



# PARTICIPATORY AND INCLUSIVE CONSTITUTION MAKING

GIVING VOICE TO THE DEMANDS OF CITIZENS  
IN THE WAKE OF THE ARAB SPRING

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## ABOUT THE REPORT

In the wake of the Arab Spring, countries across the Middle East and North Africa are still struggling with societal divisions and citizens' demands for transparency, accountability, and greater political, social, and economic rights. In many of these countries, constitutional reform has featured prominently in the nature and direction of the transition. Inclusive constitutional reform has been a key component of Tunisia's path toward democratic consolidation. In Syria, consensus building and constitutional reform will have to wait until leaders can come to the negotiating table.

Where conditions exist to lead a participatory process, this report underscores how inclusive constitution making can potentially assist Arab Spring countries to respond to the needs of their citizens and build consensus in divided societies. While there is no blueprint for how to make a constitution, Arab Spring leaders and citizens can be inspired by the last two decades of modern constitution making, in which citizens have gained a meaningful voice in developing their social compacts. The risks and benefits of participatory constitution-making processes, as well as themes, arguments, and case studies presented in this report, are drawn from a workshop entitled "Opportunities and Dilemmas of Public Participation in Constitution Building," jointly organized by Interpeace, the U.S. Institute of Peace (USIP), and International IDEA, held in Cape Town, South Africa, April 25, 2009. It also builds upon previous scholarship from USIP, Interpeace, and other external institutes.

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[Throughout Arab Spring countries, demands continue for participation, inclusion, and transparency to overcome widespread corruption and abuses. How governments respond to these calls may determine whether constitution-making processes unite or further divide their societies.]



## Summary

- Many of the countries of the Arab Spring face daunting challenges. Syria is racked by war. Libya's transition is challenged by armed militias vying for control. In Egypt, the early promise of popular transformation has reinforced divisions in society. Jordan and Morocco have taken steps toward reform, but it is still unclear whether these countries can meet the demands of their citizens. It is also unclear to what extent Yemen's mediated transition and ongoing constitution-making process will lead to a more stable and democratic society.
- Tunisia, though still early in its transition, stands alone as a country that has achieved constitutional reform through a more inclusive and participatory process and has held peaceful elections under this new order.
- Yet throughout Arab Spring countries, demands continue for participation, inclusion, and transparency to overcome widespread corruption and abuses. How governments respond to these calls may determine whether constitution-making processes unite or further divide their societies, whether they help or hinder the creation of a national consensus on fundamental principles and values, and whether the processes and documents that result from them are deemed legitimate.
- There is no blueprint for how to make a constitution, but the last two decades of constitution-making experience underscores that inclusive and participatory constitution making should address root causes of conflict and sectarian divisions, and ensure that the political process benefits from the full contribution of all citizens, including women and youth.
- To achieve such results, constitution makers must have the political will to carry out a genuine process of civic education and consultations, in which the views of citizens are carefully considered. The constitution makers must carefully apply guiding principles, such as transparency and inclusion, and ensure that sufficient time and resources are allocated to the process. A nationwide participatory process must be well managed to avoid risks and reap benefits.
- Where circumstances are conducive to meaningful constitutional dialogue and reform—at a minimum, a cessation of violence and a willingness of actors and constituencies to come to the table—the countries of the Arab Spring will benefit from using their constitutional moments to draw upon their own historical experiences as well as the lessons learned from the past twenty-five years in constitution making and research about what factors sustain peace.





## Introduction

The countries of the Arab Spring face daunting challenges. Syria is racked by war. Libya's transition is challenged by armed militias vying for control. In Egypt, the early promise of popular transformation has reinforced divisions in society. Jordan and Morocco have taken limited steps toward reforms, but it is still unclear whether these countries can meet the demands of their citizens. Through an internationally mediated process, Yemen has thus far avoided civil war and against all odds is continuing its transition toward a new constitutional order. Tunisia, though still early in its transition, stands alone as a country that has achieved constitutional reform through a more inclusive and participatory process and has held peaceful elections under this new order.

Citizens across the Middle East and North Africa have demanded transparency, accountability, and rights from their governments. For societies where borders were arbitrarily defined and dictators ruled for decades, these demands have created an opportunity to redefine national identities, set precedents for inclusive political processes, and create constitutions that represent the aspirations of their people. What is the nature of citizenship, and what is religion's role in society? What are the nations' core values? How do politically marginalized citizens, such as women, youth, or minorities, gain social, economic, and political rights and access to justice? On what terms can historically—and often deliberately—fragmented peoples peaceably coexist?

Elites cannot answer such questions summarily. To overcome the legacies of dictators and hastily drawn borders, transitional leaders must build consensus across deep divisions and with previously excluded citizens through national dialogue, public consultations, and civic education. A robust democracy requires the full participation and contributions of all its citizens.

As has happened in Tunisia, new governing arrangements must be formed on carefully constructed compromises. Participatory processes must be broad and nationally owned and led to shape new social contracts that achieve a durable peace. As Nicholas Haysom suggests, "The right answer through the wrong process will not usually yield an acceptable solution."<sup>1</sup>

Where circumstances are conducive to meaningful constitutional dialogue and reform—at a minimum, a cessation of violence and a willingness of violent actors and constituencies to come to the table—the countries of the Arab Spring will benefit from using their constitutional moments to draw upon their own historical experiences as well as lessons learned over the past twenty-five years in constitution making. Tunisia can serve as an example of how opening up the process and seeking consensus can lead to more legitimate outcomes.

Leaders should develop and sustain the political will to promote the broadest possible participation and consensus. To achieve this goal, they must take adequate time to plan carefully and secure sufficient material and human resources. Leaders should continually review their plans to ensure the process is transparent and accountable at every stage and work to create a secure environment for opportunities for citizens to freely participate.<sup>2</sup>

Constitution making historically was concerned with the content of the document itself rather than how that content was agreed upon, and until recently, the writing of a constitution was generally an act of power consolidation rather than political negotiation. Imperial powers protected their own interests by determining which parties would take the reins of government and the terms under which they would rule. Especially during the Cold War, conquerors of vanquished nations or new rulers intent on consolidating their power<sup>3</sup> drafted their constitutions behind closed doors.

Times have changed, and in postconflict settings, constitutions tend to be negotiated instruments. In the past two decades, a trend has begun to emerge toward greater transparency, inclusion, participation, and national ownership; constitution-making processes now tend to have greater levels of citizen participation.<sup>4</sup> Transitional leaders across the globe—from South Africa, Thailand,

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and Uganda to Papua New Guinea, Brazil, and Kenya—have chosen to invest significant time and resources to implement inclusive and participatory constitution-making processes because they have the potential to:

- make the constitution itself, transitional authorities, and subsequent governments more legitimate in citizens' eyes;
- garner wide support for a peace process;
- provide a forum for inclusive national dialogue to promote reconciliation and trust building;
- foster consensus on the fundamental principles of the nation and the framework of the state;
- strengthen and promote a common sense of belonging, national unity, and identity;
- acknowledge and incorporate the aspirations of citizens who have been previously marginalized, such as women, youth, or minorities;
- broaden the constitution's social and economic agenda;
- transform the understanding of constitution makers themselves, as they learn about the hopes and concerns of their people and see and hear firsthand the problems they face; and
- break from an autocratic past and lay a foundation for more democratic practices, a culture of rule of law, and ongoing citizen participation in decision making in the future.<sup>5</sup>

Researchers on peace and statebuilding highlight<sup>6</sup> that unstable political orders are more likely to be the products of political exclusion than of poverty, conflicts over natural resources, or weak leaders. Sustained peace is achieved through inclusive political settlements.<sup>7</sup> One recent study found “a strong correlation... between active civil society participation in peace negotiations and the durability of the peace during the peace-building phase.”<sup>8</sup> Studying data from 132 new constitutions, professors at American University determined that countries with higher levels of direct citizen participation—such as citizen engagement in civic education, dialogues, and public consultation activities—had higher levels of subsequent democratic practices. Direct citizen participation during the drafting phase was more important than referenda or other end-phase activities in achieving more legitimate outcomes.<sup>9</sup> Other researchers have concluded that a referendum at the tail end of a constitutional process can even undo carefully constructed compromises; sometimes autocratic regimes use referenda to legitimize elite-dominated processes.<sup>10</sup>

The above studies and the advice of experienced constitution makers underscore that the task of promoting a participatory and inclusive process can lead to increased democratic tendencies and potentially a more durable peace.<sup>11</sup> There is no single blueprint for how to make a constitution. Even the most well-planned and participatory process will be fraught with challenges, including overcoming decades of oppression and mistrust, fragmentation of social and political actors, a weak history of transparency and consultation in governance, and illiberal tendencies within old regimes and many social movements. In many cases, regional interests will also have to be contended with—something constitution making is less equipped to handle.

But inclusive and participatory constitution-making practices can assist countries seeking to secure peace in giving voice to citizens' demands for accountable, transparent, and democratic reforms. In so doing, such processes can address many of the above challenges and increase the likelihood that constitutional reform can provide the basis for sustainable and peaceful democratic change.

We begin with a brief overview of some of the constitution-making processes in the Arab Spring. Although it is too early to fully assess these political transitions, the report discusses options for how these processes may benefit from the global lessons learned in constitution making.

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We then review both the benefits and the risks of participatory and inclusive processes and conclude with the general principles and guidelines that should guide them.

## Constitution Making in Arab Spring Countries

Constitutional processes have been central to the transitions in Egypt, Tunisia, Libya, and Yemen, as well as the attempts to preserve the regimes in Morocco and Jordan. Reformers faced the task of creating a new legitimate constitutional order that redefined the relationship between citizens and government and redesigned the government's systems and structures. In the wake of the Arab Spring, some countries have returned to sectarian conflict or a legacy of exclusionary political processes. Yet citizens continue to demand greater accountability, equity, and political freedom. It is not surprising, therefore, that in countries where constitutions have been made or remade, people have called for transparent, participatory, and inclusive processes that allow them to participate. For countries in the middle of constitutional reform or hoping to return to the negotiating table, Tunisia—although unique—holds out hope that leaders can embrace more democratic forms of constitution making.

### *Calls for Meaningful Participation*

In Egypt, secular and youth groups in early 2012 filed legal challenges claiming that the Constituent Assembly—the first assembly formed to draft the constitution—did not adequately represent women, youth, and minorities. The first assembly was dissolved by judicial ruling in April 2012. The second Constituent Assembly, formed in June 2012, faced similar problems, as the same groups held mass demonstrations in the fall of 2012 against the draft constitution and referendum, protesting that their voices had been excluded despite an abundance of commentary calling for a nationally inclusive and participatory process. One Egyptian editorialist noted in spring 2012 that “the success of a constitution derives not only from the wisdom and the fairness of the text/document, but most importantly from the widespread involvement, informed participation, and buy-in by all of the people of Egypt into the constitution making process.”<sup>12</sup> Other writers noted that “in a country of 85 million people, the writing of Egypt’s constitution should allow for Egypt’s diverse civilian voices to speak for themselves.”<sup>13</sup>

In Tunisia, focus group research reflected calls for the Constituent Assembly, newly elected in October 2011, to “listen to the people,” warning that the assembly “should not forget what happened to [ousted president] Ben Ali; the Tunisian people revolted once and can do so again.”<sup>14</sup> A poll conducted in February 2013 showed that 80 percent of Tunisians wanted to be able to vote on the constitution at referendum, a contingency that was available only if the Constituent Assembly failed to approve the draft by a two-thirds majority vote.<sup>15</sup> Focus groups in Libya revealed similar sentiments: “Citizens want and expect to play a key role in the constitutional development process.”<sup>16</sup> An August 2012 press statement from the organization Lawyers for Justice in Libya declared that

after decades of authoritarian rule where the will of the Libyan people was suppressed, the participation of Libyans in the constitution-making process will be vital to its success and legitimacy. It is absolutely essential that Libyans, all Libyans, have the opportunity to participate and engage in the constitution-making process and that the GNC [General National Congress] foster a sense of ownership of the process amongst Libyans.<sup>17</sup>

The same calls heard in Egypt, Tunisia, and Libya have echoed in countries that quickly undertook constitutional reform, such as Jordan and Morocco, and in countries where constitutional reform has yet to begin, such as Bahrain. In Morocco, within five months of the start of demonstrations on February 20, 2011, the regime revised its constitution. It transferred the power to appoint government officials and dissolve parliament from the king to the prime minister, enshrined freedom of expression and equality between men and women, and criminalized torture, arbitrary detention, and enforced disappearances. The king announced the formation of a constitutional commission on March 9 of that year. The reforms were made public in mid-June and a national referendum was held on July 1. The Constitutional Commission invited political and social organizations to submit proposals for amendments and conducted approximately a hundred meetings with representatives of these organizations.<sup>18</sup> The compressed time line, lack of transparency, and heavily orchestrated process, however, failed to assuage some in the revolutionary movements. Weekly protests across the country continued throughout the process, and the February 20 Movement ultimately rejected the 2011 constitutional revision process as “insufficient and overly controlled by the monarchy.”<sup>19</sup>

Jordan also employed a top-down approach to constitutional reform with uncertain results. The Royal Committee on Constitutional Review, formed in April 2011, proposed forty-one amendments to the parliament. The committee included no representatives from opposition parties or civil society.<sup>20</sup> The amendments were made public in August, and the parliament debated them during nine days in September without public consultation, even though the king himself articulated “citizen activism and effective public participation” as a goal of constitutional reform.<sup>21</sup> The bulk of the amendments were approved by royal decree on September 30. Since then, protests have continued and political opposition and civil society groups continue to call for greater constitutional reform in a “more transparent and participatory process.”<sup>22</sup>

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Libya’s constitution-making process is currently underway, even as the country experiences growing unrest. Libyans elected a Constitutional Drafting Assembly (CDA) in three stages between December 2013 and January 2014. Unfortunately, a combination of insecurity, voter apathy, and boycotting by minority groups resulted in less than five hundred thousand votes cast—less than half of those registered and barely a sixth of the national electorate. Four of the sixty seats in the CDA were left unfilled due to lack of security in certain areas and a boycott by the Amazigh minority community.<sup>23</sup> The CDA met for the first time on April 21, 2014, with a deadline of August 19, as Libya’s Constitutional Declaration provided for 120 days for the CDA to complete its work. The deadline was missed, but this was ignored amid increasing violence,<sup>24</sup> competing legislatures and governments vying for legitimacy,<sup>25</sup> threats of secession,<sup>26</sup> and ongoing attempts by the international community to mediate a dialogue to put Libyans back on a path toward consensual, constitutionally-based democratic governance.<sup>27</sup>

In Yemen, the outcomes of the almost eighteen-month National Dialogue were handed over to a presidentially-appointed Constitutional Drafting Commission (CDC) on March 9, 2014. The CDC is a technical body of seventeen members, including judges, lawyers, and other professionals that reflect Yemen’s geographic, ethnic, and political diversity. Approximately one-quarter of the membership is women. The constitutional roadmap calls for the CDC to produce a first draft, which will then be submitted for public comment and to a “national body”—composed of representatives of the same groups that participated in the National Dialogue—to confirm that the draft is consistent with the National Dialogue outcomes. Like Libya, however, Yemen faces daunting political and security challenges. Houthi rebels have taken near-total control of Sanaa and other cities,<sup>28</sup> and calls from the south for independence have increased.<sup>29</sup>

## Egypt: Closed Processes

Egyptians began expressing concerns about the 2012 constitution-making process the moment the legislature announced the criteria for selecting the constituent assembly. By using the results of the parliamentary election—in which Islamist parties won the most votes—as the basis for determining the assembly’s membership, and by instituting a majority threshold for decision making, Egypt missed an opportunity to have the constitutional drafters “move beyond clear-cut party lines...in order to express a wider spectrum of opinion within Egyptian society.”<sup>30</sup> This effect was exacerbated when the opposition parties boycotted the assembly. The largely closed nature of the process—the assembly rarely consulted with the public, and drafters were alleged to have ignored the public inputs they received—further undermined the legitimacy of the process and final document.<sup>31</sup>

After the 2012 constitution was passed, “most of the complaints in Egypt about the [constitution were] about the process—who wrote it and how—and far less about the content.”<sup>32</sup> Egypt’s constitutional referendum, the most participatory aspect of the process, did little to improve the situation; it merely codified the imposition of a majority’s will on a sizable minority. Although 63.8 percent of Egyptians who voted in the referendum approved the constitutional draft, only 32.9 percent of the total electorate voted, meaning that a mere 21 percent of eligible voters approved the constitution. One commentator predicted that “the poor showing will have a number of consequences, including the prospect that the new constitution’s popular legitimacy may be challenged for some time to come.”<sup>33</sup>

The rationale for toppling President Mohamed Morsi’s government, and the manner in which it was overthrown, will be studied and debated for years and is beyond the scope of this report. What seems clear, however, is that the 2012 constitutional drafting process failed to bring Egyptians together to reconcile their differences and find consensus on the core principles, values, and nature of the Egyptian state. To the contrary, the process polarized social and political constituencies. Even before the 2012 constitutional referendum was held, an Egyptian commentator presciently warned, “If there is a sizable number of people who think the constitution is illegitimate and the consensus around [sic] is weak, there is a risk down the line that this would make a coup (soft or hard) easier.”<sup>34</sup>

The 2013 constitutional drafting process suffered from similar defects. Of the fifty-person constitutional drafting committee, only two were Islamists and neither was from the Muslim Brotherhood’s Freedom and Justice Party, which had won the previous presidential election. Article 29 of the constitutional declaration reserved only 10 percent of the committee member positions for “women and youth” each, resulting in only five women and four youths.<sup>35</sup>

The committee met with some civil society organizations, but the meetings were almost always closed, and there were no mechanisms for members of civil society to follow up with the committee or confirm that their views were being considered seriously. The committee had a website, but it went live to the public only a few days before the draft was complete. Social media were used for messaging, but there was no organized effort to reach the broader public. When the draft was eventually published, there was no systematic public engagement.<sup>36</sup> Egypt’s 2013 constitutional reform process, far from promoting national dialogue, seemed to narrow the space for political dissent. The number of arrests of journalists, academics, and activists rose markedly in the second half of 2013,<sup>37</sup> culminating with the arrest of several “peaceful activists” hanging posters encouraging people to vote against the constitution in the upcoming referendum.<sup>38</sup>

When the referendum was held on January 14 and 15, 2014, the constitution passed by an overwhelming 98.1 percent. However, like the 2012 referendum, the 2014 referendum was

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marked by extremely low voter turnout, only 38.6 percent. Several components of Egyptian society, including the Muslim Brotherhood and liberal parties, boycotted. Regular protests continued as incidences of violence increased. The Strong Egypt Party issued an official statement in January 2014 stating that “Egypt has come back officially—and unfortunately—to the ranks of the countries where dissidents are traitors, opposite opinions are foreign agents, and patriotism is only for those who blindly support.”<sup>39</sup> After the referendum, a civil society group monitoring the process noted that the lack of inclusiveness and participation would make it even more important for Egyptians to “find common ground for a constructive dialogue in which all Egyptians are equally represented.”<sup>40</sup>

### Tunisia: A Gradual Opening Up of the Process

In sharp contrast to Egypt, Tunisia adopted its constitution on January 27, 2014, with wider national support. The more inclusive, transparent, and participatory process employed there seems to have helped the country eventually reach a greater consensus that conferred some degree of legitimacy to the constitution and, by extension, Tunisia’s democratic transition.

Inclusion, transparency, and consultation were lacking during the early stages of Tunisia’s constitutional review<sup>41</sup> but picked up after the National Constituent Assembly (NCA) presented its first draft to the public in August 2012. Following publication of a second draft, the NCA launched a two-month outreach campaign that included public meetings in the NCA representatives’ constituencies,<sup>42</sup> hearings with interest groups, and television broadcasts of most NCA debates and proceedings. The United Nations Development Programme supported a dialogue in 2012 and 2013 between NCA members and citizens and civil society organizations in all twenty-four of Tunisia’s governorates; no fewer than 6,000 citizens, 300 civil society organizations, and 320 university representatives provided input directly to NCA members.<sup>43</sup>

The public interventions affected the eventual draft. Public reaction to the first draft contributed to at least three substantive changes,<sup>44</sup> while lobbying from civil society groups helped secure guarantees regarding separation of powers and rights and freedoms.<sup>45</sup> The Carter Center assessed these consultations to be “productive in reaching consensus on key issues.”<sup>46</sup> In the summer of 2013, however, the NCA was still gridlocked due to a majoritarian political dynamic similar to the one in Egypt. According to Mustapha Ben Jaafar, president of the Tunisian NCA, the assembly

found all these issues raised by the opposition were almost impossible to solve in the framework of the Joint Committee for Cooperation and Drafting that was composed along the same lines of proportional representation as the Assembly itself... So we needed to find a formula where everyone would feel involved and represented... We really wanted everyone to participate.<sup>47</sup>

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The answer came not from politicians, but from civil society. Four venerable and respected civil society organizations, with support from thousands of demonstrators, led a national dialogue that created the space for compromise within the NCA.

Tunisia adopted its constitution through a two-thirds majority vote in parliament and not, as many Tunisians had wanted, through a referendum. But deliberate and organized efforts to reach out to and consult with people during the negotiation and drafting helped Tunisia secure greater legitimacy and support for the constitution, steadying a democratic transition that months earlier appeared shaky.<sup>48</sup> The speaker of the Tunisian parliament declared that the constitution, “without being perfect, is one of consensus.”<sup>49</sup>

Perhaps as important, inclusiveness and participation seems to have taught Tunisians a new paradigm of political discourse and conflict resolution. “Tunisians didn’t know how to communicate before,” remarks Abdullah Fadhli, of an association of unemployed people. “We were so used to being afraid to say anything of substance outside of our own homes, in case there was an RCD spy nearby. Now we are learning to talk together again.”<sup>50</sup> The benefits of inclusion and participation have been felt in other ways as well. According to one member of the NCA, “Before the Revolution, there was no clear role for Civil Society in decision-making and no conception of how people should participate in public debates.” Inclusion “brought people closer together. People have learned to listen to each other....a culture of dialogue [is] emerging.”<sup>51</sup> There are already plans for the next parliament to set up mechanisms for further strengthening relations with civil society.<sup>52</sup>

## Reflections

It is far too early to assess in all cases whether citizens who have participated in constitutional reform processes in the Middle East and North Africa will, in the end, feel that their voices and demands were heard and that their constitutions are legitimate social compacts. Widespread demands for participation, inclusion, and transparency to overcome corruption, abuse, and histories of marginalization and exclusion remain at the heart of many calls for reform and complaints about recent processes. Some citizens, including women and youth, continue to demand representation at the decision-making table and also demand that transitional leaders and constitution makers hear their views. Where there is calm enough for constitutional reform, people have returned to the streets when they perceive the process as exclusionary or secretive. How governments respond to these public demands, and how constitutions are drafted, can determine whether the resulting documents are deemed legitimate and whether the peace that follows is to last. Tunisia’s gradual opening up of its constitution-making process and more inclusive political processes can serve as inspiration to other Arab Spring leaders who seek to reach consensus and meet the demands of their citizens—or who will return to the negotiating table after violent conflicts subside.

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## Benefits and Risks of Meaningful Participation

Leaders in postconflict, transitional, and divided societies have chosen to commit significant time and resources to undertake participatory and inclusive constitution-making processes—in part because they felt such a process offered the greatest chance of addressing the root causes of conflict and securing consensus towards peace. However, the conditions have to be present to successfully transition a society to a new social compact through broad participation, including a secure environment, freedom of speech and the media, and political will. Leaders need to assess how they will structure the process and respond to their context’s unique challenges to maximize the benefits and overcome the risks.

## Benefits

Recent scholarship regarding peace agreements underscores the benefits of broadening participation and the risks of exclusion. Badreddine Abdelkefi explains that “looking at case material from a range of peace agreements over the last fifteen years...we see that high or moderate civil society involvement in peace negotiations appears to be strongly correlated with sustained peace in the peace-building phase.”<sup>53</sup> Anthony Wanis-St. John and Darren Kew argue that “excluding civil society groups may streamline peace negotiations that are already complex,” but



the absence of these voices and interests at the negotiating table can prove fatal to the peace agreement during the postconflict peace-building phase. From Arusha to Oslo, the focus on elite interests in peace negotiations often leaves the populace at large without perceived stakes in the peace-building frameworks that the negotiators construct, weakening the ability of governments and transitional authorities to reach a sustainable peace.<sup>54</sup>

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The constitution-making processes in Arab Spring countries provide an opportunity to address the underlying social and economic inequities that led to the need for reforms in the first place. By bringing together the disparate components of a divided society and broadening the constitutional discussion, a participatory constitution-making process can even confront deep-seated regional, ethnic, or religious issues in a way that top-down elite-driven constitutional reform may not. As Nicholas Haysom argues, if “new values” of social equality and cultural harmony “are to be absorbed into the political culture, then it is critical that they be embraced by the ordinary men and women—the citizenry at large.”<sup>55</sup> This requires constitution makers to build trust with the public and promote democratic practices themselves. They must allow substantive input into the process, improving transparency while providing for people’s safety, generating public goodwill to confer legitimacy on the entire process.

### Building Trust

Even in the midst of conflict, a meaningful participatory process allows people a chance to express their own views and hear the perspectives of current or former adversaries. This type of exchange can promote understanding and build trust among communities; give rise to new institutional arrangements, rights, or guarantees; give visibility to and empower previously marginalized peoples; and provide a forum for national dialogue to promote reconciliation and forge a common vision on the identity and core values of the nation.<sup>56</sup> In South Africa, trust was established between blacks and whites not only through the words and deeds of heroic South African statesmen on both sides, but also through public constitutional forums that enabled black South Africans to hear from their white countrymen and women their ideas of a future state that recognized the reality of a black majority while simultaneously enabling whites to hear directly from blacks their ideas of a country that included a fair and equitable role for the white minority.<sup>57</sup>

### Promoting Democratic Practices and Values

Participatory, inclusive, and transparent processes can transform the relationship between citizens and their government, particularly in countries emerging from totalitarian or authoritarian regimes. The constitutional moment can be a break from a past where voices were suppressed at the point of a gun and demonstrate a new government’s respect for freedom, democracy, and the rule of law. Researchers refer to this in the peace agreement context as developing “social capital”; greater participation helps to “disseminate civic values...and demonstrate democratic behaviors for both political elites and the public.”<sup>58</sup>

In Libya and Egypt, where authoritarian regimes held power for decades, or where most citizens had been excluded from the political life of the country, a more participatory process could set important democratic precedents, establish or reinforce the democratic bona fides of leaders, lay the foundation for a culture of rule of law, and educate citizens about democratic practices, values, and principles. Such education can, in turn, empower citizens to demand enforcement and implementation of constitutional rights and limitations and to hold governments accountable when they fail to abide by constitutional requirements. The example of Uganda (1989–95), related by Devra Moehler, is instructive:



In Uganda, active citizens seem to be attached to democratic principles and constitutional rules and simultaneously more attentive to the flawed democratic performance of their political institutions. Uganda's informed distrusting democrats are thus more inclined to hold their leaders accountable to constitutional standards and to push for democratic improvements. Institutional distrust, combined with civic engagement, democratic attitudes, and support for fundamental rules, seems to offer the best recipe for furthering democratization, though individual-level attitudes alone are not sufficient to guarantee progress.<sup>59</sup>

Direct participation might be appealing to unelected transitional governments because it can enhance their legitimacy. It can also provide leeway for the transitional government to lengthen the transitional period, which may be necessary but otherwise politically dangerous.

### Enabling Substantive Input

The immediate effects of participation are difficult to quantify, often because no baseline surveys are conducted before the process starts. But the effects of direct participation on the content of the texts of constitutions are clearer. As Bereket Habte Selassie writes, "Public participation in the making of a constitution necessarily raises questions of substance."<sup>60</sup> Public inputs typically lean toward including more rights, including socioeconomic rights, often broadening the social and economic agenda of the constitution.<sup>61</sup> The Nicaraguan constitution of 1987 incorporated several important provisions that arose directly from public forums, including the establishment of autonomous zones for Nicaragua's Miskito Indians and other indigenous peoples.<sup>62</sup> In South Africa, a recommendation by the Centre for Human Rights at the University of Pretoria inspired a constitutional provision requiring the Human Rights Commission to report annually on the country's achievements—or lack thereof—regarding socioeconomic rights.<sup>63</sup> In Iceland, a massive public consultation effort using the internet in unprecedented ways resulted in approximately sixteen hundred web-based proposals,<sup>64</sup> including recommendations to add rights that had been absent from the previous constitution.<sup>65</sup> In Rwanda, gender equity advocates successfully influenced the content of the constitution.<sup>66</sup> In Tunisia, public opinion prompted significant changes to the first draft that the National Constituent Assembly produced.<sup>67</sup>

Even less documented than the number of provisions that have made it into constitutions as a direct result of public engagement is the number of times the public has prevented the incorporation of an unpopular provision. Public participation can be an invaluable check against unilateral or coercive action by elites. Even if it does not prevent the adoption of an offending provision, it documents and makes public the dissatisfaction, fueling future reform efforts. This benefit from public input can extend beyond the constitutional moment. As expressions of the people's needs, aspirations, and views emerge, governments can get a better sense of national goals and priorities for services and development, which can be incorporated into governance strategies.

### Increasing Transparency

Public participation, by definition, increases the transparency of the constitution-making process. It is also a valuable tool for constitution makers to manage public expectations, protect the integrity of the process, and protect officials against unfair or unjustified allegations of behaving in a biased or self-serving fashion (see the following). Transparency also strengthens officials' accountability to the public as the process unfolds. As the media, civil society groups, and the public at large know more about how the process is supposed to unfold, they can monitor and report on any deviations.

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### Providing for Safety

There are pragmatic benefits to inclusive, participatory, and transparent processes. By their nature, democratic transitions are emotional and volatile moments in a nation's history. It is not uncommon for people to take to the streets to express a policy preference or general displeasure with decisions being made, especially if there is no other option. Incorporating participation into the official constitution-making process provides people with a formal and managed mechanism through which to express their views. This outlet can act as a pressure valve.

In Libya, Tunisia, and Egypt, massive and sometimes violent demonstrations and protests have occurred in part because people felt that the political process marginalized, excluded, or ignored them. A strategic and well-communicated effort to engage and include the public at key moments in the transition, such as the drafting of the constitution, can be valuable for transitional leaders seeking to avoid violent conflicts and promote dialogue while maintaining the public's support and the legitimacy of the democratic transition.

### Generating Public Good Will

If leaders do not heed the public's demands to take part, they may erode the legitimacy of the process. The government of South Sudan had limited time to draft and ratify a transitional constitution before independence on July 9, 2011, and it appointed a committee to do the work in only four months. As a result, the process included no civic education or public consultation. The ruling party, which had won 97 percent of the seats in the national legislature less than one year earlier, came under intense criticism from the media, the South Sudan Council of Churches, opposition political parties, state and local government officials, and numerous nongovernmental organizations for adopting an exclusionary constitution-making process. Because these stakeholders were not included in the discussion, many assumed that the leaders were motivated by self-interest. This pressure forced the government to spend time and political capital seeking to bolster its democratic bona fides, in part by adding guarantees of greater participation and inclusion in the postindependence constitution-drafting process.<sup>68</sup>

In East Timor, civil society and a broad swath of the public called for widespread public participation and a consensus-based process. Instead, a single political party dominated the constitution making, giving only lip service to participation. The resulting constitution was viewed as the product of a single party and lacked legitimacy. When violence erupted a short time after the constitution's adoption, many key actors and groups called for the document to be replaced.<sup>69</sup>

### Conferring Legitimacy

As Muna Ndulo argues,

a constitution should be the product of the integration of ideas from all the major stakeholders in a country (i.e., all political parties both within and outside parliament, organized civil society, and individuals in the society).... A constitution perceived as having been imposed on a large segment of the population or having been adopted through the manipulation of the process by some of the stakeholders is unlikely to gain sufficient popularity or legitimacy to endure the test of time.<sup>70</sup>

It is in every government's interest that the public perceives the process and results of constitution making as legitimate, as both can affect the legitimacy of the government itself. Genuine public participation, conducted in good faith by the governing authority, boosts societal ownership of the constitution and extends its legitimacy. The South African constitution, drafted through a participatory process, includes an introduction explaining that "the objective of drafting this text

was to ensure that the final constitution is legitimate, credible and accepted by all South Africans.” In Kenya, where the 2010 constitution was ratified after a particularly contentious and divisive referendum, interest groups that campaigned hard to reject the constitution accepted the outcome, in part because they felt they had been given a free and fair chance to express and champion their views. As William Ruto, Kenya’s then-minister of higher education and a leader of the No campaign, stated as he admitted defeat: “[The] majority had their way, we had our say.”<sup>71</sup>

Constitution-making leaders may engage the public to derive the benefits discussed above. They may also do so because of pressure from civil society, the media, or other stakeholders who expect to be consulted on the foundational document of their society and are aware both of the trend toward greater participation and of the international legal framework that confers rights on citizens to take part in public affairs. The African Charter provides that “popular participation is the fundamental right of the people to fully and effectively participate in the determination of the decisions which affect their lives at all levels and at all times.”<sup>72</sup> There may also be a moral case for public participation, particularly in postconflict states. Civilians bear the brunt of conflict—by some estimates, up to 90 percent of war casualties are civilians<sup>73</sup>—and thus surely deserve to have their say in the making of constitutions supposed to usher in enduring peace.

### **Risks and Challenges**

Even as meaningful participation can confer benefits, there are attendant risks, and participation must be well planned and managed to address the challenges that arise particularly in divided societies. Participatory processes are more complex and complicated than elite-driven ones. They take more time, cost more money, demand more institutional capacity (e.g., local offices, larger secretariats, civic education teams, educational curriculums), and require the management and processing of many more interests and views. If meaningful participation is to be incorporated into the official process, national leaders and constitution makers should be aware of the potential pitfalls associated with engaging the public so they can plan accordingly.

#### **Potential of Polarization**

Public participation can make building consensus harder. As participation increases the number of views to be accommodated, in both the process and the draft, it increases the likelihood that competing opinions will need to be reconciled. Even where constitution making is grounded in mass participation, it still requires compromise among political elites; open dialogue that exposes highly polarized views can make it harder for political elites to strike a bargain.<sup>74</sup>

Opening up the process can give spoilers a chance to undermine progress. Especially in divided societies, individuals or groups may use identity-based issues and politics to polarize and divide the population. Taken to the extreme, this polarization can undermine the very purpose of the constitutional undertaking and slide a nation into—or back into—open conflict. Political interest groups can also manipulate consultations. In Bolivia, both major parties mobilized huge numbers of supporters for marches, demonstrations, and even a general strike. At one point members of the constitutional assembly were physically attacked.<sup>75</sup> Public participation became an exercise in “threat-based bargaining” and almost caused the country to collapse into violence.<sup>76</sup>

#### **Requiring More Time and Money**

As noted above, civic education and public consultation lengthen the process of negotiating and drafting a constitution, not only because of the time required to conduct the civic education and

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***According to government estimates, the participatory elements of Kenya's process, including outreach efforts, the national conference, and the referendum, cost \$88 million, or roughly \$2.57 per person.***

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consultations themselves but also because of the greater number of views that need to be reconciled to reach agreement or fashion compromises. They are costly too. According to government estimates, the participatory elements of Kenya's process, including outreach efforts, the national conference, and the referendum, cost \$88 million, or roughly \$2.57 per person. Unofficial estimates are as high as \$138 million.<sup>77</sup>

In societies emerging from decades of totalitarian rule, there may be a natural and justified impulse to rush through constitution making and create a democratically elected government. This has been the predominant rationale for Libya's compressed constitutional timeline. However, Libyan officials may be able to temper some of the calls for quick completion of the transition and achieve the myriad potential benefits of a more broad-based dialogue by being more inclusive and participatory during the transition and engaging in a process of incremental constitutional reform.

### Creating Unrealistic Expectations

Public participation can erroneously lead people to expect to have their way on every—or any—issue. When the reality sets in that constitution making involves compromise, and that the final text may not include their interests or concerns, people may regard the constitution with suspicion. On the other hand, in societies emerging from repressive totalitarian regimes where there is an understandable fear of government, unchecked public participation could lead to excessive constraints on the executive or the transfer of typically executive powers to independent institutions, which ultimately undermine effective governance.

Constitution makers must take care in shaping expectations so the public understands that the process is not an opinion poll. Even if an overwhelming majority of citizens expresses a particular view, it may not be reflected in the final draft. In Kenya in 2010, a majority of Kenyans opposed Qadi (Islamic) courts, but the final draft of the constitution included them out of respect for the Muslim minority, to the ire of the majority.

### Creating a Rift between the Public and the Political Elite

Public input should inform but not supplant the judgment of representative constitution makers and experts. Marginalizing political elites can risk creating tension between the constitutional text and the interests of those who will be called on to implement it. This could lead to a constitution that is ultimately undermined or ignored, fatally weakening not only the document but the entire democratic transition.<sup>78</sup> Kenya's attempt at constitutional reform (2000–05) was incredibly open and participatory, resulting in a draft that enjoyed widespread public support but threatened the interests of the political establishment. After adoption by an inclusive national conference, the Kenyan parliament removed publicly popular provisions relating to separation of powers and decentralization before submitting the draft for referendum. The public subsequently rejected the parliament's draft at referendum, paving the way for violence following the 2008 elections. The public in the end had its way in Kenya's 2012 constitution-making process, which resulted in a new constitution incorporating the popular provisions.

The 2012–13 Fijian process suffered from a similar disconnect between public and elite views, as the government literally burned the draft produced by the Fijian Constitutional Review Commission.<sup>79</sup> Designing a process that carefully balances the contributions of politicians, experts, and the general public is crucial to creating a constitutional draft that is supported by the political elite, is coherent, provides for effective and efficient governance, and reflects the will of the people.

## Evaluating Public Inputs and the Challenge of Coaching

A more participatory process creates the challenge of analyzing, evaluating, and incorporating public comments into the constitutional draft. Should a petition signed by one thousand people enjoy greater weight and consideration than a letter sent by a single person? What about a Twitter feed with ten thousand followers or a Facebook post with thousands of likes? What if five thousand questionnaires are gathered that are exactly alike and seem to be part of a campaign? What if the one thousand people who signed a petition all belong to the same political party? How do constitution makers weigh the opinion of a civil society leader who purports to speak for thousands of others? There are no right answers to these questions. In the end, weighing, considering, and incorporating public inputs is more art than science. What is important is that drafters sincerely consider the views and preferences of the people, try to find consensus wherever possible, and remain transparent in communicating how they incorporated public inputs into the draft and the reasons for their decisions.

A similar challenge may arise during in-person consultations. Public consultations are susceptible to manipulation from political elites, who may coach citizens to present a party line. In Zimbabwe, civil society monitoring groups reported that people were “reading from prepared scripts/booklets... providing answers... irrelevant to questions being asked, [and only a] few people making contributions even where the meeting [was] highly attended.”<sup>80</sup> These practices infringe on citizens’ right to be heard and constitute a form of coercion. It was also reported that “departures from coached positions usually carry the risk of punishment.”<sup>81</sup> Coaching undermines the utility of eliciting public input, further polarizes the public, and erodes the legitimacy of the constitution-making process.

## Creating the Veneer of Democracy

Public participation is susceptible to manipulation by authoritarians in democrats’ clothing. In Venezuela, the 1999 constitution-making process overseen by then recently-elected Hugo Chavez was greatly participatory. Elections for the constitutional assembly resulted in Chavez’s party controlling 95 percent of the seats, though his party only received 60 percent of the vote. Without a viable opposition, Chavez’s movement led a constitution-making process that received hundreds of proposals from civil society and even accepted a large number of them—all while dismantling Venezuela’s two-party system, purging the other branches of government, and facilitating Chavez’s control of the entire state.<sup>82</sup> The participation helped cloak Chavez’s takeover.

## Mitigating Risks

Scholars and practitioners have noted that at certain stages of the process or in particularly insecure environments, the risks and challenges of public participation may outweigh the benefits.<sup>83</sup> In Iraq, limited public consultation was carried out despite a lack of security. As a result, it occurred only in certain areas and tended to reflect the interests of only one ethnic group. The benefits and risks of public participation must always be carefully assessed on a case-by-case basis. Widespread public participation may be more appropriate and necessary in certain countries and contexts, and in certain phases of a process, than in others.

That said, many risks attend constitution making even in the absence of formal public consultation. When constitution drafters do not manage and lead the process, ideologues or spoilers are more likely to dominate the discourse. A delay in launching the formal process of constitutional review in Libya has left greater space for proponents of extreme forms of federalism. The more loudly extreme views are voiced, the greater the danger that different segments of the public will harden their positions.

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Careful planning and management of the process and people's expectations; conducting effective civic education and public information campaigns; ensuring that the process has sufficient time and resources; and adhering to the principles of inclusiveness, transparency, and national ownership can help manage and mitigate many of the aforementioned risks. The challenge is to design and manage the process to maximize the benefits while avoiding the risks of increased political or other identity-based polarization. Legitimacy through consensus is the ultimate goal of constitution making—consensus among political elites, between the people and their elected representatives, and among communities. Public participation can be an invaluable tool with which to achieve this consensus; the absence of participation can severely impede efforts to build it.

## **General Principles and Guidelines to Give Citizens a Meaningful Voice**

Many Arab Spring countries have designed their constitution-making processes by drawing upon their own historical experiences. This connection to the past can provide a sense of continuity, comfort, and perhaps even legitimacy. But countries should also avail themselves of lessons learned in other countries during the past two decades of inclusive and participatory processes. Not “confining one's imagination to one's own limited constitutional traditions and experiences,” as one expert observes, is “the true exercise of sovereignty.”<sup>84</sup>

Each country has its own set of constraints and opportunities. Each principle must thus be tailored to fit the experiences and needs of each of the Arab Spring countries. If customized wisely, however, general principles derived from other countries' experiences will assist constitution makers to address the demand for greater public participation, maximize the benefits of that participation, and minimize the risks.

### ***General Principles for Participatory Constitution-Making Processes***

In both its design and implementation, as mentioned above, a participatory process should develop and sustain political will, be as broadly participatory as possible, and promote consensus. It should involve careful planning and adequate resources, be transparent and accountable, and tailor public participation to its audience. Finally, it should provide a conducive political and security environment and foster a sense of national ownership.<sup>85</sup>

### **Developing and Sustaining Political Will**

Perhaps no single factor affects the outcome of a constitution-making process more than the agendas and intentions of political leaders.<sup>86</sup> A prerequisite to successfully engaging the public is the political will to conduct genuine and effective consultations. In some cases, constitution makers have conducted public consultations without fully embracing them or understanding why they benefit the process, their work, or their political interests. In Egypt, a July 2012 public hearing by the Constituent Assembly failed to engender goodwill or foster trust and legitimacy in the constitution-making process, instead prompting an open letter from eight Egyptian human rights organizations accusing the assembly of holding the hearing as a “largely formal gesture...to improve the image of the Constituent Assembly and give the impression that all segments of society, including human rights groups, participated in drafting Egypt's new constitution.” The letter denounced the proceeding as unserious, given that the agenda was overly general and confusing and that the hearing was conducted when the country believed that the constitutional referendum would take place in a mere six weeks.<sup>87</sup>

In other cases, regimes have used public participation to give the appearance of democratic transition or to confer legitimacy upon themselves, even as they were determined to manipu-



late the consultations or impose their preferences, regardless of what the public wanted. Uganda's constitution-making process included widespread civic education and more than twenty-five thousand public inputs but did not result in a democratic system of government.<sup>88</sup> The 1990 Zimbabwe constitution-making process included more than five thousand public forums but merely "illustrate[d] how a government can use a commission to ostensibly consult with the people on constitutional reform while in reality ensuring that the government controls the process."<sup>89</sup> During the 2012 constitutional review in Fiji, the Fijian government was reported to have burned thousands of copies of a constitutional draft prepared by an independent commission that had elicited over seven thousand public submissions.<sup>90</sup> The government replaced that draft with one that it favored, which Fijian civil society groups criticized as "an extreme concentration of power in the Prime Minister...that is unprecedented in most modern, democratic constitutions, and dangerous for Fiji."<sup>91</sup> As Virisila Buadromo argues,

when the government rejected the draft in December 2012 legitimacy instantly evaporated. The state was subsequently prepared to *consult* people on the constitution in order to provide a superficial rubber-stamp of popular legitimacy, but it was not prepared to allow genuine *participation*. Now, irrespective of whether or not the proposed 2014 electoral process is free and fair, the government will declare itself legitimate. This does not give power back to the people, but centralizes and reinforces it among elites.<sup>92</sup>

Research has shown that when people perceive a consultation to be insincere, they lose trust and confidence not only in the process but in the resulting constitution, their leaders, and the direction in which they are steering the country.<sup>93</sup> Experience has also shown that constitution makers with a genuine will to consult with the public may lack sufficient resources or knowledge about how to do so effectively. These are necessary to successfully engage the public.

In short, efforts must be made to secure the political will and support of all interests. Constitution making is as much a political negotiation as a legal drafting exercise, and every side in that negotiation must be made aware of the potential rewards of the process and the value of including the public in a national dialogue. Mediation—either local or international—may be helpful in getting the parties to buy into the process.

International actors can help facilitate more participatory processes and provide the required resources. They cannot, however, force sincerity or political will on national actors; any effort to do so will be substantially diminished without the buy-in of and commitment from national counterparts. Such an effort could also backfire if elites try to influence international opinion by merely going through the motions of public consultation. The public will recognize the lack of a genuine commitment to hearing and considering their views, and the resulting constitution may enjoy less legitimacy than if it had been crafted behind closed doors.

### Being as Broadly Participatory as Possible

A constitution-making process should make special efforts to reach as many citizens as possible. Civic education and consultation programs should reflect the ethnic, religious, cultural, tribal, linguistic, gender, and geographic diversity of the country. This principle applies both to inclusiveness (i.e., having all key stakeholders represented in the constitution-making body) and to participation (i.e., reaching people directly). Failure to reach out to the population as a whole risks provoking accusations of partisanship and favoritism, on the one hand, and unfairness and marginalization, on the other hand.

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***An inclusive process must consider factors such as poverty, illiteracy, cultural biases, language barriers, lack of development, lack of education, and weak infrastructure in determining how best to reach and educate different populations.***

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Special attention should be paid to reaching disadvantaged or marginalized peoples. This may require translating materials into minority languages or using audio and visual tools for the illiterate. In Kenya, constitutional materials were available in braille. Arrangements may need to be made for women or members of other groups who may not feel comfortable speaking in public. An inclusive process must consider factors such as poverty, illiteracy, cultural biases, language barriers, lack of development, lack of education, and weak infrastructure in determining how best to reach and educate different populations. Efforts should be made to ensure that all key groups have a voice and that citizens who wish to share their views are provided with a mechanism to do so. In Kenya and Uganda, consultations were held in each electoral district.<sup>94</sup> South African constitution makers made a concerted effort to reach out to remote parts of the country, but realizing that it would be impossible to reach, let alone properly educate, every person, they focused on community leaders with the motto “reach the people who reach the people.” Special efforts to reach out to potential spoilers and other self-excluding groups may also increase buy-in and help reduce obstruction and other challenges to the process.

### Promoting Consensus

If inclusiveness requires all key stakeholders to be at the table, consensus demands that all voices are heard and considered and that compromises are not necessarily based on majority positions. Especially in postconflict and transitional states, constitution making is as much about building a new national compact as it is about building new institutions and rules for governance. With such high and long-term stakes, it is crucial that diverse components of society agree on key issues. Not every view on every issue can be represented. But if done well, all participants will feel they have meaningfully taken part in the constitutional negotiation, will have had their views and voices heard, and will confer legitimacy and support for the constitution as a whole and, by extension, the new national project.

Achieving consensus requires having time to build relationships and develop mutual understanding. Decisions must be made through discussion, negotiation, and persuasion, using majority votes only as a last resort. Constitutional negotiators in South Africa used the concept of *sufficient consensus*; in practice, this meant support from the two main parties and a critical mass of the smaller parties. In the negotiations in the late 1990s to bring peace to Northern Ireland, sufficient consensus was reached only when a majority of the parties agreed on a particular provision, as well as a majority within each broad faction—unionist and nationalist. The process in Yemen sought agreement among 90 percent of the members of the National Dialogue’s constitutional committee or, failing that, the consent of 75 percent. Consensus can also be defined to mean agreement that is reached without a vote. During Indonesia’s constitution-making process, only one vote was taken, on a minor issue; in all other cases, there was unanimous agreement.

Reaching consensus among negotiators is insufficient if the goal is a legitimate and enduring constitution. Consensus must also be reached among citizens’ groups and society at large. To encourage the development of such consensus, drafters have to explain to the people why they have produced the text they have: what factors they weighed, what compromises they struck with fellow negotiations and why, and how they reached agreements on the final text. Persuading the public to accept a negotiated draft is much easier if the drafters have communicated with the public throughout the drafting process.

## Planning Carefully and Securing Adequate Resources

Programs that engage the public should have realistic objectives and include a strategic plan that incorporates the time and resources needed to achieve them.<sup>95</sup> Adequate time to plan and implement civic education and public consultation programs is crucial and will depend on myriad factors, including the size and population of the state, difficulties in reaching certain areas of the country, security conditions, seasonal challenges, linguistic diversity, levels of literacy, and the baseline knowledge and understanding of the population at large. The first stage of the Kenyan process in 2001 encompassed six months of strategic planning, during which the commission prepared educational and outreach materials; set up, staffed, equipped, and housed the secretariat; retained consultants; established a website; created an archives system; and set up local offices and planned constituency visits—all before any outreach and education programs were actually launched and before any drafting and negotiation were even considered. In South Africa, the Community Liaison Department took four months to plan for civic education and consultations.

It is difficult to predict how much time will be needed in any given country, both because of the factors described above and because civic education and consultations are not a discrete event but continue throughout the constitution-making process in various forms. That said, it would not be unusual for preliminary civic education to require two to three months and for public participation in the drafting and review process, especially if undertaken nationwide, to take an additional six to twelve months. This carries risks.

In countries emerging from dictatorship or violent conflict, a prolonged transition may seem unpalatable. The National Transitional Council of Libya felt compelled to prove its democratic bona fides by expediting Libya's democratic transition and rushing to a constitutionally-based, democratically-elected government. The result was mandating a 90-day constitutional review, later extended to 120 days. The benefits of direct participation are many, but they may not always supersede the desire to complete the democratic transition quickly. The issue then becomes one of balancing the need to get it done with the need to get it right.

Constitution-making processes in which international actors have shaped the agenda and time-frame—as in Iraq and East Timor—have tended to rush the planning stage and skimp on civic education and public consultation. By contrast, some of the most highly participatory processes that have genuinely engaged the public—as in Kenya in 2005 and South Africa in 1996—have been nationally owned and led.<sup>96</sup> In Iraq, the international community funded public participation efforts. But there was no civic education, outreach extended no farther than Baghdad, the mechanisms through which the public could provide input were inadequate, and there were no assurances that those drafting and debating the constitution would analyze or even see the views collected; indeed, the views were not considered. If the potential gains of a participatory process are to be realized, the impulse to impose tight timetables must be resisted to allow time to genuinely engage with the public, analyze the views gathered, and consider these views when preparing the constitution.

The human and financial resources needed to design and implement a highly participatory process can be substantial. In Uganda, 150 people were employed to cull the key inputs from more than twenty-five thousand public submissions. Kenya budgeted more than \$7 million solely for its district coordinators, workshops, civic education, and the collection, collation, and analysis of public input. A substantial additional substantial sum was needed to fund a secretariat that had a part in overseeing the consultation process.<sup>97</sup> The cost of undertaking similar tasks in South Sudan has been budgeted at approximately \$5.5 million.<sup>98</sup> Staff is required not only in the constitutional committee's national headquarters but also in satellite offices around South Sudan, which have a vital role to play in educating and consulting with the people.

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## Being Transparent and Accountable

A transparent constitution-making process is one that is conducted in an open manner so that, at each stage, people are aware of what is happening and why, informed about the decisions being made, and confident that their voices are being heard. Transparency is sometimes viewed as a weapon, ensuring that governments obey the rules of the process and holding them accountable when they do not. Especially in the constitution-making context, however, the opposite is also true: Transparency is a tool that officials can use to promote the legitimacy of the process, manage public expectations by explaining how consensual decisions were reached, and protect themselves against allegations that they have behaved in a biased or self-serving fashion. Moreover, transparency can forestall criticism and stifle rumors. It has been said that the press is like a hungry dog: If you do not feed it, it will eat the scraps that fall on the floor. Transparent processes feed the dog.

One way to create transparency and accountability is to pass legislation that establishes the timeline and principles that will govern the constitution-making process, as well as the nature and mandate of the constitution-making bodies that will manage and perform it. By informing the public about the nature of the process from the start, authorities can begin to engender confidence and legitimacy. As the process unfolds, public confidence grows if it is kept informed. The mechanisms employed to disseminate information must be tailored to local realities and preferences. In other countries, several methods have been used successfully. Plenary sessions of constitution-making bodies have been recorded and broadcasted by radio and television. The press and civil society have been allowed to attend commission meetings and sessions. Constitution-making bodies have issued regular updates to the public and media through written statements, briefings, and question-and-answer sessions. Constitution-making bodies have posted reports on an official website and have made hard copies available at their headquarters. Further reports have been produced to accompany draft constitutions, explaining how public inputs were considered and why certain choices on constitutional matters were made. Drafts of constitutions have been distributed to all localities and posted online. The public has been given access to constitution-making records, including bylaws, minutes of sessions, constitutional drafts and working papers, and financial records. Finally, drafts and other key documents have been archived, both as a historical record and in case lawyers or courts in the future want to refer to records in interpreting the constitution.

A strategic information campaign should regularly inform the public about what is happening and what will happen next. Such a campaign keeps the public informed and allows constitution makers to manage the public's expectations. When public hearings begin, the constitution-making body might explain that public inputs will be only one of several data points used in negotiating and drafting the constitutional text; other data might include the views of experts and the content of international conventions and standards. Such a message can help the public realize that, although they will be invited to express their views, the constitution-making process is not a public opinion poll in which majority views prevail every time. People may thus be more prepared to accept difficult and potentially divisive decisions.

The public also should be informed of plans for civic education and public consultation efforts as early as possible and given sufficient notice of when and where to participate. The views gathered during public consultations should be carefully gathered and recorded and then made available for public review. In Kenya, the Constitutional Commission held hundreds of public hearings and received tens of thousands of public inputs. The commission entered every input into a database that could be sorted by name, topic, locality, and other criteria. One day, a man came to the commission and accused it of having public hearings “just for show”—of listening to the people but then ignoring them and imposing its own views. A commissioner asked the man his name and

pulled up his record in the database. This was proof that the constitutional commission had not only given the man a chance to speak but had recorded his comments for later consideration by the drafters.<sup>99</sup> In South Africa, every person who made a submission to the Constituent Assembly received a reply from the constitutional body and was put on a mailing list to receive subsequent drafts of the constitution.<sup>100</sup> Actions like these helped protect the integrity and legitimacy of the constitution-making body the constitution-making process, and the constitution itself.

Not all meetings and forums need to be open to the public; some groups, such as women or vulnerable minorities, may feel more comfortable presenting their views in a closed forum. Similarly, a constitution-making body could decide to make each record of an individual's input available only to that individual—not, at least for a while, to the general public. The degree and nature of transparency can vary according to context, and careful consideration must be given as to when to make proceedings open to the public and when to close them. A closed session can fuel suspicions that negotiations have stalled or that private deals are being made; at the same time, confidentiality may at times be necessary for compromises to be reached. Outside the public spotlight, parties are less likely to grandstand before their constituencies and more likely to negotiate in good faith.<sup>101</sup>

Codes of conduct requiring integrity and neutrality on the part of those carrying out the civic education and public consultation processes should be adopted and publicized, and officials should be held accountable for any misconduct. Elected officials, courts, media, and a variety of civil society actors should monitor and oversee formal and informal institutions involved in the drafting process. A constitution-making body's final report should then explain why and how views were considered and how competing interests were handled. In this way, the public can be reassured that their views were heard even if they were not adopted.

A transparent process is likely to increase the sense of national ownership and support for the constitution. It can also educate the public on democratic practices and set precedents for future government conduct. Transparency is not only a means of achieving integrity and legitimacy for the constitution-making process, but a goal in itself.

### Tailoring Public Participation to the Audience

Constitution makers should listen respectfully to the views of the public without expecting citizens to speak about their aspirations or needs in constitutional terms.<sup>102</sup> In Nepal, early civic education efforts were largely absent from the constitution-making process. Later, when constitution makers sought to consult with the people, questionnaires were distributed asking communities about their views on federalism, presidential versus parliamentary systems, and other concepts of which people did not have clear understandings.<sup>103</sup> The Nepalese public could instead, or in addition, have been asked questions about the major challenges in their lives, what they perceived as defects in their government, how their communities could be improved, and what they wanted the government to be able to do for them. It is the responsibility of constitution makers, not of citizens, to understand how to put the concerns and aspirations of the people into constitutional terms.

The Constitution Commission in Kenya produced a Little Red Book (described in detail below) asking questions that varied in their sophistication and complexity. The section on the legislature contained questions regarding whether Kenya should “introduce moral and ethical qualifications for parliamentary candidates.” There were also more complicated questions, such as whether Kenya should “continue with the current multi-party system in the Legislature and one party in the Executive” or “change to a system that demands multi-party representation at both levels of government.”<sup>104</sup> Different mechanisms and tools, including different languages, should be used for different audiences; indeed, a variety of mechanisms and tools should be used for each audience.

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***The degree and nature of transparency can vary according to context... A closed session can fuel suspicions that negotiations have stalled or that private deals are being made; at the same time, confidentiality may at times be necessary for compromises to be reached.***

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Different groups will also require different mechanisms of consultation. Some will be able to respond to surveys. Others, such as the illiterate, will need to be consulted orally. Private or small group meetings may be necessary for particularly sensitive issues or with vulnerable or previously marginalized groups. In some cultures, women may need to be consulted separately from men.

### Providing a Secure Environment

Providing a secure environment for the public to learn about and contribute to the constitution-making process is central to the process's efficacy and success. If people fear retribution for the views they voice, they are likely to remain silent. In the midst of renewed or ongoing violence, constitution-making officials may need to consider the feasibility and efficacy of a constitution-making process. Especially in nations transitioning from totalitarian regimes, laws may still inhibit free speech, assembly, or the media or may give undue latitude to security forces. Repealing these laws may be necessary to instill confidence in people that they can act and speak freely.

Cultural norms should also be considered. As mentioned above, special arrangements, such as separate meetings, may be required for women and youth, who may be reluctant to express their aspirations in front of men or their elders. In Afghanistan, the constitution-making body met separately with women's groups and youth so that they could speak freely about their views and aspirations. All obstacles to the free expression of views should be considered and addressed to ensure that all voices can be heard.

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### Fostering a Sense of National Ownership

As much of the above suggests, constitution making must be nationally owned and led in order to be successful. International advisers should get involved only if national or transitional authorities invite them to do so. Once involved, international actors should leave the lightest footprint possible and make every effort to ensure that national actors play the principal roles in designing and implementing the constitution-making process, including educational and other participatory programs. In some cases, this may mean international actors do little more than provide funding and offer advice from the sidelines. Even where more robust assistance is appropriate, international actors should cite lessons learned to help national actors make informed decisions for themselves and not push for a civic education curriculum or process that does not meet local needs.

National actors must lead because it is their process and they must live with the results. For practical, cultural, and social reasons, they will understand which options can succeed and will be better able to incorporate local context, culture, and language into the process. Local preferences, needs, and interests should be at the forefront, increasing the credibility and legitimacy of the constitution-making project. Empowering national actors with training, knowledge, skills, and experience pays dividends long after the constitution-making exercise is completed. It also strengthens civil society, as interest groups mobilize around key issues and develop advocacy and organizational skills.

Experience has shown that problems may arise when international actors lead in designing and conducting civic education and public consultations. The process may be perceived as a foreign-imposed agenda rather than a locally owned exercise, with predictable results. In East Timor, the United Nations organized public consultations before the sitting of the Constituent Assembly, and when the United Nations handed over the results of the consultations, they were shelved; the assembly did not trust them. Public consultation conducted by actors other than those writing the constitution also prevents those making the constitution from directly engaging with the public.



Special care should be taken to ensure that international interference does not erode the credibility of a constitution-making process.<sup>105</sup>

Respect for national sovereignty, however, does not mean that international actors should fund processes that are primarily public relations exercises designed to promote a particular political agenda. Nor should they waste resources in contexts that make it impossible to have a nationwide and highly participatory process—such as high levels of violence or suppression of the free expression of views.

International actors should decide whether and how to support participatory elements of a constitution-making process case by case,<sup>106</sup> carefully assessing whether assistance will bolster the legitimacy of the process, especially where political elites do not have the political will to conduct the process in a genuinely inclusive and democratic way. There is a risk that assistance can lend an air of legitimacy and credibility to a process that is mere window dressing for a regime with more self-serving motives.

There is seldom a clear answer to the question of whether or not to fund participatory elements of a constitution-making process. But the international community can develop guidelines for tackling the question. These could identify which factors and actors to assess and monitor in order to determine if processes that purport to be people-driven are what they claim to be. When international actors decide not to fund an official process, there may be other opportunities to open up the constitutional dialogue, such as supporting civil society.

### ***General Guidelines for Civic Education and Public Consultation***

Civic education and public consultation are the cornerstones of efforts to promote a national dialogue on constitution making, build consensus, and engage the public. Meaningful participation can be defined by both what it is and what it is not. The constitution-making landscape is littered with boxes of surveys that citizens filled out and constitution makers never looked at,<sup>107</sup> and too many civic education campaigns have been more about public relations than about hearing the voices of citizens.

Transitional leaders should promote civic education partly because it enables people to understand the constitution-making process specifically and democratic values and principles generally. It is also a chance for people to hear the issues being discussed, the choices being made, and the ways that they can participate in the process. People cannot be a part of constitution making if they do not understand what choices they are being asked to make, or even why a new constitution or reform process is needed. Civic education also enhances the public's ability to participate in the implementation of the constitution after its adoption. It should take place before, during, and after an official process is launched to ensure that members of the public understand the constitution and their rights. Constitution makers can consult with the public about how the process should be conducted before it is designed, the agenda for the reform process, specific constitutional issues before a draft is prepared, and the nature of the reforms themselves.<sup>108</sup>

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### **The Need for Ongoing Civic Education**

To prepare the public to participate in constitution making, government officials and civil society may promote civic education even before the official constitution makers are selected. The focus at this stage should be on fostering awareness of the process itself as well as preparing people to participate. Educational efforts should explain why reform is needed, the history of constitutionalism, the timeline of the process and the public's role in it, and how the process will take place.

Civic education in the early stages of constitution making may also focus on creating a basic understanding of core constitutional issues and themes, which will help the public to make choices regarding constitutional design and participate more fully in discussions on the substance of the constitution. Kenya's Little Red Book discussed about twenty general issues—identified through public consultation—and two hundred specific items relevant to that country's forthcoming constitution-making process, empowering the public to contribute thoughtful and targeted inputs once public hearings began. If the constitution-making body plans to consult the public on a specific set of reforms or a draft of the constitution, the public will need to be educated about the contents, the rationale behind choices made in the draft, and how public inputs are to be considered. If a referendum is to occur, people will need to be informed about the process, the issues under consideration, and how the questions will be posed on the referendum ballot.<sup>109</sup>

Civic education is a key component in the effective implementation of the constitution as well. It is axiomatic that organizations and individuals can demand their rights only if they know them. Civic education during the constitution-making process should inform people not only of what rights exist but why these rights are important. It should also educate them on the institutions—such as courts and independent commissions—they can petition to enforce their rights. Finally, public participation should give people a feeling of ownership and entitlement regarding the rights that appear in the final text. In South Africa, some people carried the text of the new constitution in their pockets for years after it was adopted, a statement of empowerment. After the constitution has been ratified and adopted, civic education efforts should focus on the constitution's contents, the people's civic rights and duties, and the ways citizens can access their rights.

### Methods of Civic Education

The methods used to educate the public should be chosen in light of local circumstances, including cultural mores, literacy levels, country size, and geographic accessibility. Different mechanisms will be needed to reach different groups, with the rural poor and marginalized citizens typically being the hardest to reach.

Past processes have used television, radio, the internet, and social media, as well as workshops, meetings, pamphlets, and books.<sup>110</sup> South Africa employed a poster campaign with the slogan "This is your Constitution," as well as brochures, posters, newsletters, comic books, and other creative means to raise awareness and encourage people to participate. In Eritrea, which has an 80 percent illiteracy rate, the constitutional commission used songs, poetry, mobile theatre, and short stories. In Somalia, where access to the public is limited because of security, civic educators texted information to people by cell phone.<sup>111</sup>

Face-to-face civic education efforts should be directed in particular at citizens who historically have been marginalized to ensure that the process is inclusive and considers voices rarely, if ever, heard in the country's political affairs. Research indicates that conducting at least three workshops in each community is the most effective way to ensure that marginalized citizens are empowered to participate and able to understand the process and choices involved.<sup>112</sup>

Whatever methods are used, a vigilant information campaign at each stage of the constitution-making process promotes better public understanding of and access to the process and facilitates public participation. In South Africa, the constitution's designers not only published early drafts of the constitution but included multiple formulations of key issues on which consensus had not yet been reached. This allowed the public to see how the views of the working committees were evolving and prepared people for a final draft that would have to choose the views of some groups over others; those whose views would not be adopted at least knew that their opinions had been considered.

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## Public Consultation

Nationwide inclusive public consultations are a key component of participatory constitution-making processes. Constitution makers typically use a wide range of consultation mechanisms to reach as many citizens as possible or to achieve different objectives at different stages of the process. Those mechanisms can range from face-to-face public meetings, civil society hearings, and expert conferences to surveys, focus groups, social media, and requests for written submissions.<sup>113</sup> A special effort should be made to ensure that previously marginalized citizens fully participate in the process, in particular women, youth, and minorities.

Leaders should consult on the design of the process as well as the future content of the constitution and the people's aspirations. Some leaders want to secure legitimacy from the outset for the process. In Libya, former prime minister-elect Mustafa Abushagur conducted an informal Facebook survey to determine whether the constitutional commission should be appointed by the parliament or directly elected by the people.<sup>114</sup> In Uganda, citizens were consulted in 2012 about whether to engage at all in a process of constitutional reform.<sup>115</sup>

Public hearings have been organized geographically and thematically; others have targeted specific interests or issues. In South Africa, women's groups, labor organizations, business interests, religious and tribal leaders, and judges provided open testimony to the Constituent Assembly. When the safety of the individual is not an issue, recording or videotaping public hearings and transcribing inputs is advisable for several reasons. It allows drafters to review specific comments, it can resolve disputes about what was said, and it creates an archive that can be kept in public libraries or other institutions to serve as a lasting testament to a seminal event in the nation's history.

The opportunity to provide submissions in writing or through electronic means is particularly important where direct consultation with all communities is not feasible. In Iraq, the security situation made consultations and hearings outside Baghdad impossible, so the Constitution Drafting Committee designed a questionnaire for people to submit at designated offices.<sup>116</sup> This, however, did not lead to an inclusive set of views. Limiting consultation to one form often benefits certain groups over others. A dedicated website can make it easier for citizens with internet access to provide direct input. Kenya in 2009 and 2010, Iceland in 2011, and Fiji in 2012 all created Facebook pages that allowed the public to offer comments.<sup>117</sup>

Where security allows, constituent assembly or commission members should consult with the public face to face. Constitution makers have reported that their views have been transformed through these interactions. In Afghanistan, committee members noted their surprise at the sophistication of the views shared in rural areas and the large portion of the population supporting greater religious freedom.

Engagement with diverse communities from across the nation also allows constitution makers to see themselves as representing not only a narrow interest or group but the nation as a whole. In South Africa, members of the Constituent Assembly divided into thematic groups and traveled to multiple districts to participate in public forums. Of course, official drafters cannot attend every public forum. A robust secretariat with local offices or another administrative mechanism or partnership is crucial for effective and comprehensive consultation.

As mentioned above, constitution makers must carefully record, sort, maintain, analyze, and seriously consider all views. Oral submissions must be meticulously recorded, whether by videotape, audiotape, or in writing. A well-trained administrative body must maintain the documentation according to an agreed-upon procedure to protect the integrity of the information. Submissions should be coded so that, where appropriate, they can be quantitatively and qualitatively reviewed and considered.<sup>118</sup> In Kenya, submissions were coded and tabulated by the submitter's biographical

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information—name, age, gender, and residence, which were kept confidential—as well as by the form of the submission, the category of issues expressed in the submission, and the actual views expressed. This matrix allowed drafters to weigh submissions based on the frequency with which they were expressed. Other factors, such as the demographics of the submitters, could also be considered, depending on the drafters' needs.<sup>119</sup> In Kenya, South Africa, Sierra Leone, and elsewhere, constitution makers subsequently prepared and distributed a report about how public views were considered and incorporated into the draft constitution.

Consultation can provide a forum for spoilers and extremists to undermine the public discussion of divisive issues that can be polarizing. Special attention should be paid to structuring public forums to minimize this likelihood. Federalism, for example, is often a divisive issue, with opponents accusing supporters of trying to disintegrate the country and supporters accusing opponents of trying to allow the capital city to subjugate peripheral or minority areas. Such is the tenor of the debate in Libya today.<sup>120</sup> And yet when one focuses not on terms (federalism, decentralization) but on substance (which division of government oversees trash collection or other essential services), Libyan centrists and federalists may not be that far apart regarding which levels of government should enjoy which powers and be responsible for which services.

Public debate should rise above labels and accusations of motives and focus on the broad concerns of citizens and options for addressing these concerns. This is easier said than done. But a well-facilitated dialogue accompanied by a public education campaign can bring people closer together, giving them an opportunity to identify the needs and preferences of citizens and to reach consensus on thorny issues.

### Working with Civil Society

The task of educating the public and raising awareness is extremely demanding and is often carried out by a multitude of actors. In inclusive and participatory processes, official constitution makers usually partner with civil society and the media to assist in preparing the public to participate in the constitution-making process.

The term *civil society* is broad and can mean different things in different contexts. It typically refers to any nonstate actor, including nongovernmental organizations (NGOs); social and professional organizations, from sports clubs and trade unions to tribal and religious institutions; and interest groups. In some countries, civil society is dominated by a vocal minority—elite, educated, urban-based organizations that have access to the media and the ears of political leaders and the international community but have less resonance with the general public. In other societies, civil society can be extremely broadly based and reach down to the grassroots. However defined, civil society and the media are often important to augmenting and supporting official efforts.

In numerous contexts, constitution makers have partnered with civil society and the media to reach citizens. Constitution makers can create a program that monitors, evaluates, and coordinates outside actors. This program can approve educational materials aimed at specific sectors of society or the nation at large, facilitate the training of those conducting the program, and monitor the process to ensure that the civic education plan is being carried out effectively. A standardized core curriculum can minimize the risk of competing or contradictory information reaching the public. In Kenya, the Constitutional Review Commission produced a civic education curriculum and source book that both official civic education providers and those external to the formal process used. A train-the-trainers model, adjusted in light of workshop evaluations, can improve coordination, support common messages in civic education activities and quality control, and ensure that programs reach previously marginalized citizens.<sup>121</sup>

Evaluation can determine the effectiveness of different methods as well as their effects on participants' attitudes and knowledge. Ideally, surveys and interviews are carried out throughout the campaign so that early efforts can be improved. A code of conduct signed by all educators, or a memorandum of understanding between the formal body and educators, can ensure that all actors know what is expected of them and what the consequences are of breaching the code.<sup>122</sup>

Civil society has supported official constitution makers in gathering public inputs and conducted its own unofficial consultations. In Zimbabwe, civil society organizations were suspicious of government intentions in drafting the constitution and did not trust that public consultations would be carried out in a free, fair, and impartial manner. They thus conducted their own intense “civic education and information dissemination through the media, community outreaches, public discussion forums, road shows, marches and other forms of ensuring that the people [were] educated.”<sup>123</sup> The United Group, an Egyptian NGO, conducted hearings in fifteen governorates, asking people what they wanted to see in the new constitution. The effort elicited more than six thousand inputs, which the NGO coded in a database—though it is unlikely constitutional drafters ever reviewed the data.

Civil society may also monitor, observe, and report on the constitution-making process to ensure that it is credible and adheres to basic principles. NGOs in Zimbabwe formed ZZZICOMP, which “focuse[d] on independent civic monitoring of the constitution-making process in all constituencies in Zimbabwe with a view to increasing the transparency of the process, holding those leading the process to account, enhancing the development of a democratic constitution in Zimbabwe, and ensuring that the draft constitution produced reflects the wishes of those engaging with the process.” Zimbabwean NGOs trained 420 monitors to attend and observe official consultations and then produced a report on their findings.<sup>124</sup> The media are another watchdog that can monitor and report on the constitution-making process.

Civil society frequently engages in advocacy, lobbying for particular issues, such as human and minority rights and gender equality, or representing sectoral interests, such as trade unions or agriculturalists. In this role, civil society representatives may attend public hearings on specific issues, prepare submissions for the constitution-making body, and organize campaigns to get certain issues included in the constitution.

Political parties can also be crucial in a constitutional review and invaluable resources and allies for constitutional drafters. Parties often have established structures and mechanisms to reach their constituencies and are accustomed to using them; these mechanisms can be extremely useful in fostering wider participation in the review process. Getting political parties involved in the constitutional reform project can also strengthen its legitimacy, just as marginalizing them risks alienating powerful interests. Formally partnering with political parties in the constitution-making process is not, however, without risks. Civic education should—to the fullest extent possible—be neutral, apolitical, and objective. It should not be combined with advocacy regarding specific outcomes. Any societal group or institution—including NGOs, particularly in countries where NGOs are closely aligned with political parties—may have a partisan agenda, but political parties are specifically organized around them. In recognition of this, some constitution-making processes have sought to limit political parties' role in civic education. Where political parties insist on engaging in civic education efforts, concerns over partisanship may be reduced by creating a code of conduct to which the parties must adhere.

By working with civil society, constitution makers can enhance their participatory efforts, reaching greater numbers of people. In addition, facilitating the ability of civil society to monitor and report on the process can improve the transparency, and by extension the legitimacy, of the

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***Civic education should—to the fullest extent possible—be neutral, apolitical, and objective. It should not be combined with advocacy regarding specific outcomes.***

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process. By creating space for civil society to advocate for special interests, constitution makers can gather useful information about the needs and priorities of society—although they must also carefully determine who these groups represent and how to weigh and balance the inputs.

## Conclusion

Constitution making in fragile and divided societies presents a unique opportunity to redress inequities, resolve conflicts, seek compromise and consensus, build peace, and give citizens a meaningful voice. These goals are much more likely to be achieved if the process is inclusive, transparent, representative, participatory, and nationally owned and led. However, political will and careful planning are required to minimize the risks and seize the opportunities that such a process affords.

Over the last few decades, constitution makers globally have been exchanging experiences, lessons learned, and guidance to provide options about how to overcome intractable conflicts or divisions through inclusive participation, dialogue, and consensus building. Leaders can look to their past experiences in constitutional reform but should also draw from the examples of other countries to maximize the likelihood of meeting new demands from citizens and changing political landscapes.

Even the most well planned and participatory process will be fraught with challenges with no guarantee of success. However, when public participation is more than an exercise in public relations, it increases the likelihood of achieving a more durable peace and building democratic foundations—especially for the countries of the Arab Spring attempting to repair the damage done by hastily drawn borders, decades of dictatorships, and ideological, ethnic, and sectarian divisions.

Tunisia's constitution-making process, while not perfect, demonstrated that inclusive and participatory constitution-making can set a precedent for inclusive political processes and lead to a more legitimate social compact. While it is too early to assess how deep public support for the Tunisian constitution runs, the country's experience provides an example of good practice for other Arab leaders as well as citizens struggling to get their voices heard.

In the wake of the Arab Spring, citizens' demands cannot be addressed by a few elites horse-trading behind closed doors. They may require an inclusive nationwide process of civic education, dialogue, consultation, and negotiation, in which people meaningfully participate and leaders seriously consider their views, seeking acceptable compromises and consensus to achieve a more legitimate social compact and durable peace.

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***When public participation is more than an exercise in public relations, it increases the likelihood of achieving a more durable peace and building democratic foundations.***

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## Notes

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The Arab Spring has been a rejection of dictatorial regimes that for decades ignored or actively repressed democratic participation, and citizens in countries across the Middle East and North Africa are now demanding reform from their governments. Whether these governments seize their constitutional moments and seek to include the aspirations of all citizens, including women and previously marginalized citizens, in their new social compacts may determine whether the constitution-making processes lead to durable peace or further division. There is no blueprint for inclusive and participatory constitution-making processes, but there are lessons to be learned from the past twenty-five years of constitution making, including the recent experience of Tunisia.

This report draws from the work of scholars and constitution makers who have been reviewing options for consensus-based constitution-making processes that can meet the demands of citizens as well as changing political landscapes in divided societies. As the countries of the Arab Spring transition from authoritarian regimes and attempt to overcome divisions in their societies, their leaders can learn from the wealth of recent comparative experience about how to use the process as a peacebuilding tool and develop a constitution that enjoys legitimacy.

## Of Related Interest

- *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* by Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter (USIP Press, 2010)
- *New Technologies in Constitution Making* by Jason Gluck and Brendan Ballou (Special Report, May 2014)
- *Yemen in Transition: Between Fragmentation and Transformation* by Philip Barrett Holzapfel (Peaceworks, March 2014)
- *Crisis and Opportunity in South Sudan* by Princeton N. Lyman, Jon Temin, and Susan Stigant (Peace Brief, January 2014)
- *Lessons from Afghanistan's History for the Current Transition and Beyond* by William Byrd (Special Report, September 2012)
- *Constitutional Reform in Transitional States: Challenges and Opportunities Facing Egypt and Tunisia* by Jason Gluck (Peace Brief, May 2011)

