

Part 4: Guide to key external actors in the process: Civil society, the media, and the international community

Although parts 2 and 3 of this handbook are intended to assist anyone involved in a constitution-making process, the discussion is particularly directed to providing guidance to national actors involved in designing, developing, or undertaking such a process. Such national actors are usually connected to government in some way and often have a legal mandate of some kind. At the same time, there are also key nonstate actors that often play important roles in processes—both official and unofficial roles, and with both positive and negative impacts. Among the most significant are civil society actors, media organizations, and international actors.

In this part, the focus shifts to one of providing specific guidance to:

- civil society and the media about roles they play, either when participating in the official constitution-making process (for example, making submissions on constitutional issues) or in situations in which they do not have official roles but wish to influence the process (ideally to make it more participatory, transparent, inclusive and nationally owned; and
- international actors, particularly when they are leading or substantially influencing a process.

4.1 Civil society and the media

As discussed in parts 2 and 3, a constitution-making body may officially work with civil society and the media in various ways; in a participatory process, in particular, they often play critically important roles in civic education and public consultation activities. (See, for example, the discussion in part 2.2.2.) We suggested in part 2.3.11 that the need for a constitution-making body to engage frequently with the media makes it vital to develop a media strategy. In addition, civil society and the media will often also take on key roles and activities related to the constitution-making process on their own initiative, in many ways quite distinct from any “official” roles they play in supporting the process. These can include roles and activities closely connected with what are generally understood to be important purposes of civil society and the media—exposing and sometimes challenging state institutions, and, in the case of civil society in particular, even mobilizing people against certain state policies. So in carrying out such roles and activities, civil society and the media can sometimes clash or have tense relations with constitution-making bodies.

In this section we discuss some of their key roles and activities, including promoting or organizing for constitutional change, informing the people about issues related to elections, providing civic education, supporting or conducting public consultations, preparing submissions, researching, lobbying, and monitoring the process. In doing so we identify some of the potential problems and dilemmas that can arise in relation to such roles and activities, and offer guidance about the constructive role civil society and the media can play, in particular to promote a participatory and deliberative process.

4.1.1 Promoting or organizing for constitutional change or reforms

As discussed in part 2.1.3, under the heading “The political dimensions of starting a process,” the pressure for constitutional reform processes often comes from political action and street action, in which civil society and the media often play significant roles.

In Colombia the media linked with student groups to push for a constitutional referendum on creating a constituent assembly. (See box 1, “Colombia’s popular movement for reform.”) In Kenya, prior to the process that ran from 2000 to 2005, civil society, faced with governmental foot-dragging over starting a constitutional process, created a group of fifty-two religious and secular organizations that set up an unofficial commission to travel the country and collect the views of the people. This elicited such popular enthusiasm that the government reluctantly started an official process of review. One important lesson is that political action is more likely to be successful if civil society organizations can work together to get a process moving. Other forms of political action could include trying to get change onto the agenda of one or more parties—or even trying to create a party with constitutional reform as a main plank. This, however, is complex, and may be possible only as a long-term strategy.

In Afghanistan and Guatemala, civil society played a role during the negotiations about the structure of the process. In Timor-Leste [2002], after the constituent assembly was established, a consortium of civil society organizations became concerned about the short time limits for the assembly, the limited agenda of issues it was considering, and the lack of interest in consulting the people. Given that the United Nations was serving as the transitional administration, the consortium wrote to the United Nations Security Council to ask its members to use their influence to put the conditions in place for a deliberative and participatory process. When this request did not lead to change, the consortium demonstrated in front of the constituent assembly, demanding a more transparent and open process, and this led to changes in how the constituent assembly engaged the public, including holding regular press conferences and limited public consultation on the draft. (See the case study on Timor-Leste, appendix A.11.)

The 2006 People’s Movement in Nepal was an example of street action. It is a form of direct political action that carries its own risks: of creating instability; of physical injury or death to some, as happened in Nepal; and perhaps of undermining belief in the rule of law, thus

undercutting the whole idea of a constitution. One demand of leading groups in the movement in Nepal was a constituent assembly. The People's Movement turned what the political parties had agreed upon from an aspiration into a possibility.

It is difficult to provide guidance to civil society and the media about how best to be effective in playing such roles; much depends on the local context. Civil society, however, will generally be most effective in such roles if it is broad-based, with good networks between the various civil society actors (NGOs, churches, associations, and the like), and if civil society leaders have good links with one another, the media, and political parties. Finally, the campaigns for constitutional change need to be designed to apply real pressure to those in power.

4.1.2 Informing and educating the people about electoral issues related to constitution-making

Elections of various kinds can play important roles in the initiation and other aspects of constitution-making processes. Because of the complexity and political sensitivity of the issues relating to both the process and the contents of the constitution that so often are central in such elections, the roles of civil society and the media in providing information and civic education can often be of great significance.

The numerous kinds of elections that can have major significance for constitution-making processes include:

- a normal election for the legislature where a major issue for voters concerns whether a constitutional reform process should be initiated;
- a normal election occurring during a constitution-making process, when issues about the process, or the contents of the proposed constitution, may well be important electoral issues;
- an election to select the members of a constitution-making body, such as a constituent assembly; and
- an election for the legislature held after the new or revised constitution is adopted (which may be the first for a new legislature established in accordance with the new constitutional provisions), when key electoral issues may relate to the implementation of the new or revised constitution.

Such elections may involve issues about candidates' and parties' varying commitments to a constitution-making process, their views on the contents of a new constitution, and adherence to and implementation of new constitutional arrangements. They will therefore often be elections with unusual significance for a country. Voters may have opportunities to influence constitutional outcomes, both by voting and by participating in debates about process, constitutional contents, and implementation.

It is common for civil society and the media to play major roles in informing people about

issues in relation to elections, and in addition for civil society to play a role in mobilizing and organizing people—for example, to lobby and apply other forms of pressure to parties and candidates, and to vote in particular ways. Because of the fundamental issues about the future of the country likely to be at stake in an election connected with a constitution-making process, the roles of the media and civil society may be particularly significant.

In many countries, the voting preferences of a large proportion of the voters are set (most voters having allegiances to particular parties), with most elections decided by the “swing” votes of a minority, with a limited range of issues likely to attract the voters’ attention. But in elections connected to a constitution-making process there will usually be many issues on which the voters should focus. Voters may need encouragement to think beyond the immediate future (as is the case in a normal election) and instead think about the shape of the state and the rights of people far into the future. They may need to be helped to think of themselves not just as workers (especially when economic times are hard), parents (when education is the main issue), and patients (when healthcare is at stake). They are also people with much wider concerns; they are also citizens (who want effective and responsible government—even from “their” candidates), they are taxpayers (who want value for money and financial accountability), they are landless or landowners, minorities or members of the majority, women or men, urban or rural dwellers, and so on. A constitution will be relevant to all their concerns. And many may find that it is not their “regular” parties that have the best approach to the constitutional issues.

In countries emerging from turmoil to make a constitution, political parties may not be well established, though usually some sorts of groups of “like-minded” candidates will emerge. And a constituent assembly and even a parliament may comprise more nonparty members than does a typical legislature. So it may be important to focus on the views and capacities of the individual candidates when deciding how to vote.

Civil society and the media can play vital roles in alerting the voters to such issues. They should not rely solely on either official “voter education” or political parties. The media—to the extent that they are independent of political parties and powerful economic forces with their own interests in election outcomes—can also play critically important roles in providing information to voters.

4.1.3 Civic education

Civil society and the media can play a wide range of roles in providing education to the people about the constitution-making process and the agenda of constitutional issues arising in it. In a highly participatory process, the constitution-makers may link with civil society and the media in various ways to support the official civic education program. (See part 2.2.2.) When the constitution-makers are not committed to informing or educating the public, civil society and the media can play a key role by taking the initiative to begin the constitutional dialogue and to inform and educate the people as well as preparing them to advocate for a more people-centered

process. (See part 2.2.2 for a discussion of civic education methods and some pitfalls to avoid.) Even where there is a participatory process, with a good official civic education program, there will almost always be room for additional information and education. Some civil society groups will be able to play special roles in the provision of education or information because of the specialized knowledge they have about key problems or issues (e.g., human rights) or their special relationship to marginalized groups (e.g., poor women).

4.1.4 Public consultation

In a highly participatory process, civil society and the media are sometimes given important roles in official public consultation processes (e.g., civil society can assist with organizing and facilitating face-to-face meetings between the public or sectoral groups and the constitution-makers, and media organizations can help by advertising meetings and gathering views—see part 2.2.3). In processes where no mechanism is provided for people to have input into the official process, civil society and the media have sometimes conducted their own public consultation and then provided constitution-makers with analyses of the views submitted. The degree to which this has had an impact on the process has depended on a number of factors, including the credibility of the methodology and the institutions involved as well as the willingness of the constitution makers to make use or review the views. In such circumstances, careful thought should go into how the public consultation is carried out to maximize the likelihood that the decision-makers will be receptive to the people’s views. It may be wise to invite the constitution-makers to attend the consultation so they trust that the process is credible. Although the discussion of how to conduct public consultation and the issues to consider contained in part 2.2.2 is directed toward providing guidance to “official” constitution-makers, many of the points made there are relevant to unofficial consultation.

4.1.5 Submissions to the constitution-making body

The modern trend in constitution-making is toward popular participation, and increasingly the official process provides opportunities for public participation and will publicize how the people can participate. Civil society and the media can play significant roles in helping people better understand how to make submissions and share their views. Further, civil society groups can be expected to have strong interests in making their own submissions, particularly in relation to the constitutional issues of relevance to their fields of work and expertise. To be able to play such roles, both media and civil society will generally have to familiarize themselves with the timetables and procedures of the process so that opportunities to contribute are not missed. However:

- delays in other parts of a process may reduce time allocated to public consultation, so that it can be critically important to pay constant attention to the changing timetables of consultative activities;
- designers of official processes may have their own, rather limited, ideas of when public input

is needed, and in what form, while civil society organizations may wish to have input at different times or in different ways; and

- not all constitution-making processes are intended to be participatory, and even in such cases civil society may be able to encourage the submission of views from the people and may make its own submissions.

Further, a constitution-making body may have its own guidelines on how submissions of views should be made (e.g., the Uganda Constitutional Commission published a pamphlet on the subject). In such instances it will be important to study and understand the guidelines so that advice given to the public about making submissions is correct. However, at times the guidelines may not allow for the issues that civil society and the public are interested in presenting to the constitution-making body. Civil society and the media can then urge a broader constitution-making agenda.

An organization or an individual with a well-thought-out idea, or many ideas, about the content of the new constitution or how the process should be carried out should plan to present these views to the constitution-making body in a way that will have a powerful effect. As discussed in part 2.2.3, in a participatory process, many people or groups may make submissions in many forms. These can range from short statements at public meetings to SMS or e-mail, Twitter, and Facebook messages, handwritten letters, long written submissions, or even full draft constitutions. Brief submissions should not be discounted, as a particularly forceful statement may have a lasting impact on a reader.

Here are a few suggestions about making submissions, some drawn from the advice of people experienced in doing so, some based on common sense:

- Find out whether the existing constitution contains anything relevant on the issue of concern. If so, should the new constitution contain the same provisions, or are you suggesting changes? If you are suggesting changes, what is the problem involved, what is your alternative, and how would it fix the problem? If your suggestion is to retain the current provision, what is the issue of concern, and why is the existing provision the best approach?
- Do not simply make assertions such as “We favor a presidential system.” Instead, always give reasons for what you propose.
- Remember that research and accurate facts and figures are important. Make sure your information comes from sources that can stand up to inquiry.
- Be as brief and as clear as possible.
- Note that ideally a submission should stand out so that recipients want to read it—but usually there is no need for it to be “glossy” and expensive-looking.
- If the submission is long, begin with a summary bringing out the main points clearly.
- Recognize that sometimes a petition, or a postcard campaign in which many people are asked to sign and send in preprinted cards making a few short points, can be useful. But it is easy

for critics to dismiss such campaigns, saying that most people who signed did not understand what they were doing.

For an oral presentation (for example, at a public meeting with constitution-makers) the following practical tips may be useful:

- If the submission is on behalf of a group, choose a representative who is knowledgeable and persuasive.
- Be creative in the form of the presentation. For example, in making a case for the rights of children, including some children with particular relevant needs, or even a short film emphasizing the plight of children, may have a powerful impact, and make your submission stand out.
- Time limits set by the constitution-makers should be respected.
- Remember that presenters should be respectful of the constitution-makers—but firm in the approach they take.

For any submission, it is wise to focus on the issues of substance and avoid “flowery” or exaggerated language. Defamatory, tribalistic, or other inflammatory statements should be avoided. A little personal detail may sometimes be helpful, showing how specific issues have affected citizens.

When using the media, it is worth noting that a constitution-making body may take more notice if the media can be persuaded to give some attention to a particular submission and the issues it raises. Suggestions in relation to use of the media include:

- Take steps to ensure that the media know about a submission that is to be presented, and that they understand its importance.
- Create effective press releases.
- Remember that the press might welcome something to take a picture of—something that makes a good picture: a photogenic person, a march, a dance, a colorful event.

Unsolicited submissions

If the process does not make provision for public submissions or if deadlines for making

Box 44. Use of South Africa’s petitions [1996]

It is often stated that the South African constitutional assembly received two million submissions. But in fact signatures on cards and petitions were counted as submissions. These forms of submission were not taken so seriously as were more formal ones that argued the case of the author, of which there were only about 13,000.

submissions have been missed, it may still be possible to create opportunities to put views forward. Appropriate tactics will vary according to whether the intention is to submit views to a commission, a constituent assembly, or the national legislature. For example, to get views before a constituent assembly, a civil society organization might:

- invite one or several assembly members to a meeting;
- lobby members of the assembly, especially while the issue is being discussed in a committee or in the plenary;
- use the media in efforts to influence public opinion and the opinions of assembly members;
- hold dignified public meetings on relevant issues;
- put together a small, easy-to-read publication that can go to every assembly member; or
- introduce ideas into a committee directly or by lobbying committee members (because committees are smaller and are where much of the real work of making the constitution will be done).

In a constituent assembly with a strong party presence, or even dominance, it may be difficult to get views listened to other than through a party. That would suggest the need to focus on party members who are able to influence other members of their parties.

Sensitive issues

In almost all societies there will be some particularly sensitive issues about which provisions are potentially to be included in the constitution, and in relation to which it may be difficult to generate public support—positions perhaps favored by civil society actors informed by an understanding of the need for protection of human rights, or “liberal” perspectives of a similar kind. Such issues could include gay rights, the rights of sex workers or prisoners, women’s rights to abortion, euthanasia, abolition of the death penalty, and rights for widows. Experience has shown that there can even be a risk that if too much attention is drawn to some issues, unsympathetic groups may be prompted to try to get the constitution drafted in a manner that excludes any “liberal” perspective on such issues. But consider the following:

- On an issue such as the abolition of the death penalty, rather than confronting the issue, submissions from civil society could support introduction of a broader provision such as strong support for a right to life, opening the possibility that at a later point, the courts or the government can use that right to abolish the death penalty (as occurred in South Africa—see box 45 below).
- Civil society submissions could draw upon international experience—especially the example of a country with similar social conditions that has adopted an idea like the one being promoted.
- In the area of human rights, or perhaps the environment, submissions could rely upon the argument that the country is already supposed to do something because it has signed

international agreements. (But remember that it is quite common for resistance to be shown to international agreements as “foreign interference.”)

Timing

Once there is a full draft constitution, it may be hard to introduce fundamental changes; big ideas on major issues may have the best chance of acceptance if introduced at an early stage. Ideas of less central importance may be easier to introduce as changes to a draft, to refine it and make it more effective.

Staying interested

Suggestions accepted at some stage may not appear in the final constitution—they may meet later resistance or incomprehension, or may even be omitted by error. It is important for civil society actors with an interest in particular issues to monitor the process, reading drafts to see whether ideas have been accepted and pointing out omissions.

4.1.6 Research

Civil society has contributed in a number of constitution-making processes through conduct of research, sometimes undertaken on an official basis for the constitution-makers, and sometimes done as part of an effort to influence the process in one way or another.

Research for constitution-makers has included work intended to improve civic education efforts (e.g., on the types of media that effectively reach particular groups in society), and to assist with opinion polls and focus groups to feed information to decision-makers about the perceptions, views, and attitudes of the public on particular issues or to provide statistics or facts about the current context. Civil society and academic institutions have also seconded researchers to the constitution-making body to research any issue requested by the constitution-makers (e.g., Afghanistan [2004]).

In addition, civil society actors normally conduct research on specific issues connected to their main concerns, such as land reform or human rights protection. They often use such research to prepare submissions providing information and recommendations to constitution-makers about how key problems should be addressed in the constitution.

4.1.7 Lobbying

Lobbying is a process of dealing directly with decision-makers such as constitution-makers with a view to seeking support for a position on some issue of importance. In a constitution-making process the issues being lobbied about can involve the design and operation of the process itself as well as questions about contents of the constitution. It is common for civil society to become involved in lobbying on such matters. Here are some commonsense points

Box 45. Abolition of the death penalty in South Africa

During the South African constitution-making process, sensitivity about high crime levels contributed to difficulty in getting agreement on the abolition of the death penalty. But not long after the new constitution came into force, the constitutional court held that the “right to life” provision in the constitution meant there should be no death penalty.

on lobbying as applied to members of a constituent assembly:

- Choose the targets carefully: perhaps members who are not already committed one way or another on the issue in question, but may be persuaded to support the viewpoint held by the lobbying organization.
- Find out the official view of each target member’s party, and about the member’s interests and possible biases.
- Be prepared with all the facts and arguments.
- Be on time for any meeting arranged, be polite, and be patient.
- Be persuasive, using a little emotion perhaps, but always providing as much useful information as possible.
- Be brief—in speech and in writing.
- If the member asks a question for which you have no answer, be honest, promise to supply the information later—and do so!
- Send a note of thanks after any meeting, one that emphasizes the main points made.

Lobbying a commission or expert committee may be harder. They are not chosen to “represent the people” in the same way a constituent assembly is. It is also unwise for any civil society actor to be exposed to any risk of being seen as attempting to use unfair influence on a member. Approaches to such bodies should perhaps be open—a request to speak to the entire committee, or an “open letter” in the newspaper, for example.

4.1.8 Monitoring a process

Civil society and the media can play valuable roles by standing outside the process, monitoring and evaluating its performance and progress, and making proposals for improvement. Such roles can be of great importance in various ways. Regular monitoring can provide the basis for making regular reports that give the public independent assessments of progress. This can be particularly important where the official constitution-making body does not inform the people fully, whether as a result of a lack of “people-directedness,” a lack of resources, a lack of full understanding, or even a deliberate wish to keep the people ill informed and thus possibly less critical. Credible and regular civil society monitoring can also be helpful to the government

and to the constitution-makers by providing them with independent assessments of progress, outcomes, public attitudes to the process, and so on.

The following discussion outlines suggestions about civil society monitoring drawn from experience in a number of processes.

Establishing a relationship with the official process

To provide credible monitoring of a process, it will be helpful first to identify the civil society actors best placed to develop and maintain a good working relationship with the official process, and for particular persons in those organizations to invest some effort in building the relationships. Helpful strategies may include:

- ensuring that relevant people in the official process know of the existence of the civil society actors in question, what they do, and what their interest in the constitution is;
- developing good personal relationships with key individuals in the process, on both the management side and the decision-making side; and
- getting to know the press and outreach people within the official process.

Developing such relationships provides a basis on which information is more likely to be readily volunteered by constitution-makers, and helps views put forward as part of monitoring reports (including suggestions about improvements to the process) to be dealt with in a nonconfrontational manner.

Civil society is often regarded with suspicion by senior politicians and civil servants. In developing countries and in conflict situations there is sometimes especially strong suspicion of NGOs that receive foreign funding (due to fears that they may be doing the work of foreign interests). In such cases it may be more difficult to develop good working relationships, and it may be wise to rely on civil society actors who do not have such problems.

Keeping the pressure up

Civil society may find that there is flagging enthusiasm for the constitution-making process on the part of politicians. Building support for the process, monitoring, and lobbying may all be as necessary during the process as they can be when getting it started. Even demonstrations and other forms of direct action may be required. There can be some risks in civil society getting involved in actions to maintain support for a process, including:

- being used by political forces to achieve quite different aims, either in relation to the process or more generally; and
- that in circumstances where there is serious controversy about the process, serious disorder could be used by those in power as an excuse to stop the process.

The balance between encouragement and critique

It is sometimes easier to criticize than to praise. Like anyone else, constitution-makers may grow to resent constant comments from civil society and the media that they see as negative and unfair. If the process is to come to a successful conclusion, it may sometimes be important that key constitution-makers feel appreciated and encouraged to go on. This may apply with particular force to nonpoliticians, but even professional politicians may resent being constantly criticized.

An effective monitoring program

The word “monitoring” has a range of meanings. In this context we are referring to systematically observing and recording what is being done in a constitution-making process in order to evaluate the impacts and outcomes of the process. One definition of evaluation is “collecting information to check performance against an expectation.” Evaluation may involve comparing actual impacts and outcomes with what was expected.

Many aspects of a process can be monitored and evaluated, all depending on the interests of those doing the monitoring and evaluation. (For example, donor countries and agencies will want to know how their money is being used; agencies of foreign powers with interests in the country or the region where it is situated may want to monitor developments in the process with a view to considering whether conflict might break out again, and whether the constitution-making country is going to contribute to regional stability.) The focus for civil society would be expected to be on monitoring the process in order to evaluate how well it is making progress toward meeting the expectations and needs of the ordinary people of the country for which the process is being conducted.

An effective monitoring program should be:

- well informed;
- systematic;
- flexible; and
- consistent.

Monitoring needs to be well informed because constitution-making is a complex business. If observation of what is going on is to be useful, it is important to understand the process well. How does what has happened relate to the objectives of the process? Monitoring a constitution-making process cannot be a mechanical affair.

The monitoring must be systematic in the sense that the monitoring bodies should have a strategy for collecting information. They need to know what they are looking for.

Monitoring should be flexible, because constitution-making will be affected by all sorts of political and social factors. As a result, information may come from many sources, some unexpected. Official sources should not be relied upon exclusively.

The monitoring should be consistent. Because circumstances may change quickly, important events may pass unnoticed unless monitoring is as continuous as possible. The challenges in monitoring a constitution-making process include the following:

- It is not enough (though it is important) to check actual events against planned timetables. (The press is sometimes guilty of focusing almost entirely on questions of timing and not paying sufficient attention to the content of developments.)
- It may be difficult for civil society to have access to the variety of skills needed to carry out an effective monitoring program, for the program may need to cover many aspects of a process, including: electoral systems and election management; public procurement and finance; civic education and public consultation methods; and debates on complex issues concerning the content of a proposed constitution.
- Reading official accounts, or even newspaper accounts, of what is being done will not be enough; it will almost always be important to witness activities such as public consultation sessions, the meetings of the constitutional commission, constituent assemblies or constitutional conferences, and so on.
- Monitoring must consider far more than just official accounts of the process, some of which may not be accurate; indeed, they may contain deliberate falsehoods. (Even opinion-polling organizations are sometimes known to be linked to political interests.)
- The media may be dominated by certain political parties, business interests, or ethnic groups.

There are almost limitless possibilities for the structure of arrangements for monitoring and evaluation. An effective monitoring program would ideally involve more than one organization; a group of NGOs could usefully cooperate to watch the various aspects of the process. It may also be possible to link up with entities beyond civil society, such as independent government bodies (e.g., a human rights commission or an ombudsman) or a media organization with an established record of independence.

In terms of tasks, a civil society monitoring process could involve:

- observing (and commenting on) whether the process unfolds according to its official timetable or at a reasonable pace, and why delays, if any, occur;
- watching out for developments—deliberate or otherwise—that threaten the continuation of the process;
- watching out for and drawing attention to process “hijackers” or spoilers—groups or people who may try to take the process over to influence the outcome to their own advantage, or who may seek to damage or destroy the process;
- ensuring that the people understand when and how they can offer input;
- watching to ensure that the process is inclusive (some women’s groups have monitored processes to ensure gender equity); and
- generally assessing whether the constitution-making bodies are fulfilling their mandates.

Box 46. Civil society monitoring in Zimbabwe

The Civil Society Monitoring Mechanism (<http://www.cisomm.org>) is a collective of about forty NGOs dedicated to monitoring and evaluating the implementation of Zimbabwe's September 2008 Interparty Political Agreement involving President Mugabe's Zimbabwe African National Union—Patriotic Front and the political opposition. Among other things, the agreement provided for a constitution-making process. The benchmarks that Zimbabwe's monitoring mechanism established for monitoring the agreement include:

- transparent and timely establishment of the select committee of parliament required to conduct the process;
- meaningful representation of, and powers for, civil society within all subcommittees for the purpose of contributing to the constitution-making process;
- widespread national consultations with the public and all civil society sectors on all relevant processes and on the content of the constitution;
- full involvement of all stakeholders in “all stakeholders” constitutional conferences;
- timely publication of the report, the recommendations for constitutional change, and the draft constitution presented to parliament;
- meaningful inclusion of the public through impartial and comprehensive publicity and dissemination of parliamentary debate on the draft constitution (through broadcast and print media); and
- no substantive amendments by parliament of the draft constitution so as to deny the will of the people as expressed during the public consultation process and all-stakeholders' conferences.

Its report for May–June 2010 recorded progress, but also identified some worrying failures, such as that the Zimbabwe African National Union—Political Front had “reportedly launched Operation Chimumumu (Operation Dumbness) whereby villagers are strictly instructed that only a few select individuals will contribute during the public consultations, with everyone else remaining a passive audience.”

Some of the techniques and methods of gathering and assessing information that may be needed to carry out such tasks include:

- developing a good understanding of the structure of the process, what is supposed to happen as part of it, and when;
- studying carefully the official information that is put out—understanding it and checking on its accuracy;

- reading the press and listening to the radio carefully (especially phone-in programs, which have become important barometers of public opinion in many countries, as well as ways of putting views forward to constitution-makers);
- pulling together media (and other) reports from different sources, because any single media source can be expected to have an incomplete picture of what is happening;
- engaging with organizations that are making submissions (to get a sense of what points they are making and how the official process has responded—both whether that process has shown a serious interest in the submissions and whether those who make submissions are being treated with proper respect);
- having, if resources permit, representatives at public meetings where the official process gives out information or where the people make submissions (trying to ensure that the people’s concerns are taken seriously, and also seeking to understand how people are feeling about the constitution-making process and the constitutional issues being considered); and
- making use of contacts within the system in order to know what is really happening.

To be effective, outcomes of monitoring and evaluation need to be communicated to constitution-makers and to the public. Reports need to be made regularly, perhaps using newsletters, a website, or media reports. To do this in a sustained way over a prolonged period requires the commitment of both people and resources. Many monitoring groups have started with enthusiasm and been unable to sustain it.

Here are a few examples of monitoring activities carried out by groups working from outside constitution-making processes:

- In Timor-Leste [2002], a group of women monitored the constituent assembly meetings as well as the public consultation meetings to determine whether the process was including women and hearing women’s concerns. The group made recommendations to improve gender equity in the process. It linked with the media to inform them when there were problems in the process, and also with a large coalition of women’s groups that then advocated for reforms of the process or changes to the draft constitution based on the information the monitoring group provided.
- In Nepal [ongoing process], staff of the Office of the High Commissioner for Human Rights attended some meetings held by constituent assembly members to collect public views, and were able to make useful comments on the organization of the meetings and on their limitations in terms of who was able to participate (especially women).
- In Kenya [2010], the press reported on many misrepresentations being peddled by politicians and religious organizations in the referendum campaign.

It is also helpful to look at examples of effective civil society monitoring of government activities in contexts other than constitution-making. In the Philippines a monitoring program, undertaken by civil society with the cooperation of the government as an anticorruption measure, monitored the production and delivery of textbooks to schoolchildren, leading to the

average price per textbook being halved; monitoring of civic education materials, broadcasting, and the like could help cut corruption in constitution-making processes.

4.2 Guidance for the international community

In part 2.3.12, we defined the various categories of entities that are often included in the term “international community” in reference to constitution-making processes and also discussed how constitution-making bodies or other key national actors can manage relationships with the international community in effective ways. Because one of the goals of the discussion in parts 2 and 3 is to provide guidance to national actors undertaking a process, it deals with the need to manage situations involving various kinds of input from the international community. They include funding the process, providing foreign advisers, including experts on constitutional matters, and assisting with negotiations or mediation efforts. Often these are necessary forms of input, and their impacts are positive. In other cases there can be a range of problems involved (for example, international actors dominate, or there are too many international actors seeking to play roles, resulting in contradicting pressures on national actors).

There are, in addition, situations in which some part of the international community may be in even more direct control of processes. Usually a multilateral organization or a particular country is officially or unofficially either leading or substantially influencing and shaping the process. (See the case studies of Afghanistan, appendix A.1, Bosnia-Herzegovina, appendix A.4, and Timor-Leste, appendix A.11.) The international community takes on such roles primarily in postconflict or conflict situations in which the absence of an effective state results in international or regional organizations serving as transitional administrations, or those in which a far more powerful country with strategic interests in the area plays a leading role in the political transition or becomes an occupying power (for example, the processes in Namibia [1990], Peru [1992], Cambodia [1993], Bosnia-Herzegovina [1995], Timor-Leste [2002], Democratic Republic of the Congo [2004], Afghanistan [2004], Iraq [2005], and Somalia [ongoing process]).

But even though a particular part (or parts) of the international community may have responsibility for running the process, there will almost always be many other international actors supplying particular input into the process. In that case, many of the issues will be much the same as in a process run by local actors.

In many of the processes where international actors exercise a high degree of control, some common difficulties and pitfalls have been experienced. Some of these are related to the extent to which international community influence tends to undermine national ownership of the process. As discussed elsewhere in this handbook, lack of leadership from national actors can undermine the legitimacy of a process and of the constitution resulting from it.

In this section we provide an overview of the problems and pitfalls experienced in processes where part of the international community plays a leading role. We also assess the current guidance available to the international community in such contexts and consider the extent to

which it addresses those problems and pitfalls. We conclude with some practical tips for international actors operating in such situations.

4.2.1 Common pitfalls of processes led or heavily influenced by the international community

It is not possible here to review the full range of experience of constitution-making processes where the international community has played leading roles of one kind or another, save to note that there are conflicting opinions regarding each case and what may have been helpful or harmful forms of engagement. For example, some analysts would argue that the United States' role in Afghanistan led to undue influence over the content of the final constitution. Others would assert that without United States involvement warring factions would not have come to an agreement at Bonn and the new constitution would have been shaped largely by warlords who were not legitimate representatives of the people and who wished to create a more conservative Islamic state than was finally adopted. There are also many views in between these two positions. Each case is unique of course and the role of the international community will differ. There are, however, some pitfalls common to most situations where the international community has a significant influence on a process, either officially or unofficially.

Lack of doctrinal or practical guidance for constitutional assistance

Occupying governments or governments with a high level of influence over another country (e.g., the United States in Bosnia-Herzegovina [1995] and Iraq [2005]) or multilateral bodies playing similar roles (e.g., the United Nations in Timor-Leste [2002] or the European Union in parts of the former Yugoslavia) have largely determined their approach to domestic constitution-making in such countries on an ad hoc basis and without guiding principles. This has led to mixed results. Success or failure has often depended on the quality of leadership and decisions taken in the field without appropriate consideration of the range of options and comparative experiences in constitution-making assistance (Brandt 2005).

For example, the United Nations played key roles in the constitution-making processes in Namibia [1990], Cambodia [1993], Timor-Leste [2002], Afghanistan [2004], Iraq [2005], Nepal [ongoing process], Somalia [ongoing process], and Zimbabwe [ongoing process], but did so without the benefit of a focal point or department at United Nations headquarters to provide doctrinal guidance, access to appropriate resources, and a point of reference on lessons learned elsewhere.

In Timor-Leste (formerly East Timor), the director of political affairs for the United Nations Transitional Administration in East Timor proposed a constitution-making process similar to that followed in the United Nations-assisted Cambodia process a decade earlier—a ninety-day affair that excluded the public and even a majority of the constitution-makers and was largely conducted in secret. (See the Timor-Leste case study, appendix A.11.) The transitional

administration did not take notice of the increasing trend toward more participatory processes that had emerged in the decade after the Cambodia experience. There was no focal point on constitution-making assistance at United Nations headquarters that could reflect on the lessons of the Cambodian and subsequent experiences and highlight emerging good practices. The short time frame and lack of real popular participation in the Timor-Leste process were probably factors in the emergence of conflict soon after the constitution was adopted. Yet these deficiencies in the process could have readily been avoided (Brandt and Aucoin 2010).

The international community does not have the resources to support constitution-making processes to nearly the same degree as it has for other elements of peacebuilding and democratic transitions. This is true despite the centrality of constitutional exercises to many peace processes and their importance to achieving durable peace. The contrast with available resources for technical advice and support that is available for electoral assistance is instructive. For example, the United Nations Electoral Assistance Division exists to undertake assessments of needs; develop operational strategies for electoral components of United Nations operations in the field; maintain a roster of electoral experts; review lessons learned; and document and standardize good practices.

The failure of the international community to similarly prioritize constitutional assistance has meant that there has been little institutional learning from process to process in the United Nations and elsewhere in the international community, continued improvisation, and poor results in some processes.

The imposition of tight timetables

Some countries emerging from conflict may require relatively short political transitions because of security issues, donor fatigue, or other political imperatives. Tight timetables are not always essential, yet in highly internationalized processes the timetables are almost always short—at times as little as ninety days to draft, debate, and adopt the constitution. Such timetables usually reflect the needs of international funding and planning cycles or the desire for the international community to have an exit strategy, rather than the requirements of the local context. In some cases, timetables have been rushed because of another country's internal political agenda. In Iraq, the United States administration pushed for the process to conclude before scheduled United States national elections because it was perceived that a new Iraqi constitution would improve President Bush's chances at the polls.

Late in 2001 a consortium of civil society actors in Timor-Leste wrote the United Nations Security Council to express the view that the United Nations was rushing the constitution-making process because it needed an early end point for the process and a rapid exit from its role in establishing the new state. The letter that follows made the following points:

A Constitution is a complex document embodying fundamental choices about the type of country an independent East Timor will be. This Constitution has to be a

living document, which reflects how the East Timorese as a people see themselves, relate to each other, and finally, after many centuries, govern themselves...

For this to happen, the East Timorese people have to be provided with the information on the choices that have to be made, information on what a Constitution is, and information on the options available to them on the fundamental issues. They will then need time to consider and debate so that they are able to form opinions, time to hold discussions in order to seek consensus where opinions are divided, and finally time to officially record their views. None of this can happen in three months.

All the legitimate constitutional processes that have taken place in recent years [in other countries] were carried out over a period of three to four years. The public consultation process for the South African Constitution lasted over three years. A three-month process would rob the East Timorese of their right to contribute to the future of their country and it will alienate them from the very document that should voice their aspirations.

As this handbook emphasizes, constitution-making can provide an opportunity to undertake a deliberative and democratic process that promotes national reconciliation, public participation, national ownership of the constitution, conflict resolution, and a cohesive drafting process. Postconflict situations in divided societies are highly sensitive and, if unduly rushed, can lead to greater polarization of society rather than building peace. This can be the case if local actors view the constitution as the product of only a few key stakeholders and not as a consensus-based document that reflects the aspirations of the broader community (e.g., Timor-Leste [2002]).

Public participation that is not viewed as credible

Several nationally owned and led constitution-making processes that have been “people-driven” have been recognized as making contributions to conflict resolution and peacebuilding (e.g., in South Africa and Uganda). Significant time and resources have been dedicated in these processes to preparing the people to participate, to consult with the public and to serious consideration of the views of the public. (See part 2.2.) This type of dedication to public consultation and dialogue has not yet been seen in processes led or heavily influenced by the international community. In part 2.2 we discuss the principles and procedures that can secure genuine engagement with the public.

Although the international community often states that public participation is critical to democratic transitions, the imposition of tight timetables or other international agendas often curtails genuine public participation in highly internationalized settings (e.g., Cambodia [1992], Bosnia-Herzegovina [1994], and Timor-Leste[2002]). In Iraq [2005], it was international NGOs that largely led the public consultation process, and although thousands of submissions were received there was no time to analyze the views, in part, because the United States had pressured

the constitution-makers to conclude the process by a particular date. Although the United States could claim that the process was participatory it yielded little democratic benefit to the country, and could potentially have increased mistrust of governing elites and processes touted as “democratic.” When a process will be primarily driven by elites or politicians (even where this is justified by the political or security situation) it is better to explain that this will be the case and why rather than claim that it will be “people” driven when the conditions are not present or there is no time or plan to conduct a participatory process. (See part 2.2.)

Engaging primarily political elites or warring factions

If the international community intervenes through negotiations or mediation efforts to end a conflict, it will typically do so by engaging with the actors who are left holding the guns and with political elites. However, a constitution-making process in a divided society should promote national unity, consensus building, reconciliation, and a sense of a shared national unity. This can only be achieved through an inclusive process. Several Security Council resolutions call for more inclusive processes (e.g. Security Council Resolution 1325 on Women and Peace and Security calls for women’s full participation in peacebuilding and postconflict reconstruction). The constitution-making process can be an important catalyst for the wider peacebuilding process if it includes the broader public and not just elites. To the extent possible, even the early negotiation phase should be as participatory as possible.

An extreme example of an elite process was seen in Bosnia-Herzegovina, where the Dayton conference and the resulting national constitution negotiated in the United States excluded any input from the people of Bosnia. They were not consulted about the content or given an opportunity to reflect on the constitution contained in the peace agreement before it came into force. The focus was on ending the war and ensuring agreement among the previous warring factions. There was no room for a focus on building a culture of constitutionalism or enhancing the legitimacy of the agreement even at a later stage. (See appendix A.4 for a case study on Bosnia-Herzegovina.) Even in contexts of violent conflict there may be ways of opening up the process (albeit in a limited way) through reaching out to civil society actors, local community leaders, etc.

Treating constitution-making as primarily a technical exercise

International constitutional assistance often focuses on the technical aspects of the exercise rather than on the political dynamics or how to structure the process to best take advantage of peacebuilding opportunities. In particular, the international community has focused on the drafting and content of the constitution rather than on creating the conditions for genuine public participation, peaceful negotiations, civil society involvement, and dialogue and deliberation on key issues. This has meant that in many cases the international community’s main effort is to hire a constitutional professor (often with no experience in a postconflict environment) to advise the national actors. Such a focus can also contribute to a tendency for international experts to push for reforms drawn from their own countries rather than to support national actors

in solving their problems using solutions arrived at locally. (See parts 2.3.6 and 3.4.1.) Most importantly, this type of assistance fails to consider the broader needs of the process, such as development of the skills of national actors in other key areas such as negotiations, financial management, or public consultation skills.

Stressing electoral solutions to problems of representation and legitimacy

The international community tends to emphasize the use of elected bodies in postconflict constitution-making processes, seeing such representative institutions as the most legitimate bodies to prepare and adopt a constitution. However, particularly in the first postconflict elections, parties may be nascent and based on ethnic affiliation or linked with a particular leader or personality rather than with a set of proposals for the constitution. Groups that were marginalized during the conflict or in society (such as women, youth, or minorities) may not have access to membership in the parties. Therefore a reliance on elections alone may not lead to a legitimate body to prepare a constitution, the expression of the people's constitutional aspirations in the draft, or consensus-building. As a result, there can be advantages in considering other approaches (as discussed in part 3—e.g., using a constitutional commission or similar institution to consult widely with the people and develop a draft that is eventually debated by an elected assembly—which could also have membership through some selection procedures) (Brandt 2005: 30). The international community must reflect on the purpose of the constitution-making process in a divided society first and consult with the people about how to create legitimate bodies and processes to realize the vision.

In Timor-Leste [2002], the director of political affairs for the United Nations Transitional Administration in East Timor argued that the only way for a proposed independence constitution to be legitimate was for it to be drafted, debated, and adopted by an elected constituent assembly. Civil society and other national leaders were calling for an independent constitutional commission to prepare a draft and an elected constituent assembly to adopt it; this was a common two-stage process at the time, and arguably more suited to the Timorese national context. Indeed, as predicted a single Timorese political party dominated the constituent assembly. This domination meant that Timor-Leste lost the opportunity to promote a more inclusive process and encourage a broader set of stakeholders to seek consensus on the constitution. The constitution the assembly created was viewed by most as a one-party constitution, this being one of the reasons why violence flared up a few years later.

In contrast, in Afghanistan [2004], a constitutional commission developed a draft constitution, and it was an elected assembly (the Constitutional Loya Jirga) that considered the draft and had responsibility for deciding on and adopting the new constitution. The United Nations advised that special seats in the Constitutional Loya Jirga should be set aside for marginalized groups. The inclusion of women and minorities had an impact on the final draft of the constitution and gained them greater constitutional rights (Brandt 2005). (See part 3.1 for a discussion of the range of mechanisms for creating representative bodies.)

Failure to develop capacity of national actors and promote national ownership

A process that is rushed by the international community in postconflict environments (where many educated national actors may have fled the country) will often lead to international technical advisors taking over certain aspects of the process rather than finding the appropriate national actors to do the job. In Somalia in 2010, the United Nations imposed a deadline of sixty days for the inexperienced constitutional commissioners to deliver a draft constitution, resulting in heavy reliance on foreign expertise to meet the deadline. In Timor-Leste [2002] international actors were put in charge of directing the constituent assembly's secretariat rather than developing the capacity of a national actor to perform the task.

A process that is rushed will also limit the amount of capacity development or training available to national actors to ensure that they perform their tasks effectively. This can lead to poor results and a missed opportunity to build the capacity of national actors to lead and manage key democratic activities. For example, if civic educators are trained well these same persons can be used to conduct voter education in the future. (Related issues concerning problems in the use of foreign advisors more generally are discussed in parts 2.3.6 and 3.4.1.)

“National ownership” of a process and the constitution emerging from it involves not only government or the elites owning and leading the process. Ownership of the process should also extend to the people more generally. In a postconflict context there may be few legitimate representatives of the people. Early in the process, efforts will need to be made to understand the concerns and aspirations of the people and to take these into full account in the approach to be taken. Input from a wider range of actors can improve the prospects of the process contributing to a national consensus on the way forward.

Assistance or engagement ends with adoption of a constitution

To breathe life into the constitution, attention must be given to how it will be implemented after it is adopted (See part 2.7.2.) Funding, resources, and assistance (provided in ways that promote national ownership) are likely to be needed postadoption to encourage national actors to give effect to the constitution and to support the enhancement of a culture of constitutionalism. However, where the international community has played the dominant role in the constitution-making process, there has been little evidence of understanding of the need for ongoing support in relation to implementation.

4.2.2 Current guidance for the international community

There is little specific guidance for international actors in the constitutional-assistance field. Further, few international actors have reviewed the results of their constitutional-assistance efforts. The United Nations is an exception. It commissioned a report on UN constitutional assistance (Brandt 2005) and late in 2005, participants at a high-level meeting reviewed the United Nations' experience in supporting constitution-making processes. They concluded that while the United Nations had provided various forms of assistance to those processes, the results

had been mixed and the assistance given had been improvised. They recommended that the United Nations receive doctrinal guidance and that it establish a central agency to be responsible for the coordination of United Nations constitutional assistance. They underscored that constitutional expertise was primarily located outside the United Nations system, and that it was important for the United Nations to link with external partners. It was also agreed that a systemwide guidance note should be adopted and an address for the coordination of constitution-making assistance designated.

In 2009, the Secretary-General circulated a guidance note on United Nations assistance to constitution-making processes. The note provides the guiding principles and framework for United Nations constitution-making assistance and underscores that when such assistance is requested by national authorities it should do the following:

- capitalize on the opportunity for peacebuilding that such a process affords in conflict and postconflict countries;
- promote compliance with international norms and standards;
- recognize that constitution-making is “a sovereign national process, and that to be successful the process must be nationally owned and led”;
- promote “inclusive, participatory, and transparent constitution-making processes”;
- make available, when needed, a wide range of expertise, both inside and outside the United Nations system; and
- promote adequate follow-up after adoption of the constitution.

It also designated the Rule of Law Coordination Resource Group, supported by the Rule of Law Unit, as the convening mechanism for United Nations constitutional assistance, with the following responsibilities:

- ensure policy coherence and development;
- document United Nations experiences;
- build institutional capacity and record lessons learned;
- mobilize and coordinate the efforts among the various United Nations departments and agencies providing constitutional assistance; and
- lead a consultative process to further develop United Nations policy on constitutional assistance.

To date, the Rule of Law Coordination Resource Group has not built its capacity to implement this mandate. The authors also are not aware of any other similar constitutional assistance guidance mechanism for members of the international community. The guidance note was an important first step for the international community to understand the importance of the process of constitution-making and the broad principles that should be followed.

Practical tips

This handbook discusses and provides guidance on wide-ranging aspects of constitution-making processes. It provides very specific tips on the principles of participation, inclusion (including

the full participation of women), and national ownership. The tips emphasized here are only brief reminders of matters already discussed in-depth. However, we focus on these abbreviated points with particular emphasis on how, in processes where particular international actors play leading roles, they can improve their efforts and reduce the likelihood of encountering the problems and pitfalls just discussed:

- At all times, be conscious that constitution-making is a sovereign process, and a deeply political one.
- Seek to promote genuine public participation, inclusion, and nationally owned and led processes, and avoid imposition of conditions, such as artificial and compressed timetables, that meet the interests of international actors but at the same time generally undermine the possibility of the process being participatory, inclusive, and nationally owned.
- If asked to provide assistance, take time to understand the complex political nature, as well as the logistical and resource needs, of a process, and ensure that assistance is appropriate, promotes democratic principles, does not sideline national actors, and is provided in a coordinated manner, so as to avoid problems such as duplication of effort and waste of resources.
- Do not fund or support processes that claim to be “people driven” where the conditions do not exist to conduct a participatory process (e.g., a legal framework that puts politicians clearly in the lead, a lack of political will of the leaders to engage the public, a lack of security or the ability of the people to speak freely, or a lack of independent media). The international community may end up bolstering the legitimacy of a process that has largely excluded the people and is manipulated by only a few elites.
- Remember that the principle of “national ownership” requires not only that national actors lead the process but also that civil society and the broader public are provided with opportunities to “own” the process, as well as the outcome. This requires engagement at every stage of the process—even during early phases of negotiation about establishing the process.
- International actors should be careful not to sideline local actors through their engagement in the process. The timetable should be realistic to allow for local actors to prepare for their roles and carry them out effectively (with international technical assistance where needed and requested).
- The extent of local capacity should be assessed before bringing in foreign technical experts or advisors. Such technical experts or advisors should have as part of their terms of reference capacity development of nationals where appropriate and requested.
- When providing advice on options for the structure of the process, consider what mechanism, including but not limited to elections, will lead to a constitutional process with institutions representative of the diversity of the people to the greatest extent possible and will allow for members with specific professional skills to contribute to the process. The mode of appointment or election of such delegates should be transparent and, where possible, can even be participatory.
- Assist with ensuring the conditions for a participatory and deliberative process to take place—one that takes advantage of peacebuilding opportunities.