional Reform Processes and Political Parties: Principles for Practice' joint publication of the Netherlands Institute for Multiparty Democracy, the African Studies Centre and the International Institute for Democracy and Electoral Assistance, available at http://www.constitutionnet.org/files/nimd_arp2012_english_total.pdf (last accessed 16 August 2012), 10.

of autonomy and integrity in the deliberations and limit direct external interference in the process; and input from legal experts to ensure coherence between the constitutional articles agreed on.[10]

The fourth and final phase concerns the concretisation of the adopted changes. In order for this to occur a number of conditions must be met, including: a commitment by politicians that agreements reached during the deliberative phase will be presented to parliament, or to the people in a referendum, and adopted without fundamental changes; monitoring of the adoption and implementation process by groups such as NGOs and the media must be unrestricted; the new constitutional text should be translated into a subsidiary law within a specific timeframe; accountability mechanisms should be in place that allow citizens to hold their representatives accountable for the agreements reached; strategies to educate and inform the public about the final results of the deliberative stage must be in place; and a mechanism to ensure the results of the deliberative stage obtain wide popular legitimacy must be in place.[11]

10 M van Vliet, W Wahiu, and A Magolowondo 'Constitutional Reform Processes and Political Parties: Principles for Practice' joint publication of the Netherlands Institute for Multiparty Democracy, the African Studies Centre and the International Institute for Democracy and Electoral Assistance, available at http://www.constitutionnet.org/files/nimd_arp2012_english_total.pdf (last accessed 16 August 2012),10-11.

11 M van Vliet, W Wahiu, and A Magolowondo 'Constitutional Reform Processes and Political Parties: Principles for Practice' joint publication of the Netherlands Institute for Multiparty Democracy, the African Studies Centre and the International Institute for Democracy and Electoral Assistance, available at http://www.constitutionnet.org/files/nimd_arp2012_english_total.pdf (last accessed 16 August 2012), 11.

In addition to the requisite four stages, the technicalities of the constitution making process should not be underestimated. The process of constitution making, it has been noted, is 'crucial, although not decisive, for its success.'[12] This essentially encompasses a two stage process for the making of the constitution in which the first stage consists of the preparation of a draft, 'often by a body called the constitution commission' and the second stage consists of a debate on the draft, 'first by the general public for a specified period, and then more formally by a constituent assembly type body, which adopts the constitution.'[13] A UN Guidance Note of the Secretary General on assistance to constitution making processes identifies the following as the seminal components of the constitution making process:

- Assessment of the need for a constitution making process;
- High level negotiation between key constituencies leading to an agreement on how constitution making should proceed (establishing a structure and blueprint for the process, including who will be involved in preparing a draft, how they will be selected, how consensus will be built, how the constitution will be adopted, the timeline, and how any disputes that may arise will be resolved;

12 *Y Ghai 'The Constitution Reform Process: Comparative Perspectives' Presented at 'Toward Inclusive and Participatory Constitution Making' 3-5 August 2004, Kathmandu, available at http://www.idea.int/news/upload/Nepal%20-%20workshop%20paper%20-%20Yash%20Ghai.pdf (last accessed 13 October 2012), 4.*

13 *Y Ghai 'The Constitution Reform Process: Comparative Perspectives' Presented at 'Toward Inclusive and Participatory Constitution Making' 3-5 August 2004, Kathmandu, available at http://www.idea.int/news/upload/Nepal%20-%20workshop%20paper%20-%20Yash%20Ghai.pdf (last accessed 13 October 2012), 6.*

- Establishment of a representative body such as a constitutional commission to lead public education and consultation campaigns, and to prepare a draft of the constitution;
- Establishment of a secretariat or other body to support the mandate of the constitutional bodies, in particular with the logistics regarding public education and consultation campaigns;
- A public information and civic education campaign on the constitution making process and the role and implications of the draft constitutions;
- A public consultation process led by the drafting body to gather views and ensure public input in the draft constitution;
- Submission of the draft constitution to a representative forum (e.g. constituent assembly, constitutional convention, Parliament) for debate and to make any amendments;
- Final adoption procedures (e.g. qualified majority in the representative forum, referendum);
- Post constitution making education on the newly adopted constitution and development of a strategy for its implementation.[14]

14 See 'Guidance Note of the Secretary General: United Nations Assistance to Constitution-Making Processes' April, 2009. Available at http://www.unrol.org/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf (last accessed 13 October 2012), 5.

From the examination above we can distil a number of crucial elements that must be present for an effective constitution making/ reform process. Evidently certain minimum conditions must be present in order for the process to get underway; there needs to agreement on basic issues such as the objectives of constitutional change and a commitment in good faith to accept the outcomes of the deliberative process. Civil society input is clearly of paramount importance and whilst legal expertise is crucial to ensure the validity of the text, the drafting process should not be considered the exclusive preserve of lawyers, nor indeed of politicians. All groups in society should be freely able to participate in the drafting/reform process having received the requisite information concerning the process and should do so in the knowledge that their contributions will be valued. Finally, the process must be viewed as a legitimate one and any changes to be made brought before the people in a referendum or before Parliament. The following section will assess the extent to which these principles are followed in practice, through looking at three key case studies.

II: Comparative Approaches to Constitutional Reform

It is axiomatic that the approach to constitution building and constitutional reform will vary depending on the political circumstances of a given State. At times constitution making can be a normal part of a functioning democratic process – a constitutional amendment may be required to facilitate signing an international agreement, for example, – but frequently constitution making is part of a broader political process in which States emerge from a colonial past perhaps, or make the transition from anti-democratic past to a democratic future. And whereas we can offer broad guidance for constitutional design, each situation will demand a distinct approach. This section considers three quite different constitutional arrangements; Ireland, South Africa, and Turkey, though some commonalities are present. All three States are republics and both Ireland and South Africa are former colonies, although South Africa's apartheid history demanded a very particular approach to constitutional design, especially in the area of public participation in the reform process. Ireland and Turkey share a constitutional reform process that is currently underway although as this section will highlight, the demands placed on each process are quite different.

A: Bunreacht na hÉireann: The Constitution of Ireland 1937

Of the three case studies highlighted in this section, the Republic of Ireland is perhaps the most straightforward and its inclusion here is primarily due to the quite interesting reform process that was specified in the current government's programme for government on being elected in February 2011. The current constitution, which came into effect following approval in a referendum on 1 July 1937, replaced the 1922 Constitution of the Irish Free State, to which there was lingering opposition owing to its being circumscribed by the terms of the Anglo-Irish Agreement of 1921 and the requirement that members of the Oireachtas (Houses of Parliament) swear an oath of faithfulness to the British monarch.[15] The 1937 document is socially and morally a reflection of the time in which it was drafted and the influence of the Roman Catholic Church on the drafting process is pervasive. In this regard it has been suggested that the most central figure in the writing of the 1937 constitution was the archbishop of Dublin, John Charles McQuaid[16] and it was described at the time of its drafting as a constitution 'worthy of a Catholic country.'[17] Throughout the drafting process consultations were held with McQuaid and other

15 See JA Murphy 'The 1937 Constitution: Some Historical Reflections' in T Murphy and P Twomey (eds) Ireland's Evolving Constitution: 1937-1997 (Hart Publishing UK 1998) 11-28.

16 See D Keogh 'The Irish Constitutional Revolution: An Analysis of the Making of the Constitution' in F Litton (ed) The Constitution of Ireland 1937-1987 (Institute of Public Administration Dublin 1988)

17 B Chubb The Politics of the Irish Constitution (Institute of Public Administration Dublin 1991) 39.

members of the Catholic clergy on 'moral' questions and the drafters even went so far as to seek approval from the Vatican on the text guaranteeing religious liberty in Article 44.[18] McQuaid, as has been noted, was the 'persistent advisor', writing to Éamon de Valera, who as leader of the government was the architect of the constitution, sometimes up to twice a day with suggestions and views on nearly every aspect of what would become the Irish constitution.[19] Indeed, as the constitution was formulated by one party only – de Valera's Fianna Fáil – it is considered to be an example of a semi-authoritarian constitution, drawing comparisons with that of de Gaulle's Fifth French Republic.[20]

The constitution of Ireland 1937 evidently pre-dates the birth of the United Nations and the 1948 Universal Declaration of Human Rights as well as the Council of Europe and the European Convention on Human Rights. The term 'human rights' is therefore not found in the constitution but Articles 40-44 comprise the section entitled 'Fundamental Rights', which are a reflection of the communitarian vision of society promoted by the Catholic Church in terms of social justice. In reality it offers a relatively limited degree of rights

18 ibid, 33. The original wording of Article 44.1.2 stated 'The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens' whereas Article 44.1.3 stated 'The State also recognises the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution.' These provisions were removed by virtue of the Fifth Amendment of the Constitution Act 1972.

19 J Cooney John Charles McQuaid: Ruler of Catholic Ireland (The O'Brien Press Dublin 1999) 94.

20 See A O'Sullivan and PCH Chan 'Judicial Review in Ireland and the Relationship Between the Irish Constitution and Natural Law' (2006) 15 Nottingham L.J. 18-36, 19-20.

protection, encompassing some personal rights, such as equality before the law and freedom of expression and association, the right to free primary education, protection of the family, freedom of religion and property rights. In addition, the Irish courts have recognised in a series of cases further 'unenumerated' rights, which are deemed to flow from Article 40.3.1.[21] The unenumerated rights include a right to bodily integrity, a right to health, and a right to earn a livelihood.[22]

Given the momentous changes in Irish society since the enactment of the constitution including the decline in influence of the Catholic church, it is unsurprising that the constitution has been the subject of a series of amendments, thirty in total. The 30th amendment was made in May 2012 to allow Ireland join the European Fiscal Compact and at the time of writing a referendum is planned for 10 November 2012 which if passed will enshrine the rights of the child in the constitution. Many of the amendments have been relatively uncontroversial such as the abolition of the lowering of the voting age from 21 to 18 in 1972 and the amendment to allow Ireland sign the Rome statute of the International Criminal Court in 2001. But some issues, particularly divorce and abortion have polarised debate. The tenth amendment bill in 1986, which proposed to remove the prohibition on divorce, was rejected in a referendum and when it was again put to the people in a referendum in 1995 was carried by just over half a percentage point. To date there have

21 The doctrine of unenumerated rights was first recognized in Ryan v Attorney General [1965] IR 294.

22 See G Casey 'The 'Logically Faultless' Argument for Unenumerated Rights in the Irish Constitution' (2004) 22 ILT 230-235.

been five referenda on the question of abortion and the issue would appear to be far from resolved with Ireland maintaining one of the most restrictive abortion laws in the world, despite criticism from the European Court of Human Rights, the Committee on the Elimination of Discrimination Against Women and most recently, the United Nations Human Rights Council at its periodic review of Ireland in October 2011.[23] During the 2011 general election all of the main political parties included constitutional reform in their political manifestos. The Fine Gael and Labour parties that ultimately formed a coalition government following the general election included in its programme for government an outline of specific issues on which it intended to hold referenda and an undertaking to commence a broader review process. It states:

> *Building on the well-established and tested Constitution of Ireland, and decades of judicial determination of rights under that Constitution, we will establish a process to ensure that our Constitution meets the challenges of the 21st century, by addressing a number of specific urgent issues as well as establishing a Constitutional Convention to undertake a wider review.*[24]

The 'urgent issues' included referenda on abolishing the Seanad (Senate) and on amending the constitution to strengthen the rights of children. The broader constitutional review, however, was to encompass a range of issues with a commitment to establishing

23 See S Mullally 'Debating Reproductive Rights in Ireland' (2005) 27 Hum. Rts. Q. 78-104.

24 Fine Gael – Labour Party Programme for Government, 7 March 2011, 16. Available at http://cdn.thejournal.ie/media/2011/03/pfg2011.pdf (last accessed 3 September 2012).

'a Constitutional Convention to consider comprehensive constitutional reform, with a brief to consider, as a whole or in sub-groups, and report within 12 months' on the following issues: review of the Dáil (Parliament) electoral system; reducing the presidential term to five years and aligning it with the local and European elections; provision for same-sex marriage; amending the clause on women in the home and encourage greater participation of women in public life; removing blasphemy from the Constitution; possible reduction of the voting age; and other relevant constitutional amendments that may be recommended by the Convention.[25] The gamut of questions to be considered is thus wide-ranging. In July 2012 the Prime Minister introduced a resolution before Parliament giving further detail of the proposed convention which outlined that it would be composed of 'a representative group of 66 citizens', 33 elected representatives from both parts of the island and an independent chair, with interest groups also being able to make submissions.[26] He noted that in order 'to facilitate as wide an engagement as possible, it is expected that much of the convention's work will be done via a new website which […] will be launched shortly. It is also planned to put the convention's working papers and various submissions on this website and it is intended that plenary meetings of the convention will be webcast live.'[27] It is proposed that the convention will report within two

25 Fine Gael – Labour Party Programme for Government, 7 March 2011, 16. Available at http://cdn.thejournal.ie/media/2011/03/pfg2011.pdf (last accessed 3 September 2012).

26 See D de Bréadún 'Citizens' Convention Plans Due Before Dáil' The Irish Times, 10 July 2012.

27 'Constitutional Convention: Motion' An Taoiseach, Enda Kenny, 10 July 2012, website of the Houses of the Oireachtas, available at http://debates.oireachtas.ie/dail/2012/07/10/00025.asp (last accessed 3 September 2012).

months on cutting the presidential term of office from seven to five years and reducing the voting age from 18 to 17 years, and will also examine the system of election to the Dáil; votes for citizens at Irish embassies abroad; same-sex marriage; amending the clause on women in the home; increasing women's participation in politics; and removing the offence of blasphemy from the Constitution. It will be free to consider other relevant constitutional amendments 'afterwards'.[28] Although yet to be constituted both the composition and scope of the proposed convention has already been the subject of criticism. By excluding, for example, an issue as important as the abolition of the Senate from the remit of the convention and the failure to include any constitutional law experts in the convention, an opportunity, it is argued, has been missed.[29]

Whilst it is perhaps unfair to judge the convention too harshly given that it has yet to get underway, a greater role for civil society groups could arguably have been envisaged from the outset. Coupled with this are unresolved questions over the actual power of the convention. Although the Prime Minister on introducing the motion to establish the convention before Parliament committed to responding to any recommendations made by the convention within four months[30] there appears to be no onus placed on the government to accept the recommendations of the convention.

28 D de Bréadún 'Citizens' Convention Plans Due Before Dáil' The Irish Times, 10 July 2012.

29 See D O'Connell 'Too Much Compromise in Planned Constitutional Convention' The Irish Times 13 August 2012.

30 Constitutional Convention: Motion' An Taoiseach, Enda Kenny, 10 July 2012, website of the Houses of the Oireachtas, available at http://debates.oireachtas.ie/dail/2012/07/10/00025.asp (last accessed 3 September 2012).

The director of Amnesty International (Ireland) was among thirty representatives of equality and human rights groups who signed an open letter to the Taoiseach (Prime Minister) in June of this year urging a meaningful consultation with civil society groups.[31] This participatory aspect of constitutional reform is one of the great successes of the South African process, examined below, and given the Irish process has been engendered not by wont of circumstance but rather by a genuine desire for reform amongst the people and their elected representatives, it would be shameful for the process not to be as inclusive as possible.

31 See 'Appeal Over Constitutional Convention' The Irish Times 27 June 2012.

B: A Society in Transition: The Constitution of the Republic of South Africa 1996

The constitutional arrangement instituted at the birth of modern South Africa at the beginning of the twentieth century ensured the dominance of the minority white population. It was, as has been suggested, doomed from the outset:

> *From its inception the South African constitutional system was in peril. The looming danger stemmed from the failure of the early fathers – they were all men – of the British-based, Westminster-oriented South Africa Act of 1909 to provide for an inclusive democracy. Instead, the Union of South Africa would be governed by whites, even then a minority of the overall population. The writing was on the wall. Over decades the differences hardened into bitter and violent confrontation, played out not only on the South African stage but also, after World War II, increasingly in the council chambers of the world, where the terms of reference were also confrontation, Cold War, East versus West.*[32]

The main features of the South African constitutional regime between 1910 and 1990 have been summarised as including the evolving scheme of apartheid, entrenching the notion of white rule and providing for Afrikaner domination of the political system, resulting in 'more emphasis on 'power' than on 'rights"; formal classification and territorial and spatial separation of 'population groups'; central executive control of government functions regarding

32 D Van Wyk 'Introduction to the South African Constitution' in D Van Wyk, J Dugard, B de Villiers and D Davis (eds) Rights and Constitutionalism: The New South African Legal Order (Clarendon Press Oxford 1996) 131-170, 131.

'white' areas increased resulting in the closing of the representative provincial authorities; attempts at greater decentralization and 'as a result of escalating confrontation between the South African authorities on the one hand, and the 'underground' liberation movements and sympathetic support organizations on the other'; undermining of the rule of law; secrecy in government and corruption amongst public officials; the dissipation of political accountability and parliamentary government; and the development of the philosophy of 'total onslaught' 'following growing isolation from the mainstream of global developments, especially in the field of human rights'.[33]

Given the violence and bloodshed witnessed under this constitutional regime, it was imperative that the new constitutional process include the voices of those who had previously been marginalised and ignored. Indeed the constitution making process is widely acknowledged as playing a vital role in post-conflict peacebuilding. The design of a constitution and the constitution making process can play an important role in the political and governance transition: '[c]onstitution-making after conflict is an opportunity to create a common vision of the future of a state and a road map on how to get there.'[34] Whilst it is perhaps easy to overstate the transformative effect of the constitution making process – after all if peace has not been achieved a new constitution

33 D Van Wyk 'Introduction to the South African Constitution' in D Van Wyk, J Dugard, B de Villiers and D Davis (eds) Rights and Constitutionalism: The New South African Legal Order (Clarendon Press Oxford 1996) 131-170, 133-134.

34 K Samuls 'Post-Conflict Peace-Building and Constitution-Making' (2005-2006) 6 Chi. J. Int'l L. 663-682, 664.

won't necessarily bring peace – the process can help accomplish a number of goals. An ideal constitution making process 'can drive the transformative process from conflict to peace, seek to transform the society from one that resorts to violence to one that resorts to political means to resolve conflict, and/or shape the governance framework that will regulate access to power and resources – all key reasons for conflict. It must also put in place mechanisms and institutions through which future conflict in the society can be managed without a return to violence.'[35]

The history of the conflict in South Africa is a complex one and has been dealt with in numerous studies.[36] For the purposes of this paper it is worth noting that the turning point in terms of the constitutional composition of South Africa is generally identified with the opening of Parliament on 2 February 1992 and the speech of then President FW de Klerk in which he noted that the aim of the government was 'a totally new and just constitutional dispensation in which every inhabitant will enjoy equal rights, treatment and opportunity in every sphere of endeavour – constitutional, social and economic.'[37] De Klerk's speech indicated not just a commitment to a negotiated political settlement and an acceptance of the need for a bill of fundamental rights but also outlined a

35 K Samuls 'Post-Conflict Peace-Building and Constitution-Making' (2005-2006) 6 Chi. J. Int'l L. 663-682, 664.

36 See, for example, B Carton Blood from your Children: The Colonial Origins of Generational Conflict in South Africa (The University Press of Virginia USA 2000) and P van den Berghe South Africa: A Study in Conflict (University of California Press USA 1965).

37 FW de Klerk's speech to Parliament, 2 February 1990, full text available at http://blogs.timeslive.co.za/hartley/2010/02/02/fw-de-klerks-speech-to-parliament-2-february-1990-full-text/ (last accessed 30 August 2012).

number of practical steps which were of great import, such as the legalising of political parties that had previously been banned (including the African National Congress (ANC)); the release of political prisoners, Nelson Mandela amongst them; and the lifting of emergency regulations and restrictions placed on organisations that were sympathetic to the liberation movements.[38] That is not to say that the transition proceeded without incident in the aftermath but de Klerk's speech certainly signalled a change in attitude and an acceptance that negotiation was 'the key to reconciliation, peace and a new and just dispensation.'[39]

It has been suggested that the period between de Klerk's speech in February 1990 and April 1994, when the first negotiated constitution took effect, can be divided into three phases; from 2 February 1990 to the start of the Convention for a Democratic South Africa in December 1991; from the Convention to the start of the multi-party negotiation process in March 1993; and from the negotiation process to 27 April 1994.[40] The first meeting between the leaders of the ANC and the government of South Africa took place at Groote Schuur, Cape Town, on 4 May 1990 and the resulting agreement – the Groote Schuur Minute – was 'the first in a line of documents embodying various agreements

38 D Van Wyk 'Introduction to the South African Constitution' in D Van Wyk, J Dugard, B de Villiers and D Davis (eds) Rights and Constitutionalism: The New South African Legal Order (Clarendon Press Oxford 1996) 131-170, 131.

39 FW de Klerk's speech to Parliament, 2 February 1990, full text available at http://blogs.timeslive.co.za/hartley/2010/02/02/fw-de-klerks-speech-to-parliament-2-february-1990-full-text/ (last accessed 30 August 2012).

40 D Van Wyk 'Introduction to the South African Constitution' in D Van Wyk, J Dugard, B de Villiers and D Davis (eds) Rights and Constitutionalism: The New South African Legal Order (Clarendon Press Oxford 1996) 131-170, 137.

and understandings which became the landmarks of the process leading to the eventual adoption of the 'interim' Constitution at the end of 1993.'[41] The period between de Klerk's seminal speech in February 1990 and the adoption of the interim constitution was punctuated by a number of highly significant events. These included the abolition by Parliament in 1991 of the Land Acts 1913 and 1936 and the Group Areas Act which had reserved 87% of South Africa's land for Afrikaners and the approval by white voters in March 1992 of de Klerk's constitutional reform referendums proposing to abolish apartheid.[42] April 1994 saw the first multiracial elections and the election of Nelson Mandela as President. Despite these pivotal events, the speed at which a full constitution was drafted still surprised many commentators; less than three years after the adoption of the interim document a new constitution came into force in December 1996 which included a comprehensive bill of rights. Additionally, during the time work was underway on drafting the new constitution the Truth and Reconciliation Commission, which was based on the final clause of the interim constitution of 1993 and passed in Parliament as the Promotion of National Unity and Reconciliation Act, No 34 of 1995, was being constituted, with its first hearing in April 1996.[43]

41 D Van Wyk 'Introduction to the South African Constitution' in D Van Wyk, J Dugard, B de Villiers and D Davis (eds) Rights and Constitutionalism: The New South African Legal Order (Clarendon Press Oxford 1996) 131-170, 137.

42 K Cavanaugh 'Emerging South Africa: Human Rights Responses in the Post-Apartheid Era' (1997) 5 Cardozo J. Int'l & Comp. L. 291-334, 292.

43 The work of the Truth and Reconciliation Commission is beyond the scope of this paper. However, there are numerous critical commentaries of the commission's composition and functioning. For an excellent account see P Hayner Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions (2nd edn Routledge London & New York 2011), especially chapter 4.

The new Constitution of South Africa was adopted by the Constitutional Assembly on 8 May 1996. Its drafting had involved close engagement with civil society actors and was described as the 'largest public participation programme ever carried out in South Africa' with the objective of ensuring the final text would be 'legitimate, credible and accepted by all South Africans'.[44] This aspect of the constitution building process – the importance placed on public participation in the process – is one of the distinctive features of the South African constitution building process and is revealed in the text of the constitution itself where numerous provisions reflect the concerns of civil society organisations and interest groups. The public awareness and education campaign instituted by the Constitutional Assembly is in fact cited as one of the most important reasons for the success of the constitution building process.[45] The campaign invoked several strategies, which included holding thousands of public meetings in almost every town and village in South Africa where people were both educated on the process and encouraged to give feedback and make submissions on the content of the new constitution.[46] The meetings were widely advertised and the media was also extensively used to convey information about the process; more than 10 million people a week listened to the constitutional assembly's

44 Explanatory memorandum, Constitution of the Republic of South Africa 1996, as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly.

45 See S Jagwanth 'Democracy, Civil Society and the South African Constitution: Some Challenges'(2003) Management of Social Transformations (MOST) Discussion Paper no. 65, UNESCO, 9, available at http://unesdoc.unesco.org/images/0012/001295/129557e.pdf (last accessed 1 September 2012).

46 C Murray 'Negotiating Beyond Deadlock: From the Constitutional Assembly to the Court' in P Andrews and S Ellman (eds) The Post-Apartheid Constitutions (Witwatersrand University Press South Africa 2001) 103-127, 106-107.

radio show whereas an estimated 160,000 people received a copy of a newsletter entitled Constitutional Talk each fortnight.[47] Additionally, a website was launched to provide information on the constitution drafting process and a constitutional 'talk line' was established which allowed people to make submissions over the 'phone.[48] Taking these initiatives and others into account, an independent survey concluded that approximately 73% of adult South Africans had been reached by the information campaign.[49] It is unsurprising therefore that an impressive 2.5 million written submissions were made to the constitutional assembly.[50]

As noted above, the South African constitution of 1996 reflects the effort and time invested in the public participation process. It is, as has been noted, written in plain gender neutral language; 'it aims to transform society and respond to [South Africa's] history of inequality and oppression' and for that and other reasons has been described as one of the most advanced and progressive constitutions in the world.[51] Chapter I contains the founding

47 C Murray 'Negotiating Beyond Deadlock: From the Constitutional Assembly to the Court' in P Andrews and S Ellman (eds) The Post-Apartheid Constitutions (Witwatersrand University Press South Africa 2001) 103-127, 106-107.

48 C Murray 'Negotiating Beyond Deadlock: From the Constitutional Assembly to the Court' in P Andrews and S Ellman (eds) The Post-Apartheid Constitutions (Witwatersrand University Press South Africa 2001) 103-127, 106-107.

49 C Murray 'Negotiating Beyond Deadlock: From the Constitutional Assembly to the Court' in P Andrews and S Ellman (eds) The Post-Apartheid Constitutions (Witwatersrand University Press South Africa 2001) 103-127, 107.

50 G Houston, I Liebenberg, V Ramaema, W Dichaba and R Humphries 'Public Participation in Legislative Processes' (1999) Human Sciences Research Council Work in Progress Seminar Paper, 26.

51 S Jagwanth 'Democracy, Civil Society and the South African Constitution: Some Challenges'(2003) Management of Social Transformations (MOST) Discussion Paper no. 65, UNESCO, 9, available at http://unesdoc.unesco.org/images/0012/001295/129557e.pdf (last

provisions of the constitution and states that the Republic of South Africa is one sovereign democratic state founded on the values of human dignity, the achievement of equality and advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the Constitution and the rule of law, and universal adult suffrage.[52] It also provides for a common national South African citizenship where all citizens are equally entitled to rights, privileges and benefits, as well as being equally subject to the duties and responsibilities of citizenship. However, the section that perhaps most reflects the strong civil society engagement in the constitution making process is the comprehensive bill of rights that the constitution contains. Given the history of intense discrimination witnessed during the apartheid regime it is perhaps unsurprising that the inclusion of a robust human rights framework in the constitution is one of its defining features. Moreover, the rights delineated in the constitution are not confined to civil and political rights but also include social and economic rights such as the right to access adequate housing (Section 26); and the right to access health care services, sufficient food and water, and social security (Section 27).

As well as the clear influence of the public participation process on the content of the constitution, there is also an attempt to safeguard the continued involvement of the public and civil society in governance by committing to access to information and

accessed 1 September 2012). 10.

52 Constitution of the Republic of South Africa 1996, as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly, Chapter I.

just administrative action.[53] Section 195, entitled 'Basic Values and Principles of Public Administration' provides that public administration must be governed by the democratic values and principles enshrined in the Constitution in accordance with a number of listed principles, one of which is that '[p]eople's needs must be responded to, and the public must be encouraged to participate in policy-making.'[54] This section further outlines the requirement that public administration must be accountable and notes that '[t]ransparency must be fostered by providing the public with timely, accessible and accurate information.'[55] Importantly, the constitution also establishes a number of State institutions charged with supporting constitutional democracy. These include the Human Rights Commission, the Commission on Gender Equality and the Public Protector, who has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; report on that conduct; and take appropriate remedial action.[56] Despite the robust protection afforded to civil society participation in governance afforded by the constitution, cautions against too lax an approach to the relationship between civil society and government

53 S Jagwanth 'Democracy, Civil Society and the South African Constitution: Some Challenges'(2003) Management of Social Transformations (MOST) Discussion Paper no. 65, UNESCO, 9, available at http://unesdoc.unesco.org/images/0012/001295/129557e.pdf (last accessed 1 September 2012)., 10-11.

54 Constitution of the Republic of South Africa 1996, as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly, Section 195(e).

55 Constitution of the Republic of South Africa 1996, as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly, Section 195(f)(g).

56 Constitution of the Republic of South Africa 1996, as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly, Section 182.1.

have been raised. The collaborative relationship between the post-apartheid government and much of civil society and the fact that many members of civil society have joined the ranks of government may lead to the situation where criticism of the government and its policies can appear disloyal or reactionary.[57] The lesson therefore is to ensure that civil society continues to play its vital role in monitoring the State institutions that are committed to bring about a lasting change.

57 S Jagwanth 'Democracy, Civil Society and the South African Constitution: Some Challenges'(2003) Management of Social Transformations (MOST) Discussion Paper no. 65, UNESCO, 9, available at http://unesdoc.unesco.org/images/0012/001295/129557e.pdf (last accessed 1 September 2012)., 13.

C: The Constitution of the Republic of Turkey and the Current Reform Process

The republican constitution adopted by the Grand National Assembly in April 1924,[58] avowed the legislative authority of the Assembly and vested the judicial function in independent courts, whilst affirming the sovereignty of the Turkish people. The new 'regime' in Turkey was to be founded 'upon fundamental reforms, such as the separation of Church and State, of which the constitution is but a necessary expression.'[59] In the years since the republican constitution was first adopted, it has been subject to change and revision on numerous occasions. In 1928, for example, the provision of the constitution declaring that Islam was the state religion was dropped. It has also undergone more radical changes; since the first modern constitution in 1921, there have been three subsequent texts, in 1924, 1961 and 1982, as well as many amendments. Through subsequent incarnations, the constitution has bestowed many rights and freedoms typically associated with modern democracies and affirmed the democratic secular nature of the state.[60] Some of the more important amendments are set forth in the following paragraphs.

Following the military coup of 1960, the ruling junta, the National Unity Committee, appointed a group of lawyers to draft a new

58 The 1924 Constitution amended the Constitution of 1921 to confirm that the form of government of Turkey was a republican one.
59 E Mead Earle 'The New Constitution of Turkey' (1924) 40. 1 Political Science Quarterly 73-100, 74.
60 The principle of secularism was enshrined in the Constitution on 5 February 1937.

constitution that 'would both act as a legal obstacle to future political abuses and institutionalize the military's involvement in politics'.[61] The new constitution implemented a series of changes, including the creation of a bicameral parliament, a National Security Council composed of the armed forces chiefs, whose job was to assist the cabinet deciding matters of national security, and a range of liberal reforms. It established a Constitutional Court, legalised trade unions and granted independence to television and radio stations and universities, in addition to providing for freedom of conscience, political belief, assembly, and press as well as the right to form political parties. However, despite the progressive constitution of 1961, a series of problems – economic instability, successive weak coalition governments, the invasion of Cyprus in 1974 and the escalation of political violence – affected the country and resulted in the military, again, taking control of the government in 1980.[62] The new junta, the National Security Council (NSC), overturned the government on 12 September 1980 and went on to rule the country for the next three years and was the 'most repressive of Turkey's praetorian governments'.[63] The first steps taken by the NSC were to declare martial law throughout the country, dissolve parliament, ban all political parties and arrest thousands of suspected criminals and political offenders. The progress made in the Constitution of 1961 was soon eroded as the ruling junta

61 PJ Magnarella 'The Legal, Political and Cultural Structures of Human Rights Protections and Abuses in Turkey' (1994) 3 D.C.L. J. Int'l L. & Prac. 439-468, 443.
62 PJ Magnarella 'The Legal, Political and Cultural Structures of Human Rights Protections and Abuses in Turkey' (1994) 3 D.C.L. J. Int'l L. & Prac. 439-468, 443.
63 PJ Magnarella 'The Legal, Political and Cultural Structures of Human Rights Protections and Abuses in Turkey' (1994) 3 D.C.L. J. Int'l L. & Prac. 439-468, 445.

forbade trade unions engaging in political activity, took control of universities, radio and television stations and strictly limited freedom of the press.[64] The 1961 constitution was replaced in 1982 with a much less liberal document that created a unicameral parliament and granted wide-ranging powers to the president and immunity from the scrutiny of other branches of government.[65] When the new constitution was accepted in November 1982, the leader of the NSC, General Kenan Evren, became president and this was followed by elections to select civilian politicians.

The constitution of 1982 clearly entrenches the reforms secured by Atatürk and stipulates the indivisible democratic and secular nature of the state. Although amendments have been made to the constitution since then, this fundamental principle regarding the nature of the state remains. When sweeping amendments were made to the 1982 constitution in 2001, no amendments were made to Part I, ('General Principles'), thereby ensuring no changes to the vision of the Republic.[66] Article 2, in particular, is often quoted by

64 PJ Magnarella 'The Legal, Political and Cultural Structures of Human Rights Protections and Abuses in Turkey' (1994) 3 D.C.L. J. Int'l L. & Prac. 439-468, 445.

65 For example, Article 105 of the new Constitution stated 'No appeal shall be made to any legal authority, including the Constitutional Court, against the decisions and orders signed by the President of the Republic on his own initiative' and Article 125 stated 'The acts of the President of the Republic in his own competence and the decisions of the Supreme Military Council are outside the scope of judicial review'.

66 One of the most extensive amendments came in October 2001when Law No. 4709 of 13 October 2001 introduced amendments to the Preamble and thirty-four provisions of the Constitution of 1982. See E Örücü 'The Turkish Constitution Revamped?' (2002) 8.2 European Public Law 201-218, 201-202 noting that the amendments could be regarded as a radical departure from the 1982 Constitution, a partial return to the more progressive Constitution of 1961, an attempt to further integrate into Europe but also as 'paying lip service to the demands of the European Union.'

those who reject the acceptability of the seemingly strong Islamic sentiments expressed by the current administration.[67] It states:

> *The Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble.*

The preamble to the constitution, which Article 2 incorporates, is forthright on the issue of the secular democratic nature of the State and states in part that

> *[…] no protection shall be accorded to an activity contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey with its state and territory, Turkish historical and moral values or the nationalism, principles, reforms and modernism of Atatürk and that, as required by the principle of secularism, there shall be no interference whatsoever by sacred religious feelings in state affairs and politics; the acknowledgment that it is the birthright of every Turkish citizen to lead an honourable life and to develop his or her material and spiritual assets under the aegis of national culture, civilization and the rule of law, through the exercise of the fundamental rights and freedoms set forth in this Constitution in conformity with the requirements of equality and social justice […]*

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67 See for example I Traynor 'Turkish general warns levels of Islamism 'alarming'' in The Irish Times 27 September 2006, noting that General Ilker Basbug, then chief of land forces, warned the Erdoğan government that the danger of Islamism in the country was reaching 'alarming' levels. General Basbug is quoted as having stated that the 'Turkish armed forces have always taken sides and will continue to do so in protecting the national state, the unitary state and the secular state'.

The constitution of Turkey is similar to many other modern constitutions yet Turkey is one of only eleven states with a predominately Muslim population that prescribe secularism in their constitutions.[68] It contains a section on fundamental rights[69] and a relatively progressive section on economic and social rights and duties.[70] Analysis of both the document and Turkish history led one commentator to conclude that the principles of constitutionalism underlying the republic consist in part of statism and authoritarianism; military involvement in government, the economy and society; Atatürk's principle of populism; and legalism,[71] clearly not all of which are necessarily associated with modern democratic republics. Whilst a number of reform packages have been instituted since the AKP came to power, the 2010 reforms were seen as much a victory for the AKP as a victory for the principles of constitutionalism, given that they were approved in the majority by the Constitutional Court in its judgment of 7 July 2012 and overwhelmingly sanctioned by the people in a

68 The other ten countries are Burkina Faso, Chad, Guinea, Mali, Niger, Senegal, Azerbaijan, Kyrgyzstan, Tajikistan, and Turkmenistan. See T Stahnke and RC Blitt 'The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries' (2005) 36 Geo. J. Int'l L. 947-1078, 955.

69 Part II Chapter II of the Constitution is entitled 'Rights and Duties of the Individual' and contains provisions relating to the right to life, the prohibition of forced labour, the prohibition of torture and personal liberty and security. Other rights and freedoms typically guaranteed in Constitutions such as freedom of assembly, expression and religion are also included in this section.

70 Part II Chapter III includes provisions on the protection of the family, education rights, land ownership, labour rights, health services and housing. Article 65 (as amended on 17 October 2001) states: 'The State shall fulfil its duties as laid down in the Constitution in the social and economic fields within the capacity of its financial resources, taking into consideration the priorities appropriate with the aims of these duties.'

71 See PJ Magnarella 'The Legal, Political and Cultural Structures of Human Rights Protections and Abuses in Turkey' (1994) 3 D.C.L. J. Int'l L. & Prac. 439-468, 447-449.

referendum on 12 September 2012. The reforms consisted of twenty-six amendments relating to reforms regarding fundamental rights and freedoms (Articles 1, 6, 7, 8, 9, and 23) and concerning the reorganisation of the judiciary (Articles 11 and 14-22).[72]

Given the somewhat chequered constitutional history of Turkey it is unsurprising that the current reform process proceeds under the weight of expectation. Turkey differs from the two jurisdictions examined above in that it is in the somewhat unique position of witnessing a period of constitutional reform that has been prompted – or certainly accelerated – by the desire of successive administrations to join the ranks of the European Union. The most recent proposal for constitutional reform is by far the most comprehensive with work underway to draft a new, and for the first time, civilian authored constitution under the guise of the multi parliamentary party commission, the Constitutional Reconciliation Commission, convened in summer 2011. The Commission comprises representatives from each of the four political parties represented in government, with three members from each party charged with drafting the new text. The process is still very much at the embryonic stage although the business of formulating the constitution began on 1 May 2012 following a six-month preparatory process. Randomly selected citizens were invited by the Constitution Platform Initiative, a group comprised of thirteen professional organizations and trade unions with the

72 See generally AS Cremer 'Turkey Between the Ottoman Empire and the European Union: Shifting Political Authority Through Constitutional Reform' (2011-2012) 35 Fordham Int'l L.J. 279-349.

secretariat of the Economic Policy Research Foundation of Turkey (TEPAV), the intention being to 'compile the opinions, demands and expectations of people about the new constitution on a neutral, free and civilized platform for deliberation.'[73] The 'Turkey Speaks' platform attracted over 6,500 people to its meetings, one third of whom were representatives of NGOs.[74] The new constitution should, Parliament Speaker Cemil Çiçek noted at the platform's Istanbul meeting, 'reflect all colors, smells, motives, cultures and expectations of the citizens. This is the liability of the four parties and the Parliament as well. We are in debt to you and you are the claimant. You should be the pursuer of this debt.'[75] The findings of the public meetings were submitted as a report to the Commission but that said, it is not entirely clear what impact the results of the public participation scheme will have on the drafting process.

The Commission began drafting the articles that are deemed to be less contentious while contentious issues will be referred to the party leaders, who will then try to reach a consensus.[76] To date, progress is reported as being 'slower than anticipated'; in early June Zaman reported that only two out of 41 sections had thus far been discussed.[77] The process, however, has been described as

73 'The Constitution Marathon Continues in Antalya', available at http://www.tepav.org.tr/en/haberler/s/2728 (last accessed 4 September 2012).
74 H Hayatsever 'Panel for New Charter Starts Landmark Duty in Turkey' Hürriyet Daily News 30 April 2012.
75 H Hayatsever 'Panel for New Charter Starts Landmark Duty in Turkey' Hürriyet Daily News 30 April 2012.
76 H Hayatsever 'Panel for New Charter Starts Landmark Duty in Turkey' Hürriyet Daily News 30 April 2012.
77 AA Kiliç 'Constitutional Reconciliation Commission extends its calendar' Today's Zaman 3 June 2013.

admirably participatory to date'[78] – with a commanding majority in Parliament the AKP government arguably did not have to involve the other parties in the reform process – and the process of public participation also follows recommended practice in the area of constitution making. All this, it is suggested, 'demonstrates a political maturity that may well serve as the foundation for an appropriate constitution, even though its details are as yet undetermined.'[79] The appetite for constitutional reform certainly seems to be present in Turkey with almost 69% of the population favouring a new constitution in early 2011.[80] The people clearly are concerned with the question of constitution making; it will be interesting to see if the current process meets their expectations.

78 JW Warhola 'Reform of The Turkish Constitution: A Step Forward or Backward?' 23 May 2012, eInternational Relations, available at http://www.e-ir.info/2012/05/23/reform-of-the-turkish-constitution-a-step-forward-or-backward/#_ftn2 (last accessed 4 September 2012).

79 ibid.

80 'Social Demand Grows for the New Constitution, TEPAV; available at http://www.tepav.org.tr/en/haberler/s/1982 (last accessed 4 September 2012).

III: Constitutional Identity, Citizenship, and the Challenges of Reform

The notion of constitutional identity – that a constitution reflects the identity of a nation and of the values of its people is one that has preoccupied constitutional theorists. It has, however, also been suggested that a constitution's identity is acquired through experience: it 'emerges dialogically and represents a mix of political aspirations and commitments that is expressive of a nation's past, as well as the determination of those within the society who seek, in some ways, to transcend that past.'[81] Constitutional identity can also 'take many forms, and evolve over time, because it is often immersed in an ongoing process marked by substantial changes.'[82] We see the truth of these statements in considering the case studies assessed above. The Irish Constitution is deeply imbued with the Roman Catholic religion, reflecting the social values of 1930s Ireland and the influence of the clergy at that time. While maintaining a close attachment to traditional religions,[83] the demand for a root and branch reform of the constitution reflects a change in attitude with regard to the separation of church and State as well as changing social mores. The South African constitution of 1996 clearly reflects the changing nature of society

81 GJ Jacobsohn 'Constitutional Identity' (2006) 68.3 The Review of Politics 361-397, 363.

82 M Rosenfeld 'Modern Constitutionalism as Interplay Between Identity and Diversity' in M Rosenfeld (ed) Constitutionalism, Identity, Difference, and Legitimacy (Duke University Press Durham and London 1994) 3-35, 8.

83 A Eurobarometer poll in 2005 indicated that 73% of those polled believed in 'God' whereas 22% believed in 'some sort of spirit of life force'. See http://ec.europa.eu/public_opinion/archives/ebs/ebs_225_report_en.pdf (last accessed 4 September 2012).

engendered by the transition from apartheid to democratic equality. Cognisant of the violent struggle preceding the transition, the new constitution reflects the country's changed identity by providing a comprehensive bill of rights. Equally, the constitutional reforms already undertaken in Turkey are reflective of that country's democratisation and the current process should build on these achievements. That this is the desire of the people was evident in the public participation process regarding the new constitution, which stressed that the two most important concepts that must be highlighted in the new constitution are 'justice' and 'freedom' according to more than 70% of the participants. Between 10% and 18% of participants chose 'equality' as a third option and the vast majority of the participants – between 96% and 99% in all provinces – said the new charter should feature a more effective mechanism of accountability for politicians, with over 90 percent supporting limitations on parliamentary immunity.'[84]

Constitutional identity is therefore not a stagnant concept and constitutional identities, are in fact dynamic, and 'bound to evolve after they are initially formed.'[85] Formal constitutional amendment procedures are one way in which such evolution can occur[86] and in some instances, such as the South African example, a comprehensive departure from the previous constitution is required. The question

84 H Hayatsever 'Panel for New Charter Starts Landmark Duty in Turkey' Hürriyet Daily News 30 April 2012.
85 M Rosenfeld The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community (Routledge London and New York 2009) 209.
86 R Dixon 'Amending Constitutional Identity' (2011-2012) 33 Cardozo L. Rev. 1847-1858, 1847-1848.

of citizenship is also inherently linked to constitutional identity. Constitutions are powerful documents in that they can be inclusive or exclusive depending on their formulation. The recognition of the special position of the Catholic Church in Article 44 of the Irish Constitution clearly had the effect of diminishing the legal significance of other churches until its removal in 1972. More significantly, constitutions can be used to exclude whole sections of society from representation such as the South African racist constitutions of 1961 and 1983 excluded the black majority.

The requirements of citizenship arguably dictate that there is a duty to engage with the constitutional reform or constitution design process when it presents. We saw in section II the extent to which the public participation process was successful in the South African context and the degree of engagement from the public in the process currently underway in Turkey. In the motion presenting the constitutional convention before the Irish Parliament the Prime Minister in announcing that 66 citizens 'representative of society generally' would form part of the new convention, strongly urged those selected to 'take the opportunity to participate in this exciting and historic initiative'.[87] The importance of public participation clearly cannot be overstated. The United Nations also recognises the significance of national involvement in constitution making and reform processes. Its Rule of Law programme notes that 'a structured (and time intensive) national dialogue or consultation

87 *'Constitutional Convention: Motion' An Taoiseach, Enda Kenny, 10 July 2012, website of the Houses of the Oireachtas, available at http://debates.oireachtas.ie/dail/2012/07/10/00025.asp (last accessed 3 September 2012).*

process that feeds back the views of the people to the decision makers involved in the drafting and debating of the constitution is an essential element of an inclusive, participatory and transparent process.'[88]

Public participation, inclusiveness, transparency, and national ownership may be key components of the process but many challenges are also presented. These include the very practical challenge of expense: the costs of constitution-making in Africa alone have been estimated at $30 million for South Africa, $10 million for Uganda, $6 million for Ethiopia, and $4.5 million for Eritrea.[89] Challenges, particularly relevant to constitution making in post conflict societies also include the issue of divisiveness: 'constitution-making may be a great nation-building event, but if the wounds are too recent, or the process is not handled with extreme delicacy, the process may give rise to renewed or new conflicts.'[90] Also relevant is the risk of failure and the delusion that problems can be solved merely by the adoption of a new constitution.[91] Despite these challenges and that of encouraging public participation in the process, constitutionalism and its demands arguably remains the

88 'Constitution-making' United Nations Rule of Law, available at http://www.unrol.org/article.aspx?article_id=31 (last accessed 27 August 2012).

89 M Brandt, J Cottrell, Y Ghai, and A Regan Constitution-making and Reform: Options for the Process (Interpeace Switzerland 2011) 37.

90 'Constitution-making' United Nations Rule of Law, available at http://www.unrol.org/article.aspx?article_id=31 (last accessed 27 August 2012).

M Brandt, J Cottrell, Y Ghai, and A Regan Constitution-making and Reform: Options for the Process (Interpeace Switzerland 2011) 37.

91 'Constitution-making' United Nations Rule of Law, available at http://www.unrol.org/article.aspx?article_id=31 (last accessed 27 August 2012).

M Brandt, J Cottrell, Y Ghai, and A Regan Constitution-making and Reform: Options for the Process (Interpeace Switzerland 2011) 37.

most effective form of limiting governmental power and ensuring the rights of citizens; it is difficult to see this situation changing at any point in the near future.

Appendix:
DPI Board and Council of Experts

Director:

Kerim Yildiz

Kerim Yildiz is Director of DPI. He is an expert in international human rights law and minority rights, and is the recipient of a number of awards, including from the Lawyers Committee for Human Rights for his services to protect human rights and promote the rule of law in 1996, the Sigrid Rausing Trust's Human Rights award for Leadership in Indigenous and Minority Rights in 2005, and the Gruber Prize for Justice in 2011. Kerim has written extensively on human rights and international law, and his work has been published internationally.

DPI Board Members:

Nicholas Stewart QC (Chair)

Barrister and Deputy High Court Judge (Chancery and Queen's Bench Divisions), United Kingdom . Former Chair of the Bar Human Rights Committee of England and Wales and Former President of Union Internationale des Avocats.

Professor Penny Green (Secretary)

Head of Research and Director of the School of Law's Research Programme at King's College London and Director of the

International State Crime Initiative (ICSI), United Kingdom (a collaborative enterprise with the Harvard Humanitarian Initiative and the University of Hull, led by King's College London).

Priscilla Hayner

Co-founder of the International Center for Transitional Justice, global expert and author on truth commissions and transitional justice initiatives, consultant to the Ford Foundation, the UN High Commissioner for Human Rights, and numerous other organisations.

Arild Humlen

Lawyer and Director of the Norwegian Bar Association's Legal Committee. Widely published within a number of jurisdictions, with emphasis on international civil law and human rights. Has lectured at law faculties of several universities in Norway. Awarded the Honor Prize of the Bar Association for Oslo for his work as Chairman of the Bar Association's Litigation Group for Asylum and Immigration law.

Jacki Muirhead

Practice Director, Cleveland Law Firm. Previously Barristers' Clerk at Counsels' Chambers Limited and Marketing Manager at the Faculty of Advocates. Undertook an International Secondment at New South Wales Bar Association.

Professor David Petrasek

Professor of International Political Affairs at the University of Ottawa, Canada. Expert and author on human rights, humanitarian law and conflict resolution issues, former Special Adviser to the Secretary-General of Amnesty International, consultant to United Nations.

Antonia Potter Prentice

Expert in humanitarian, development, peacemaking and peacebuilding issues. Consultant on women, peace and security; and strategic issues to clients including the Centre for Humanitarian Dialogue, the European Peacebuilding Liaison Office, the Global Network of Women Peacemakers, Mediator, and Terre des Hommes.

DPI Council of Experts

Christine Bell

Legal expert based in Northern Ireland; expert on transitional justice, peace negotiations, constitutional law and human rights law advice. Trainer for diplomats, mediators and lawyers.

Cengiz Çandar

Senior Journalist and columnist specializing in areas such as The Kurdish Question, former war correspondent. Served as special adviser to Turkish president Turgut Ozal.

Yilmaz Ensaroğlu

SETA Politics Economic and Social Research Foundation. Member of the Executive Board of the Joint Platform for Human Rights, the Human Rights Agenda Association (İHGD) and Human Rights Research Association (İHAD), Chief Editor of the Journal of the Human Rights Dialogue.

Dr. Salomón Lerner Febres

Former President of the Truth and Reconciliation Commission of Perù; Executive President of the Center for Democracy and Human Rights of the Pontifical Catholic University of Perù.

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Head of the Department of War Studies, King's College London. Previously served as Chair of Politics and Head of Department at the University of Natal in Durban. Former President of the South African Political Studies Association; expert on human rights in international relations, humanitarian intervention, justice in world politics, democratising global governance, just war tradition in an Era of New Wars and ethics in a globalising world.

Martin Griffiths

Founding member and first Executive Director of the Centre for Humanitarian Dialogue, Served in the British Diplomatic Service, and in British NGOs, Ex -Chief Executive of Action Aid. Held posts as United Nations (UN) Director of the Department of Humanitarian Affairs, Geneva and Deputy to

the UN Emergency Relief Coordinator, New York. Served as UN Regional Humanitarian Coordinator for the Great Lakes, UN Regional Coordinator in the Balkans and UN Assistant Secretary-General.

Dr. Edel Hughes

Senior Lecturer at University of East London. Prior to joining the University of East London, Edel was awarded an LLM and PhD degrees in International Human Rights Law from the National University of Ireland, Galway in 2003 and 2009 respectively. Edel was a lecturer in law at the School of Law, University of Limerick, between 2006 and 2011.

Professor Ram Manikkalingam

Visiting Professor, Department of Political Science, University of Amsterdam, served as Senior Advisor on the Peace Process to President of Sri Lanka, expert and author on conflict, multiculturalism and democracy, founding board member of the Laksham Kadirgamar Institute for Strategic Studies and International Relations.

Bejan Matur

Renowned Turkey based Author and Poet. Columnist, focusing mainly on Kurdish politics, the Armenian issue, daily politics, minority problems, prison literature, and women's issues. Has won several literary prizes and her work has been translated into 17 languages. Former Director of the Diyarbakır Cultural Art Foundation (DKSV).

Jonathan Powell

British diplomat, Downing Street Chief of Staff under Prime Minister Tony Blair between 1997- 2007. Chief negotiator in Northern Ireland peace talks, leading to the Good Friday Agreement in 1998. Currently CEO of Inter Mediate, a United Kingdom -based non-state mediation organization.

Sir Kieran Prendergast

Served in the British Foreign Office, including in Cyprus, Turkey, Israel, the Netherlands, Kenya and New York; later head of the Foreign and Commonwealth Office dealing with Apartheid and Namibia; former UN Under-Secretary-General for Political Affairs. Convenor of the SG's Executive Committee on Peace and Security and engaged in peacemaking efforts in Afghanistan, Burundi, Cyprus, the DRC, East Timor, Guatemala, Iraq, the Middle East, Somalia and Sudan.

Rajesh Rai

Rajesh was called to the Bar in 1993. His areas of expertise include Human Rights Law, Immigration and Asylum Law, and Public Law. Rajesh has extensive hands-on experience in humanitarian and environmental issues in his work with NGOs, cooperatives and companies based in the UK and overseas. He also lectures on a wide variety of legal issues, both for the Bar Human Rights Committee and internationally.

Professor Naomi Roht Arriaza

Professor at University of Berkeley, United States, expert and author on transitional justice, human rights violations, international criminal law and global environmental issues.

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