

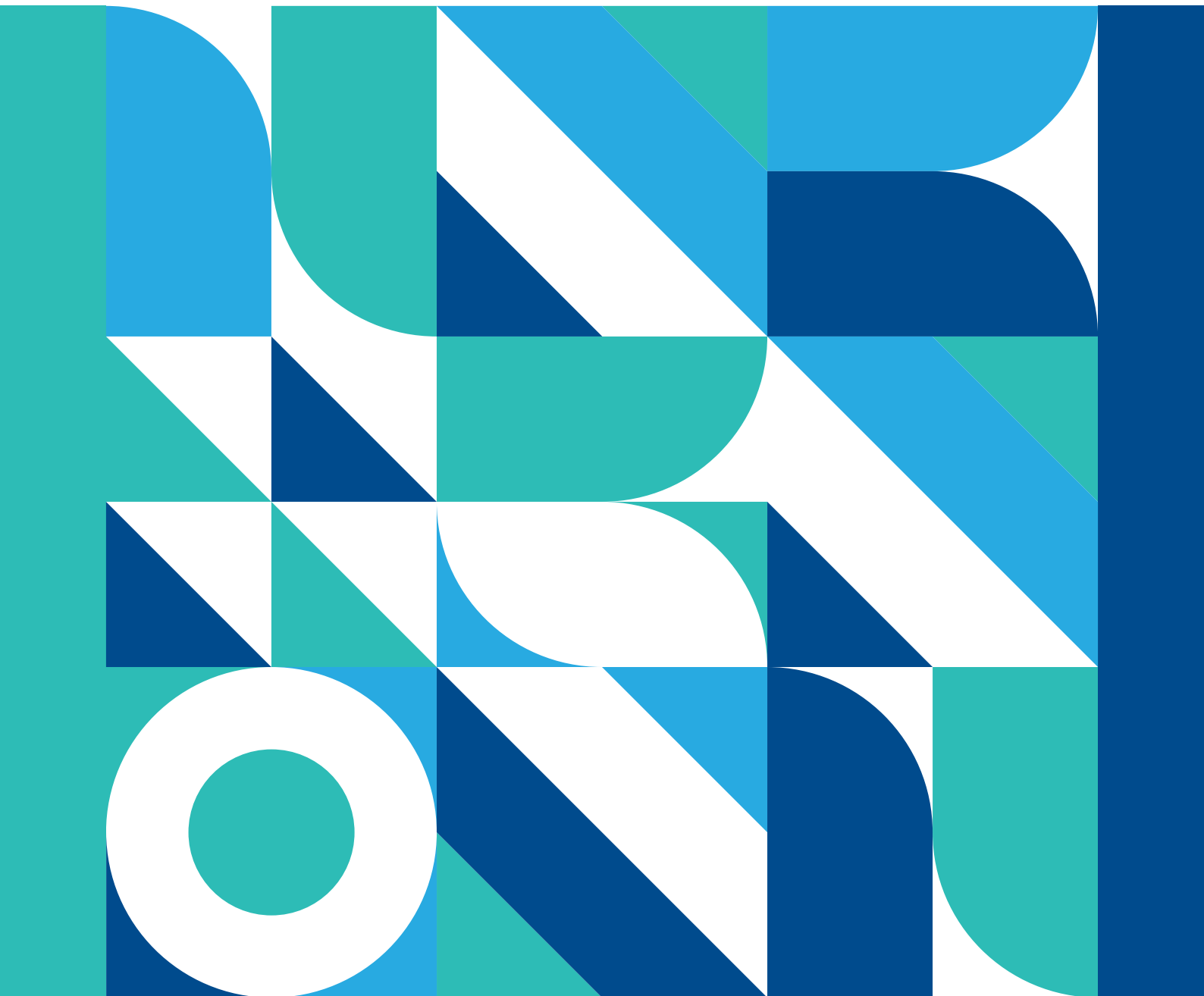


THE UNIVERSITY  
of EDINBURGH



# HOW CONSTITUTION-MAKING FAILS AND WHAT WE CAN LEARN FROM IT

Discussion Paper 2/2023



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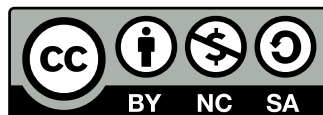
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# EXECUTIVE SUMMARY

Constitution-making is often integral to achieving a new political settlement after conflict and in fragile settings. However, the process fails with relative frequency, in that actors cannot agree on a new text or the finalized text is not approved or ratified. While failure may be temporary—the process may resume after a period of time—it can also be costly. Key reforms may depend on the adoption of a new or revised constitution, and in its absence negotiations may stall and conflict recur. This Paper starts a conversation about the potential grounds for, and strategies to prevent or build on, failure.

Failed constitution-making processes can be classified as follows:

(a) processes that produce a text, but the text is never adopted and the process stalls indefinitely, as is the case in Yemen and as was the case in Ukraine after the 2014 second Minsk agreement; (b) temporary failures, where a new process starts after a relatively short period of time, perhaps building on the previous failed process, as has happened in Fiji, Kenya and Nepal; (c) processes that stall or that are formally suspended but then resume, as in the constitution-making processes that resulted in the 2008 Myanmar Constitution or in Somalia's 2012 Provisional Constitution; (d) partial failures, where only part of a previous agreement makes it into the new or revised constitutional text; and (e) amendment processes that require thresholds that are excessively difficult to attain and are therefore bound to fail.

Even when a new or revised constitution is adopted by the planned deadline, this does not inevitably result in the success of the process. A new or revised constitution can, for various reasons, be challenged in its implementation, or it may be suspended shortly after adoption.

There are a number of factors that may contribute to failure. First, in fragile and conflict-affected settings negotiating parties will find it difficult to reach agreement on issues that have divided them in the past. Second, the higher the level of fragmentation and polarization between groups, and the more inclusive the process, the more opportunities actors will have to veto agreements.

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**Constitution-making is often integral to achieving a new political settlement after conflict and in fragile settings.**

Furthermore, the longer the conflict and the negotiations persist, the greater the likelihood that new parties will emerge and old ones evolve, potentially creating new veto points along the way. Third, lack of confidence and trust heightens the probability that parties will seek to avoid uncertainty and attempt either to engage in contract-like drafting—including details in the constitutional text that would be better left to ordinary legislation or judicial interpretation—or to introduce onerous amendment procedures. Fourth, often deadlines are ignored or missed to the extent that the momentum is lost. Fifth, the reason for not keeping to an agreed timeline is often highly divisive issues or ‘poison pills’ that have the potential to derail the process. Sixth, designing a process appropriate to the context is complex, but designing one that can be adapted to future changes in the context is even more so. Overly convoluted processes designed for countries with highly personalized politics and fragile institutions often result in failure. Seventh, and perhaps most fundamentally, short-term goals and personal or group interests may contribute to (part of) the leadership not agreeing or not being committed to finding a negotiated and institutional solution that could help to resolve the issues that the country faces. Finally, international intervention can disrupt a process that it is intended to support if it is perceived as supporting some parties over others or when it appears to dominate a process that requires a high degree of local ownership for legitimacy.

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**The failure of a constitution-making process can result in the sequencing of the process in various more or less unanticipated stages.**

The failure of a process can result in the sequencing of the process in various more or less unanticipated stages, as has happened in so many cases from Kenya to Nepal and from Libya to Somalia. Such iterative processes can be considered not failed ones but processes that do not conform to their original design. Lessons can certainly be learned from past failures: for instance, actors can be trained in negotiations and networking or controversial issues can be defused and perhaps resolved by building on previous, narrower agreements. Sometimes, however, processes stall indefinitely, and the constitution-building process loses relevance in the face of other developments.

With this in mind, the Paper concludes by suggesting that actors engaged in political settlement negotiations undertake some scenario planning to try to prevent or build on failure. This would require the parties to think about some of the following issues or trade-offs:

- It is important to establish a realistic (and perhaps flexible) timeline, while avoiding individuals or groups taking advantage of that flexibility by prolonging the state of uncertainty without making compromises.
- The constitution-making body’s rules of procedure need to be as detailed and clear as possible but also adaptable to changing circumstances.
- Procedural deadlock-breaking mechanisms should be considered. These might include carefully structuring the agenda and scheduling negotiations on contentious issues; consolidating proposals into one single text; structuring the constitution-making body to enable both vertical and horizontal internal communication; and referring some issues to third



parties, such as experts or civil society representatives. At the same time, it is important to maintain a level of flexibility that allows the parties to address specific deadlocks that may arise.

- Deferring decisions on controversial issues, by using ambiguity, outright contradictions, or sunrise or sunset clauses, may in the short term avoid deadlock and enable the parties to assert that the demands of their distinct constituencies have all been met. However, constitution-makers need to be aware that these techniques should be used sparingly.
- Where the process stalls despite the need to establish a new constitutional framework, in the absence of an immediate default to fall back on, partial or unfinished texts can become interim frameworks. Such incomplete interim frameworks need to include details of the review process or the process for the drafting of a more permanent constitution.
- Alternatively, or in addition, constitutional frameworks should allow for their immediate amendment, rather than providing for moratoriums on amendments. Particularly when finding agreement between the parties has been complex and entailed significant compromises, it may be important to provide for a (not too cumbersome) procedure to amend the constitution or even to schedule a review of a particular design choice.
- The absence of public participation processes—particularly public consultations—is rarely the reason for the failure of a constitution-making process where there is agreement between political elites on both the process and the resulting constitutional text. When elites do have a basic level of agreement, public consultations can contribute to finding compromises on particular issues. On the other hand, public consultations can also derail a process, particularly when no ground rules or basic principles have been agreed to orient the discussions.
- Finally, the role of the international community in these processes can be a factor contributing either to failure or to achieving compromise and eventually success. The competition for influence between different foreign actors is increasingly, and sometimes perniciously, a feature in transition processes. Intergovernmental organizations, and sometimes specific countries or country coalitions, can offer the space for parties to engage in dialogue and negotiations. Intergovernmental organizations may also have the convening power to broaden the negotiation table and include actors with a particular interest in a country.

In brief, planning to prevent or forestall the failure of a constitution-making process is as necessary as it is complex and uncertain. When failure does happen, there may be tools and mechanisms that can help constitution-makers to build on it, such as keeping records of the proceedings, carrying out civic education programmes and processing public submissions. Building the capacity of not only constitution-makers but also civil society representatives and the wider public may enable and incentivize their ever more informed participation in future processes of constitutional reform.

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**Planning to prevent or forestall the failure of a constitution-making process is as necessary as it is complex and uncertain.**

# INTRODUCTION

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## Constitution-making fails more often than one might think.

Constitution-making fails more often than one might think. On average approximately 20 large-scale processes of constitutional reform happen worldwide in any given year, but from 2018 to 2023 only eight have resulted in a new or fundamentally amended constitution, and all of these were unilateral processes.<sup>1</sup> More often than not, particularly in negotiated reform processes, either the constitution-making body does not manage to finalize a draft or the complete draft is not approved or ratified by the responsible institution.

Of course, a draft that fails to be approved or ratified may still have served the purpose of (at least temporarily) channelling conflict into a political (and legal) negotiation on a new political settlement. Such a draft may also be partially used in the future as the basis for a final version, once the country is ready to embark on a new constitution-making process.

Formally, though, once a constitution-making process starts, the parties have decided what success will mean—the approval and entry into force of a new or a revised constitution, generally in accordance with a given timeline. Sometimes the specific content of the new text will further determine whether certain actors see the entry into force of the new constitution or amendment as success or failure, because it does or does not correspond to their preferences. For instance, in The Gambia (see more on this case below) some parties wanted retroactive term limits to be included in the new constitution and others did not. The outcome of the process, and its ultimate failure, will be regarded differently by those parties. Disagreements around the process of constitution-making—with regard to, for example, the level of public participation or the perceived dominance in the process of certain groups—may also leave some persuaded that the (partial or temporary) failure of a particular process is in fact a success, depending on their specific preferences.

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<sup>1</sup> These successful constitution-making processes are Algeria, 2020; Burundi, 2018; Chad, 2018; Comoros, 2018; Cuba, 2018; Georgia, 2018; Kyrgyzstan, 2021; and Tunisia, 2022.

Constitution-making is a high-stakes process the failure of which can be costly, particularly in fragile settings. Sometimes the holding of elections or the establishment of new state structures and processes depends on the adoption of a new or revised constitution, as is currently the case in Libya, Mali and Sudan. The new dispensation may also be meant to ensure the participation of certain (previously marginalized) groups in state institutions or the protection of their rights, as in Burma (later Myanmar) when the first post-independence constitution entered into force in 1948. The (temporary) failure of these processes may increase the chances of conflict recurring or may persuade some groups of the futility of engaging in political negotiations. Particularly where the old constitutional framework is no longer in force or is irreparably outdated—that is, where there is no fall-back option—a new or renewed constitutional framework can be an essential element of exiting a political transition.

The high-stakes nature of constitution-making processes also arises from the fact that they often follow and are supposed to address serious crises that may have resulted in violent conflict or a coup d'état (see Elster 1995: 370). These circumstances often amplify distrust between different groups or actors, hardening red lines and hindering the search for compromise at the negotiation table. This is especially the case when constitution-making processes are designed to ensure the agreement of a majority of key stakeholders, which increases the legitimacy of the process but can also enable stakeholders to veto potential agreements (Brown 2008: 676).

In brief, major constitutional change, particularly in fragile settings, is never easy or straightforward. It is therefore important to analyse potential grounds for failure, because understanding them better may help in developing strategies to prevent or build on failure. This Paper seeks to start that conversation. It will focus particularly on fragile or conflict-affected settings. Chapter 1 explores different types of failure, Chapter 2 analyses some of the potential contributing factors to failure and Chapter 3 compiles lessons learned from failed processes that can contribute to our ability to avoid failure.

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**Constitution-making is a high-stakes process the failure of which can be costly, particularly in fragile settings.**

## Chapter 1

# HOW TO THINK ABOUT FAILURE

**This Paper defines a failed constitution-making process as one not achieving its stated objective of adopting a new or revised constitution or constitutional amendment in accordance with a given timeline.**

This Paper defines a failed constitution-making process as one not achieving its stated objective of adopting a new or revised constitution or constitutional amendment in accordance with a given timeline. It is important to note that this is a narrow procedural definition of that does not take account of the eventual performance of the constitution, if it is finally adopted. In fact, there may be groups within a country that consider this type of failure to be a success, because of dissatisfaction either with the content of the new constitutional text or with the process. This happened in both Kenya in 2005 and Zimbabwe in 2000: in both cases, a majority of voters rejected the draft constitution in a referendum. Conversely, there may also be groups that consider the success of a constitution-making process to signify a failure of constitutionalism, because of either the content or the process, or both. This happened with the drafting and adoption of Myanmar's 2008 Constitution; both processes were controlled by the Myanmar armed forces and did not take into account many of the demands voiced by the democratic opposition.

Approaching failure from this procedural point of view, it can still be difficult to be clear about whether and how a process has failed. Constitutions can indeed fail in different ways and at different points in the process. Understanding these different dimensions of failure is important in and of itself. A preliminary typology is set out below.

1. *Outright failure or indefinite stalling of a constitution-making process.* A constitution-making process starts, and a draft new text is produced, but the text is never adopted and the process halts without any prospect of resumption.
  - In Yemen, for instance, the submission of the draft constitution to the President on 3 January 2015 prompted the takeover of the capital by the Huthis and the start of the civil war (Lackner 2016: 11). The draft constitution was never adopted.

- In Ukraine in 2015, the second Minsk agreement—that is, the package of measures for the implementation of the Minsk agreement signed on 12 February 2015 by representatives of Russia, Ukraine and the leaders of the two pro-Russian separatist regions, Donetsk and Luhansk—specified in article 11 that Ukraine would need to carry out constitutional reform, ‘with a new Constitution entering into force by the end of 2015, providing for decentralization as a key element (including a reference to the specificities of certain areas in the Donetsk and Luhansk regions, agreed with the representatives of these areas)’ (Minsk II 2015). Amendments to the constitution meant to increase decentralization were passed by parliament at first reading on 31 August 2015, but the process then stalled and was not resumed (see ICG 2016a: 2, 16; Jarábik and Yesmukhanova 2017).
2. *Temporary failure.* Sometimes processes appear to fail but the failure is only temporary—that is, a new process starts relatively soon, perhaps building on the previous failed process, as in Kenya and Nepal (see more in Boxes 2, 3 and 4).
- Fiji is an interesting case, as it may fall in between two categories: outright and temporary failure. Fiji’s 2013 Constitution was the result of an executive-dominated and barely participatory process, aimed at replacing the 1997 Constitution that had been suspended after the 2006 coup d’état. This process followed the rejection by the government of a draft constitution developed by a five-member Constitutional Commission, after a relatively broad civic education and public consultation process (see Kant 2014; Saati 2020). The draft that the chair of the Commission presented to the President of Fiji was immediately rejected, and the Attorney General’s office was mandated to rewrite it (Dorney 2013). The revised draft was promulgated by the President on 6 September 2013 (Kant 2014: 15).
3. *Temporary stalling or suspension of the process.* Processes can also stall or be formally suspended for some time and then resume.
- This happened in Myanmar during the drafting of what became the 2008 Constitution. After refusing to recognize the results of the first democratic elections held in 1990, in 1993 the military government established a National Convention mandated to write a new constitution, which was suspended in 1996 and resumed again in 2004 (Htut 2019: 9–22).
  - Something similar occurred in Somalia during the constitution-making process that started in 2004. It was supposed to last two and a half years, but it was delayed several times and interrupted by civil conflict, ending with a Provisional Constitution only in 2012 (see Box 5).
4. *Partial failure or partial success.* Partial failures may happen, for instance, when parties reach a political settlement that includes a certain number of constitutional reforms and only some of those mandated reforms

make it into the draft constitution or amendment. Sometimes the political agreement, or a part thereof, is distorted once it becomes part of the draft constitution or amendment. Sudan is an interesting example. Its 2005 Interim Constitution was amended in 2017 following the recommendations that emerged from a national dialogue. Some of these recommendations, however, were altered in the amendment process. For instance, the recommendations included having state governors directly elected rather than appointed; this was included in the draft but the implementation was then delayed. Some other amendments, such as the expansion of the powers of the National Security and Intelligence Services, were not among the recommendations (Abdulbari 2017; Sudan Tribune 2017).

5. *Failed amendments.* While of course constitutional amendment procedures should protect the constitution from ‘shortsighted or partisan amendment’ (Böckenförde 2017: 3), sometimes the process is too rigid to allow amendments that could arguably avoid the constitution becoming outdated or that could support the implementation of a political agreement. Constitutional reform may in these circumstances require thresholds to be reached that are so difficult to attain that constitutional reform is virtually impossible. This was the situation in the case of the now defunct 2008 Myanmar Constitution, which required military representatives in the Union Parliament to vote in favour of amendments to the constitution that they had themselves developed. Attempts to amend the 2008 Constitution in 2015 and 2020 both failed for the most part for this reason.

At the same time, even when stakeholders adopt a new or revised constitution by the planned deadline, this does not inevitably result in the success of the process. A new or revised constitution can, for various reasons, be challenged in its implementation, or it may be suspended shortly after adoption, either unconstitutionally—for instance, in a coup d’état, as happened with the 2020 Constitution of Guinea in 2021 (see Zulueta-Fülscher and Noël 2022: 82–85; Boucher 2019)—or through the courts, as has happened in Colombia. In that case, an attempt to introduce a fast-track legislative procedure to help with the implementation of the 2016 Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace was challenged before the Constitutional Court and declared partly unconstitutional (Ozcelik and Olcay 2020: 1383).

## Chapter 2

# WHAT ARE SOME OF THE FACTORS THAT MAY LEAD TO FAILURE?

In fragile and conflict-affected settings, building a new or revised constitutional framework may be an essential basis for creating sustainable peace, but it is often in these contexts that constitution-making is most difficult and failure most likely. This chapter analyses some of the factors contributing to failure, using some examples as illustrations.

In short, first, in highly polarized environments parties negotiating a new political settlement will often find it difficult to reach agreement on issues that have divided them in the past (see Elster 1995; Horowitz 2021: 55). Second, the more numerous and fragmented the groups, and the more inclusive the process, the more veto points there will be throughout the negotiations. This is compounded by, third, high levels of distrust between parties, and parties attempting to avoid the risk of important issues being ill defined. Fourth, with more veto points the duration of the process may become an issue, with deadlines ignored or missed and momentum lost. Fifth, often the reason for missing deadlines is the presence of highly divisive issues. Sixth, procedures for the adoption of constitutional reforms sometimes enable parties to pause or halt the entire process, for example because of supermajority requirements or the need to hold a referendum. While these may be necessary to ensure that a majority of representatives or voters agrees with the proposed changes, it can also enable opponents of reform to block the process. Seventh, and perhaps most fundamentally, short-term goals and personal or group interests may contribute to (part of) the leadership not agreeing or not being committed to finding a negotiated and institutional solution that could help to resolve the issues that the country faces. Finally, and particularly when reaching a new political settlement proves to be difficult, international intervention can disrupt a process that it is intended to support, for instance if it is perceived as supporting some parties over others or when it appears to dominate a process that requires a high degree of local ownership for legitimacy.

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**Parties negotiating a new political settlement will often find it difficult to reach agreement on issues that have divided them in the past.**

**Without enough time to build trust, high levels of polarization may prevent parties from reaching a new political settlement.**

## **2.1. STAKEHOLDER POLARIZATION AND INTEREST FRAGMENTATION**

The first and perhaps most important contextual factor contributing to failure is the fact that actors who have been engaged in (sometimes violent) confrontation are also responsible for negotiating a new political settlement. However, without enough time to build trust, high levels of polarization may prevent parties from reaching agreement. Furthermore, conflict parties are often influenced by diverse, and sometimes shifting, political and economic interests and motivations (Ginsburg and Bisarya 2022: 34; Elster 1995).<sup>2</sup> Or they may be constituted by different (more or less powerful and institutionalized) factions. When a particular party reaches an agreement, possibly compromising on its initially stated goals, some of those factions may decide to break off, thereby withdrawing from the agreement. This happened in the Bangsamoro Autonomous Region in the Philippines in 1974 with the split of the Moro Islamic Liberation Front (MILF) from the Moro National Liberation Front, given the latter's inability to gain significant autonomy from the central government, and again in 2008 when the Bangsamoro Islamic Freedom Fighters splintered from the MILF after the annulment by the Supreme Court of the Memorandum of Agreement on Ancestral Domain and the return of the MILF to negotiations with the Government of the Philippines (ICG 2019: 14), which eventually resulted in the adoption of the Bangsamoro Basic Law in July 2018.

In addition, the longer a violent conflict persists, the greater the likelihood that new parties will emerge and old parties evolve, as has been the case in many long-standing conflicts, including in Libya, Myanmar and Yemen. The proliferation of conflict parties, and their fluidity, may prevent parties from reaching agreement or make the implementation of a new or amended constitution more difficult (see Brown 2008: 684).

Furthermore, in an always complex war economy, organized crime is often one of the most important sources of finance for (non-state) armed groups. Therefore, these actors, having attained a modicum of financial security, may be disincentivized from engaging in negotiation processes aimed at achieving a new political (and constitutional) settlement that would help to prevent organized crime, for fear of putting that perceived security at risk. In addition, further splintering of groups may result when subgroups find that agreeing to and formalizing a political settlement disadvantages them in certain ways (Bell and Ainsworth 2022: 5).

<sup>2</sup> Ginsburg and Bisarya (2022: 29) remind us that 'issues such as preferred constitutional design choices in the geographic region, colonial history, countries where legal elites are educated, and the specific drama(s) which gave rise to constitution making will all shape the preferred options of the constitutional negotiators'.



### Box 1. Libya

Libya provides an example of groups splintering and then clustering around two opposing and shifting alliances, and governments, that hardened their respective positions—partly to avoid further fracture—and as a result hindered compromise. After the 2011 revolution against Muammar Gaddafi, Libya witnessed the rapid fragmentation of its security sector and the proliferation of armed militias. The institutions that were elected at the start of the transition—the General National Congress (GNC) in July 2012 and the Constitution Drafting Assembly (CDA) in February 2014—reflected this fragmentation in the political realm. The GNC included more than 20 newly established political parties and alliances, and the CDA was mostly made up of independents who ‘only loosely represented the country’s main political groups and interests’ (Al-Ali 2021: 47). New parliamentary elections were held in June 2014, but the results were not recognized by some Islamist representatives on the GNC. This resulted in two competing parliaments and governments based in the east and west of the country, and war between a constellation of local militias supporting either government. The CDA was mandated to draft and adopt

a new constitutional framework in less than four months (Constitutional Declaration 2011, article 30), but it became embroiled in the political and military conflict. It managed to finalize a first draft of the constitution in October 2015, which was adopted in July 2017 (Al-Ali 2020). However, the text fell short of addressing either the needs of the population at large or any of the demands of the conflict parties. It was ultimately ignored. Separately, and since 2015, the United Nations Support Mission in Libya had been trying to broker a peace agreement that would lead to the country’s reunification (ICG 2021: 1–2). Worsening violence between the two parallel governments led to a ceasefire agreement in October 2020 and the formation of a government of national unity. Elections were announced for December 2021, but disagreements between the parties regarding some of the ground rules—mainly the eligibility criteria for the presidential elections—the sequencing of the elections and the referendum to ratify the 2017 draft constitution (ICG 2022) forced the cancellation of elections. At the time of writing the parties, and their international backers, are yet to find a solution to the impasse.

## 2.2. INSUFFICIENT ELITE OR GROUP INCLUSION

Any agreement that leads to a new constitutional dispensation will be more sustainable if a significant number of conflict parties agree on and commit to the proposed changes. Elite accommodation may therefore increase the likelihood that the new or revised constitution will be implemented. However, where the constitution-building process has not been designed to ensure the inclusion of different groups and their representatives—or where the process becomes less inclusive as it goes on—the following scenario may arise.

Likeminded elites sit around the negotiation table—with opposition representatives either excluded or self-excluded—and hence agreement will be easier to reach but less durable (Horowitz 2021: 116). This was the case in Egypt after the overthrow of Hosni Mubarak in February 2011. Division between Islamists and non-Islamists—and between Islamists and the military—deepened, especially once the Islamists won a majority in the first post-Mubarak legislative elections, which allowed them to control the constitution-building process (Al-Ali 2013; Brown 2013). The Constitution was adopted following a referendum in December 2012, with an extremely low turnout and with large parts of the opposition boycotting the vote (Brown 2013: 49). Nationwide protests in June 2013 prompted the military to launch a coup against the government of the Muslim Brotherhood, immediately suspending the Constitution (Kandil 2020). The coup then led to the adoption of a new

(or substantially amended) constitution in January 2014, sponsored by the Egyptian armed forces.

### Box 2. Kenya

In Kenya, an inclusive and participatory process culminated in a draft constitution that part of the governing elite disagreed with and decided to unilaterally amend. This fostered the emergence of a new political movement that successfully campaigned for the rejection of the draft in a referendum. To give more detail, in March 2004 the National Constitutional Conference (NCC) adopted a draft constitution that, despite contention over these aspects, included what was in essence a parliamentary system and strong devolutionary elements—key departures from the extant 1963 Constitution. The NCC was unable to secure the support of a significant section of the governing elite. In the next stage of the process, parliament was to adopt the draft approved by the NCC. President Kibaki's National

Rainbow Coalition, however, decided to significantly amend the draft in parliament, reintroducing a hyper-presidential system of government and removing the second chamber as well as other devolutionary elements. The National Rainbow Coalition's move to amend the draft by a simple majority in parliament and against the wishes of both opposition parties and civil society sparked the emergence of a new political movement—the Orange Democratic Movement—led by Raila Odinga. The Orange Democratic Movement successfully campaigned against the draft—with 57 per cent of voters rejecting it in a referendum—and later became the main opposition leader against Kibaki in the 2007 general elections (see Murray 2013: 2022).

The question of who to include in, or who to leave out of, these processes is often controversial. Certainly those groups with the potential to mobilize citizens for or against the constitutional reform process and the new constitutional framework should be included in the process and their buy-in should be secured. This is certainly one of the key lessons learned from the 2021–2022 process of constitutional reform in Chile, where arguably the exclusion of conservative parties from negotiations within the Constitutional Convention critically contributed to the rejection of the draft in a referendum (Larrain, Negretto and Voigt 2023). But new groups can also emerge throughout the process, perhaps encouraged by the promise of political relevance, or existing groups can change their role. Maintaining a certain degree of flexibility to enable the process to adapt to changing circumstances therefore needs to be balanced with the need to avoid creating incentives for the emergence of new and sometimes self-serving groups.

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### 2.3. UNCERTAINTY, DISTRUST AND 'CONTRACT-LIKE' DRAFTING

One key impediment to reaching consensus is a lack of trust between opposing parties at the constitutional negotiation table. Actors may be suspicious of others and doubt that they truly intend to honour written and unwritten commitments. Most, if not all, high-stakes (constitutional) negotiations entail a certain level of distrust and uncertainty, which may result in parties failing to agree on a new constitution or approaching constitutional

drafting as the making of a contract rather than an enabling framework. This can result in parties seeking to (a) include details in the constitutional text that would be better left to ordinary legislation or to future judicial interpretation, in an attempt to insure themselves against future changes in the balance of power (see the example of Nepal in Box 3), or (b) introduce onerous amendment procedures or even a temporary moratorium on amendments, as for instance in the 2017 draft constitution of Libya (article 216). High levels of distrust can also motivate parties to use their veto power to block particular decisions and to push for particular design options perceived as better responding to specific (group) interests (see Brown 2008: 683).

### Box 3. Nepal

Nepal is an interesting case in point. Nepal's Constitution was promulgated on 20 September 2015, after seven years of negotiations and the election of two consecutive constituent assemblies. These constitutional negotiations followed 10 years of civil conflict between the Communist Party of Nepal (Maoist) and the armed forces. The first Constituent Assembly was elected in April 2008 and was given two years to finalize a draft constitution. The new constitution was to address the main underlying causes of the Nepali conflict by eliminating the centralized unitary state (Edrisinha 2017: 438). The way in which the Nepali state was to be restructured, eventually becoming a federal republic, was, however, a very contentious issue, particularly in relation to the establishment—names, number and boundaries—of its constituent units (Karki and Edrisinha 2014; Edrisinha 2017: 440; Dev 2022). While the Maoists and the (historically marginalized) Madhesi groups argued for a higher number of provinces—between 10

and 14—based mainly on identity-related criteria, initially with a view to ensuring ethnic control of provincial governments, the more traditional political parties—the Nepali Congress and the Communist Party of Nepal (Unified Marxist–Leninist)—insisted on viability being the main criterion for the formation of provinces and hence argued for a maximum of six (Khanal 2017: 75). None of the groups had a two-thirds majority in the first Constituent Assembly, and no agreement between them seemed possible, to the extent that the Assembly's two-year duration was extended several times, until finally the Supreme Court dissolved it in May 2012. The dissolution of the first Constituent Assembly plunged the process into deep political crisis, and it was salvaged only by an agreement between the parties to hold new elections in November 2013. The Constitution was eventually adopted, in the aftermath of a severe earthquake, in 2015.

## 2.4. TIME, DELAYS AND HASTE

In fragile or post-conflict contexts, timelines are often ignored or deadlines missed. Delays in the early stages can lead to further delays down the line and the weakening of the momentum for constitutional change. This in turn may result in temporary (or ultimate) failure to draft and adopt a constitutional text (Horowitz 2021: 107). Some parties may deliberately delay processes to cause their collapse (as may have been the case in South Sudan). Sometimes parties may need more time (or more time pressure) to reach compromises, as was arguably the case in Nepal (Box 4).

While delays can be a problem, pressure to meet deadlines can either force stakeholders to produce a text without the agreement of all parties, as was the case in Nepal (AFP 2015; see also Horowitz 2021: 107), or it may lead to an incomplete or ambiguous text, as in Somalia (see Box 5) or, arguably, in Iraq's

#### Box 4. Nepal

Nepal's first Constituent Assembly was to last a maximum of two years. It was extended several times, despite the Interim Constitution providing for only one extension of a maximum of six months (article 64). The Assembly was disbanded in May 2012, but the Interim Constitution did not provide for the possibility of electing a second Constituent Assembly. Furthermore, because the first Constituent Assembly had been dissolved, the Interim Constitution could not be amended in this regard (Edrisinha 2017: 442). An agreement was needed between the different political parties represented in the first Constituent Assembly. The parties decided to establish a technocratic government headed by the Chief Justice of the Supreme Court, and this government

eventually held new elections in November 2013. The Maoists lost their majority and became the third party in the second Constituent Assembly; the more traditional Nepali Congress and Communist Party of Nepal (Unified Marxist–Leninist) won more than half of the seats (Edrisinha 2015: 311; Edrisinha 2017). The new composition did not initially facilitate reaching a compromise on the future federal system, and deadlines were again missed. Only after a deadly earthquake in April 2015 did the Maoists side with the two major parties to adopt the final draft constitution. It divided Nepal's territory into seven provinces, something that previously marginalized communities—the Madhesi and the Janajati—adamantly disagreed with.

2005 Constitution. In practice, more time does not necessarily mean reaching a more consensual agreement, and perhaps the resulting text is the best that could have been aspired to. Providing for more ample deliberation time or more liberal time frames can also have negative consequences, as it can allow groups and sometimes individuals to derail the process or hold it hostage to their own personal or group interests.

#### Box 5. Somalia

In the case of Somalia, delays were caused by factors both internal and external to the constitution-making process. Nonetheless, the adoption of the Provisional Constitution in 2012, partly as a result of international pressure, was perhaps a partial success. Somalia became committed to federalism in 2004 with the adoption of the Transitional Federal Charter. This constitution replaced the decentralized unitary system provided for in the 2000 Transitional National Charter and provided for a process for drafting the National Federal Constitution of Somalia in a maximum of two and a half years, which was then to be ratified in a referendum (Transitional Federal Charter, article 71.9). However, the institutions responsible for preparing the draft constitution were not established in a timely manner (Samuels 2010), and later on their work stalled against a backdrop of increasing tensions between the government and the Islamic Courts Union. A preliminary draft of the new constitution was released only in August 2010; this was principally aimed at stimulating civic education and

public submissions to inform the final draft (International IDEA 2018). However, insecurity and violence continued to delay the process, and it was only at the strong urging of the United Nations and other development partners that in September 2011 the government adopted its Roadmap to End the Transition. In early 2012 several constitutional drafts were circulating, which were eventually merged into a compromise document. This compromise document, however, left key sections of the new constitution incomplete owing to lack of agreement, particularly regarding the design of the new federal system. This text was referred to as the Provisional Constitution. Holding a referendum to ratify the Provisional Constitution was not possible mainly due to persistent violence and stakeholders came to accept that a subsequent process of consensus-building and finalization would be necessary; the text was therefore adopted as a transitional, rather than a final, constitution in August 2012 (see Elmi 2022: 8).

## 2.5. THE 'POISON PILL' IN CONSTITUTIONAL DESIGN

In polarized environments there are often a small number of highly divisive points that some parties insist need to be included in the draft, eliciting the immediate opposition of other parties. These points may, for instance, relate to (presidential) term limits, the electoral system, the relationship between state and religion, the right to abortion or how specifically regional autonomy is to be established (for instance, the number of constituent units or their powers). Even on occasions when the rest of the draft is agreeable to all parties, these 'poison pills'—there may be more than one—can jeopardize the entire draft.

### Box 6. The Gambia

In The Gambia the Constitutional Review Commission established in June 2018 finalized its draft constitution in March 2020, after a highly inclusive and consultative process. The final draft included retroactive term limits: no president would be allowed to serve more than two terms, and current or past terms would count (Perfect 2022: 33). The amendment bill had to be supported by no less than three-quarters of the members of the National Assembly and then ratified in a referendum by 75 per

cent of those who voted (articles 226 and 4b and 4d). However, the bill did not receive the requisite majority in the National Assembly. Despite broad-based support among the population and political consensus in support of the vast majority of the text, the draft appears to have been unacceptable to the President and a large part of the political elite (Reuters 2020; see also Nabaneh 2020; Perfect 2022).

## 2.6. INADEQUATE PROCESS DESIGN

Designing a constitution-building process that is appropriate to the context, realistic and able to lead to a legitimate constitutional text is a complex endeavour. The design needs to address issues related to the timeline, the agenda, the institutions involved and their mandates, the adoption and ratification processes, and the level of public participation. Sometimes contextual changes prevent the conclusion of the process no matter how well designed it was, but sometimes processes are designed regardless of the specific context or without allowing for sufficient flexibility to respond to changing circumstances. In Somalia, for instance, the constitutional draft was to be ratified in a referendum, but persistent violence did not (and still does not) allow such a vote to be held. What was to be the National Federal Constitution of Somalia therefore became the 2012 Provisional Constitution of Somalia—the third transitional constitution in 12 years.

### Box 7. Somalia

Process deficiencies continued in Somalia during the 2012 Provisional Constitution review process. The two institutions that were to conduct the review process—the Provisional Constitution Review and Implementation Oversight Committee and the Independent Provisional Constitution Review and Implementation Commission—were to consist of members nominated by bodies some of which had yet to be established, including the federal

member states and the Senate. Only Puntland existed as a federal member state before the 2012 Provisional Constitution was adopted, and the rest of the states were established during the period from 2013 to 2016 (see Schmidt 2015; Gluck and Bisarya 2020). As a result, the constitutional review could not be accomplished during the first parliamentary term, from 2012 to 2016, and it had to be deferred to the second term.

### Box 8. South Sudan

In South Sudan, the 2018 Revitalised Agreement on the Resolution of Conflict in the Republic of South Sudan provided for a new constitution-making process to replace the 2011 Transitional Constitution of South Sudan. The process, however, was overly complex, including three formal stages guided by six different mechanisms, a legal framework and five different institutions. The first stage included the adoption of the Constitution-making Process Act in December 2022 and the establishment of an inclusive 57-member National Constitutional Review Commission to oversee the process and lead public consultations (still to be constituted at the time of writing). In addition to this

Commission, a 15-member Constitutional Drafting Committee is to be constituted to draft the constitutional text. In a second stage, an executive-appointed 25-member Preparatory Sub-committee and a National Constitutional Conference comprising 1,200 delegates will be established to adopt the constitutional text. A joint sitting of the two houses of parliament as a Constituent Assembly will then ratify the final draft and the President is then to promulgate the constitution (Akech and Geng 2023). The overall climate of distrust, insecurity and general instability has already led to various delays (Akech 2022; UNMISS 2023).

## 2.7. LACK OF AGREEMENT BETWEEN POLITICAL ELITES

Ultimately, the leadership at the table needs to have a level of agreement on the fact that constitutional reform may help to resolve at least some of the issues that the country faces (such as violence, inequality or lack of development). At the same time, the leadership also needs to be committed to finding a new political settlement that works for most and ultimately needs to believe that other parties will also be (sufficiently) committed. Processes have failed in the past because decision makers, in or outside the constitution-making body, have resisted compromise. Resistance to compromise may arise from a perceived position of strength—as for example, in the case of the regime of President Bashar Al-Assad in Syria, the Myanmar armed forces before the February 2021 coup d'état or Kenya's National Rainbow Coalition government until the 2005 referendum—or out of fear that compromising may ultimately disadvantage elites or their constituencies in ways that they cannot control or, for that matter, predict, as was arguably the case in The Gambia (see Box 6). In Libya, also, the stalemate is becoming entrenched as political leaders keep obstructing any progress on negotiations, favouring their own personal interests rather than those of the broader Libyan society (McDowall 2022).

### Box 9. Somalia

In Somalia, key disagreements between the Federal Government and both the Jubaland and Puntland state governments have been one of the main reasons for the lack of progress on the review of the 2012 Provisional Constitution. Disagreements have mainly related to the allocation of responsibilities and to natural resource sharing and financial management (OC and ICRIC 2021:

29, 31). On the other hand, political disputes on issues unrelated to the constitutional review process, such as electoral matters at both federal and federal member state levels, have also led to Jubaland and Puntland disengaging from the process (Max Planck Foundation 2022: 13–14).

### Box 10. Tanzania

In Tanzania, lack of agreement between elites was the main reason for the failure of the 2011–2015 constitution-making process. The reform of the 1977 Constitution of Tanzania started in 2011 after the adoption of the Constitutional Review Act and the establishment of a Constitutional Review Commission (CRC), in charge of preparing a preliminary draft based on input from the public. A 628-member Constituent Assembly was then to prepare a 'proposed constitution' to be submitted to referendum. The Constituent Assembly, with a majority of representatives from the governing party, controversially altered the content of the preliminary draft prepared by the CRC. The 'proposed

constitution' in turn maintained the existing two-government structure—removing the federal structure proposed by the CRC, reinstating strong presidential powers and weakening the separation of powers set out in the CRC draft (particularly between the executive and the legislature), among other changes (Polepole 2014; Masabo and Wanitzek 2015). The majority-led review and the lack of agreement between the governing party and the opposition led to a walkout by 130 opposition representatives (Maoulidi 2014) and eventually to the postponement of the April 2015 constitutional referendum, which was never rescheduled (Reuters 2015; Halim 2021).

## 2.8. INTERNATIONAL INFLUENCE OR TAMPERING

The role of international actors in constitution-making can be significant, and varies depending on, among other factors, the specific actors, their relationship to the parties, the type of assistance provided and, of course, the specific country context. The provision of international assistance to certain particular actors may be the only way to create a level playing field in constitutional negotiations, as arguably was the case throughout the constitution-making process in Nepal, where various international agencies supported capacity building of disadvantaged and marginalized groups (International IDEA 2015: 36). Sometimes, however, international assistance or the assistance provided by particular actors can be perceived as disruptive, particularly if those actors for whatever reason show a preference for engaging with a few rather than all stakeholders involved in the process, as has arguably been the case during processes in Libya, Nepal and Somalia.

Since at least the turn of the century, and more so in the past decade, there has been a renewed internationalization of intrastate conflicts after approximately 10 years of relative truce—from the end of the Cold War until the 9/11 attacks (Palik, Obermeier and Rustad 2022: 18–19). '[A] growing number of international actors [are] seeking to ally with particular conflict parties and/or using the conflict resolution space as a vehicle for their own foreign policy ambitions. Neighbouring state or non-state armed groups are often as, or more, influential than other actors' (Bell and Ainsworth 2022: 6). This has very clearly had an impact on political settlement processes in places such as Libya or Syria, but also in South Sudan and Somalia, where powerful neighbours or regional powers prop up conflict parties, removing incentives to compromise and agree to new constitutional frameworks (see, on Somalia, de Waal 2020: 579).

If foreign actors provide financial and other resources to parties at the negotiation table, it can disincentivize those actors from constructively engaging with the other parties in the negotiations. This is particularly the case in settings with high levels of distrust, bearing in mind that the resources that a party receives may cover its needs, perhaps more effectively than anything that might result from negotiations. This dynamic seems to be accentuated in multi-level government contexts, such as Somalia, where foreign powers can channel resources to their partners through local state structures, thus undermining the central state.



## Chapter 3

# BUILDING ON FAILURE AND PREPARING FOR FAILURE: LESSONS LEARNED

Constitution-building rarely follows the pre-planned process for the adoption of a new constitution. Often processes are designed to be highly inclusive and transparent—to ensure a high degree of legitimacy of both the process and the resulting text—but unexpected circumstances and dynamics may hamper the achievement of these goals or derail the entire process.

Factors analysed in the previous chapter offer partial explanations as to why processes have failed in the past, including lack of elite inclusion, high levels of distrust, insufficient time frames, failure to make compromises, structural process design issues, ‘poison pills’ and disruption caused by international actors. Future process designers may want to keep those factors in mind, not only to try to prevent or address some of those issues, but perhaps also to manage expectations of the outcome of the process.

Temporary failure or stalling may result in the process taking place in various unanticipated stages. In the case of Nepal, the failure of the first Constituent Assembly led to the election of a second, and the continuation and eventual completion of the process based on a new timeline. What was to have been a two-stage constitution-making process, with the adoption of an interim constitution and free elections for the constitution-making body—akin to the ‘post-sovereign constitution-making’ model described by Arato (2009: 418)—morphed into multiple unplanned stages, with breaks in between, and the hope but not the certainty of closure. Something similar happened in Kenya when, after the proposed draft constitution was rejected in the 2005 referendum and after electoral violence marred the 2007 elections, a new process started, deliberately designed to avoid as far as possible the problems of the previous one. As part of this process a Committee of Experts proposed a Harmonized Draft mostly based on the draft adopted in March 2004, and submitted it to the Parliamentary Select Committee on Constitutional Review. The amended draft was adopted by the National Assembly and ratified in a referendum on 4 August 2010 (Murray 2013).

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**Constitution-building rarely follows the pre-planned process for the adoption of a new constitution.**

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### **A phased or iterative process does not necessarily mean a failed process.**

A phased or iterative process does not necessarily mean a failed process. Often processes stall or drag, either before the draft has been finalized, as in Nepal or Tanzania, or sometimes after the final draft has been rejected in parliament or in a referendum, as in The Gambia or Kenya respectively. However, the experience of iterative (and often messy) constitutional negotiations may actually enable the parties to (a) identify key contentious issues and achieve agreement on where foundations may be laid for future deliberations, (b) build networks and channels of communication, and (c) prepare for a future in which they may become actors in regular democratic politics (Brown 2008: 685). More importantly, perhaps, such negotiations may increase awareness that constitution-building processes mainly constitute exercises of political will, and hence time is needed to build the minimum degree of trust between the parties required to enable them to reach agreement and make compromises.

Sometimes, though, processes stall indefinitely, as has been the case for a relatively long time in Libya, Somalia and Yemen. Mediators are engaged in many of these countries, but the constitution-building process may lose relevance in the absence of an initial political settlement and in the face of other developments.

In those cases where failure is not primarily due to lack of commitment or lack of willingness to see the process through, parties and advisors would do well to think about scenarios that could help to prevent the process from ultimately stalling. This type of scenario planning would require the parties to think about some of the following trade-offs.

- *A realistic timeline and a degree of flexibility.* Ideally the process would be designed to offer enough time for the parties to negotiate and agree on a constitutional text, acknowledging, at the same time, the relatively narrow window for change. This is of course not easy. Notwithstanding how realistic the timeline may initially appear to be, it is increasingly the case that processes are delayed or extended without limit. When the timeline is delayed and cannot be changed, the existing constitutional framework (or any other default framework) may need to endure until the parties agree to a new process. Individuals or parties that may prefer to be ruled by the existing (temporary) framework may prolong the state of uncertainty by not making compromises, perhaps even gaining time to pursue ulterior ends. The same can happen if the timeline is flexible enough for some groups to unilaterally change it. An awareness of conflict dynamics and the relationships between the different actors at the negotiation table should inform not only the timeline but also its degree of flexibility and any mechanisms or institutions mandated to monitor and adjudicate on the latter. As an example, the constitution-making process outlined in Nepal's 2006 Interim Constitution was flexible only to a certain extent, allowing only one extension of six months (article 64). However, it also provided for a relatively independent Supreme Court with the final authority to interpret the Constitution (article 102(4)). After many delays, the Supreme Court eventually decided to dissolve the first Constituent Assembly and force the

parties to the negotiating table. The role of the Supreme Court rulings in incentivising parties to compromise is difficult to gauge. However, at least having a review mechanism signalled the fact that the process could not continue indefinitely without a constitutional text being agreed.

- *Detailed, clear and adaptable rules of procedure.* The rules on how the constitution-making body or bodies will function and execute their mandate—that is, the internal structure and the procedure to be followed in drafting and adopting the constitutional text—need to be as clear, consistent and detailed as possible. This will help to avoid deadlocks emerging from the need to interpret ambiguous, contradictory or vague clauses. The rules of procedure should also provide for the possibility of their own amendment, to tackle cases in which ambiguous or contradictory clauses need clarification or the rules need to be adapted to changing circumstances. The procedure for amendment should incorporate specific safeguards, such as special thresholds for approval, to avoid particular camps taking advantage for their own ends. The Rules of Procedure of Tunisia’s National Constituent Assembly were amended four times during the constitution-making process—between March 2013 and January 2014—in attempts to address several challenges that the Assembly faced that threatened to stymie the process. Many of the amendments could have been avoided if the rules of procedure had been more detailed and clearer, particularly with regard to the mandates and mechanisms to be used by the bodies they provided for. This could have spared the National Constituent Assembly later delays and tension (Carter Center 2014: 51–53).
- *Procedural deadlock-breaking mechanisms.* Procedural mechanisms, as well as substantive ones, can help parties to reach agreement on controversial issues and may also be critical in anticipating future issues that the parties may encounter. These mechanisms may or may not need to be formally established, as sometimes maintaining a level of flexibility will better allow parties to specifically address issues that emerge unexpectedly. Some mechanisms to be considered include (a) structuring the agenda by agreeing on overarching principles that will guide the negotiations, scheduling discussions on contentious issues or focusing on issues that provisions are meant to resolve rather than on specific provisions themselves; (b) following the ‘one-text rule’, or consolidating different proposals into one text, specifying those issues on which there is not yet agreement; (c) structuring the constitution-making body and its decision-making rules to allow direct communication between top-level leaders, and between them and lower-level party members, in order to solve problems when necessary; and (d) referring some issues to third parties, such as experts or civil society representatives, who can act as advisors to the constitution-making body and propose alternative solutions on controversial issues (Bisarya and Noel 2021: 5–7). In Tunisia the process reached an impasse in 2013, after which a number of organizations that represented labour unions, business groups, human rights activists and lawyers decided to organize a national dialogue; this was intended to persuade the political parties to resume negotiations, which it succeeded in doing (Horowitz 2021: 26). In South Africa the Interim Constitution

provided for the establishment of a Panel of Constitutional Experts to make suggestions on amendments to the draft constitution if the Constitutional Assembly was unable to adopt the draft by a two-thirds majority. In the end, however, the more effective deadlock-breaking mechanism may have been the requirement to hold a referendum if the two-thirds majority was elusive (Murray 2001: 831). In both South Africa and Tunisia the use of referendums as deadlock-breaking mechanisms incentivized negotiating parties to compromise 'to avoid the risk of being seen to have failed in their mandate, and of seeing the constitution rejected by the people in a referendum' (Bisarya and Noel 2021: 8). Mid-term elections or intermediate referendums could in theory also constitute potential deadlock-breaking mechanisms, but it would not always be possible to organize these, and they might heighten existing tensions between parties.

- *Substantive deadlock-breaking mechanisms.* With intense polarization and distrust, agreements are unlikely and the potential for stalling increases. Parties may decide to avoid clarity in the text to save them having to decide on issues that are still disagreed upon, and instead use ambiguity, outright contradictions, or sunrise or sunset clauses, thus deferring controversial choices (Lerner 2010: 70; Dixon and Ginsburg 2011). These approaches may allow the parties to assert that the demands of their different constituencies have been met. However, such devices need to be used 'carefully and sparingly lest the constitution be filled with time bombs and trap doors' (Brown 2008: 685); omissions can later be used by power holders to shape basic structures in their own interest (Horowitz 2021: 112) or can be a source of conflict if governance is hampered by leaving structural issues ill defined (Inbal and Lerner 2007). Examples of ambiguity and deferral in the drafting of a new constitutional text abound. The debate around India's national language, given its tremendous diversity, is a good example: it lasted for three years and was concluded by deferring the decision to a future parliamentary committee that, after 15 years, would reassess the issue. The Constitution itself declared Hindi the 'official language', while allowing English to be used for a period of 15 years 'for all official purposes' until parliament by law provided for the use of either language for all or for specific purposes (article 343). The Constitution then also provided that state legislatures could adopt whichever languages they chose as official languages of the state or part of the state, with English as the default (articles 345 and 347). According to Lerner (2010: 77), 'The drafters preferred to circumvent unequivocal decisions on controversial issues by deferring them to future political institutions', thereby, presumably, allowing the process to be completed without delays.
- *Interim legal frameworks as defaults.* Despite the possibility of using any of the aforementioned mechanisms, sometimes the process still stalls. This is particularly problematic in those cases where there is no immediate default to fall back on, as the current (temporary or permanent) constitutional framework has become outdated (or will become illegitimate after a certain period of time), and especially where elections are tied to the new constitutional framework being adopted. In some cases, as in Somalia, a consolidated but incomplete text is adopted provisionally, while providing

for its own review and completion. While the revision is not yet complete, the 2012 Provisional Constitution appears to at least have offered a governing framework (albeit an imperfect one). In Burundi there was a sequence of different interim constitutions, the last of which was adopted in October 2004 as the provisional version of what was to become the Constitution of Burundi, adopted in July 2005 (Bell and Zulueta-Fülscher 2016: 28). In brief, aiming to achieve a permanent constitution immediately may become the enemy of building an efficient governing framework.

- *The possibility of immediately amending the (new) constitutional framework.* In Nepal, long delays in the drafting process generated a constitutional crisis when the Supreme Court dissolved the first Constituent Assembly. No process had been envisaged in the Interim Constitution for such an eventuality. Once the second Constituent Assembly had been established, and after more delays, a terrible earthquake created the decisive sense of urgency that drove the Maoists to change sides and agree to the relatively conservative constitutional proposal that was on the table. Despite broad political support for the 2015 Constitution, key groups in the south of the country engaged in violent protests against the new constitutional framework, particularly the way in which the new federal system had been designed and their overall lack of representation in state institutions. These protests finally motivated political parties in parliament to adopt amendments to the Constitution meant to increase these groups' representation in state institutions (ICG 2016b). These groups, however, rejected the amendments as insufficient. Two other amendment bills were tabled. The one that was put forward in November 2016 was eventually withdrawn. The next, tabled in April 2017, was intended, among other things, to establish a commission mandated to propose changes to provincial boundaries; it was rejected in parliament in August 2017 (Ghimire 2017). However, the possibility of amending the Constitution immediately after its adoption—in the form, for instance, of the absence of a moratorium on amendments, as in Libya's 2017 draft constitution, for example—allows parties to channel potential conflicts through political (and legal) processes. Another option would be to schedule a review of a particular design choice, as in Brazil, where, five years after the adoption of the 1988 Constitution, there was to be a referendum on whether to maintain the presidential system of government or change to a parliamentary system.
- *Participation of key public stakeholders or the public in general.* The most common public participation mechanisms include public consultations, elections and referendums (see Houlihan and Bisarya 2021). The absence of public consultations appears rarely to be the main reason for the failure of a constitution-building process, as long as there is agreement between political elites. When there is no such intra-elite agreement, however, ignoring or not transparently dealing with the results of a public consultation process can threaten the entire process. This arguably happened in Kenya, where part of the political leadership hijacked the process in order to change the text that had been drafted following public consultation. Opposition figures then capitalized on the tampering to build their campaign against the draft, which resulted in a majority of voters

rejecting the draft in the 2005 referendum. In Liberia, it was precisely the public participation process (arguably in the absence of an intra-elite agreement as to the type of constitutional reforms needed) that motivated President Johnson Sirleaf to delay constitutional reform. One of 25 proposals coming from a relatively inclusive National Constitutional Conference argued that Liberia should formally be declared a Christian state, which she considered could foment inter-religious conflict in the country (Al-bakri Nyei 2016).

New elections to the constitution-making body in Nepal were eventually a solution to the constitutional and political crisis that the country suffered once the Supreme Court had disbanded the first Constitutional Assembly in 2012, although ultimately at the cost of some of the commitments for a more inclusive and representative government and society that had underpinned the peace process. Referendums are also increasingly used to ratify constitutional texts; they are sometimes required only when a constituent assembly falls short of the supermajority that would allow it to adopt the new constitutional text.

- *The international community.* As mentioned in Chapter 2, the international community can encompass a variety of actors, with different relationships with stakeholders on the ground and distinct, sometimes competing, incentives for getting involved in a particular process. On occasion, international actors can disrupt a transition or peace process to the extent that it fails. There is indeed a long history of international domination of, or undue meddling in, these types of domestic processes (Carothers and Samet-Marram 2015). Still, analyses differ as to international actors' incentives and actual impact on transitional processes, and particularly on constitutional reform processes (see Brandt et al. 2011: 327–29), with international assistance to constitution-building also taking on a number of different forms that can be more or less useful and effective in particular contexts, including the provision of capacity building or technical advice<sup>3</sup> (see Bell and Zulueta-Fülscher 2016: 47). Increasingly, though, competition for influence among external actors, including neighbouring countries and other foreign actors, is a feature of transition processes and a contributing factor to heightened potential for conflict between local actors but also between international actors and institutions involved in the process. This has been the case in Libya, Syria and Yemen, for instance, over the past decade. Intergovernmental organizations, on the other hand, as well as sometimes specific countries or country coalitions, can offer the space for parties to engage in dialogue or negotiations. Intergovernmental organizations such as the United Nations, or regional organizations such as the African Union, have the convening power to expand (internationally mediated) negotiation tables to include representatives of states that have developed a particular interest and role in a country and its transition. The 1999 Lusaka Ceasefire Agreement is an example of bringing foreign states that have been involved in an intrastate conflict to the negotiating table, to

<sup>3</sup> According to the International IDEA Database on Constitution-Building Processes in Conflict-Affected States (International IDEA [n.d.]), the role of the international community in assisting a constitution-building process in fragile settings includes becoming a mediator or facilitator, a certifier or guarantor, an advisor, or a funder.

agree to a ceasefire and to support constitutional negotiations between the domestic parties to the conflict.<sup>4</sup>

In conclusion, the danger of a process failing—which happens more often than one might expect with sometimes dire consequences for the future of the country in question—needs to be taken more seriously, while acknowledging the fact that forestalling failure is complex and uncertain. Decision makers are often not at liberty to design a process from scratch, as they may need to follow past agreements or constitutionalized procedures. Even when they have ample freedom, process designers will be constrained by contextual dynamics, and how these may affect the behaviour and decision making of actors able to influence the process. Beyond this, mechanisms aimed at preventing failure often carry an intrinsic risk, in that some actors may wait for (or actively contribute to) the process stalling in order to use those mechanisms to increase their own decision-making power. Failure is sometimes inevitable. However, process designers can also include mechanisms and tools to help future constitution-makers build on potential failure. Some examples would include ensuring that the necessary resources are in place for record keeping and archiving, for planning and carrying out civic education, and for receiving and processing public submissions. These and other mechanisms can be critical to facilitate learning from past experiences and make efficient use of always limited financial, time and human resources. Furthermore, opening the debate to civil society organizations and the wider public builds their capacity and may incentivize their informed participation in future processes of constitutional reform.

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<sup>4</sup> The Lusaka Ceasefire Agreement was signed by representatives of Angola, the Democratic Republic of Congo, Namibia, Rwanda, Uganda and Zimbabwe as parties to the agreement, and Zambia, the Organisation of African Unity, the United Nations and the Southern African Development Community as witnesses. The parties to the conflict agreed to the cessation of hostilities, and among other things, 'to facilitate inter-Congolese political negotiations which should lead to a new political dispensation in the Democratic Republic of Congo' (Chapter 5, Annex A, Lusaka Ceasefire Agreement, 1999, <[https://peacemaker.un.org/sites/peacemaker.un.org/files/CD\\_990710\\_LusakaAgreement.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/CD_990710_LusakaAgreement.pdf)>).



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# About the partners

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## INTERNATIONAL IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

### What we do

In our work we focus on three main impact areas: electoral processes; constitution-building processes; and political participation and representation. The themes of gender and inclusion, conflict sensitivity and sustainable development are mainstreamed across all our areas of work.

International IDEA provides analyses of global and regional democratic trends; produces comparative knowledge on democratic practices; offers technical assistance and capacity building on reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

### Where we work

Our headquarters are located in Stockholm, and we have regional and country offices in Africa, Asia and the Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations and is accredited to European Union institutions.

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## PEACEREP

PeaceRep is a research consortium based at Edinburgh Law School. Our research is rethinking peace and transition processes in the light of changing conflict dynamics, changing demands of inclusion, and changes in patterns of global intervention in conflict and peace/mediation/transition management processes. PeaceRep is funded by the Foreign, Commonwealth & Development Office (FCDO), UK.

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## THE EDINBURGH CENTRE FOR CONSTITUTIONAL LAW

The Edinburgh Centre for Constitutional Law (ECCL) provides a focal point for staff and postgraduate research students working in all areas of Scots and UK public law, Commonwealth and comparative constitutional law, human rights law, environmental law and climate change law, democratisation and transitional constitutionalism, and constitutional theory. Our members undertake research and teaching in all these areas, as well as providing expertise to institutions outside academia in the UK and beyond.

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Constitution-making is often integral to achieving a new political settlement after conflict and in fragile settings. However, the process fails with relative frequency, in that actors cannot agree on a new text or the finalized text is not approved or ratified. While failure may be temporary—the process may resume after a period of time—it can also be costly. Key reforms may depend on the adoption of a new or revised constitution, and in its absence negotiations may stall and conflict recur.

This Paper starts a conversation about the potential grounds for, and strategies to prevent or build on, failure. It was developed following the Ninth Edinburgh Dialogue on Post-Conflict Constitution-Building held in September 2022.