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**EXTERNAL SUPPORT TO
CONSTITUTION BUILDING PROCESSES**

Cheryl Saunders, Andy Carl, Anna Dziedzic, Samantha Smith

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to

The Expert Group for Aid Studies (EBA)

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Foreword by EBA

The form of national governance is often contested, marked by vested interests, and fundamentally a political issue. Nevertheless, without a certain level of functional governance, ambitions for socio-economic development will be in vain.

At the core of such difficulties lies the issue of constitutions. How should a society's governance be formally organised, and how to build sufficient consensus around state structures and functions? When an armed conflict is ended in a peace agreement, or when illegitimate exercise of power is to be replaced by social contracts, the art of constitution building is called for.

Over the last three decades external support has often played an important role in such processes. However, things are currently changing, with democratic backlashes, unconstitutional changes of governments and shifting geopolitics. What lessons have been learned by the prime actors who have provided external support? How can such insights be applied and adapted to new realities on the ground? What needs to change in practice and thinking as global and national power balances shift?

This report summarises lessons learned through professional practice in the field of constitution building. These lessons include the continued importance of external support, especially when conducted in close collaboration with local actors.

We believe the report will be of use to staff at the MFA, Sida, FBA and Swedish embassies involved in supporting constitution building processes in various ways. It may also inform a wider audience working with democracy support, Rule of Law and governance more generally, as well as an international cadre of constitution building specialists.

The study has been conducted with support from a reference group chaired by Joakim Molander, who previously served as a member of EBA. Responsibility for the content of the report lies fully with the authors.

Stockholm, August 2024

A handwritten signature in blue ink, appearing to read 'T. Becker'.

Torbjörn Becker

Chair, EBA

A handwritten signature in blue ink, appearing to read 'Jo. Molander'.

Joakim Molander

Chair, reference group

Sammanfattning

Denna rapport bygger på trettio års erfarenhet av externt stöd till författningsbyggande processer. Syftet är att undersöka hur stödet blir effektivt och hur det kan förbättras. Studien undersöker också inkluderande processer, konstitutionsbyggande i konfliktsammanhang samt hur stödet från Sverige sett ut.¹ Det senare används i rapporten som en fallstudie av en givarstat.

De senaste tre decennierna har mycket författningsbyggande skett, ofta med externt stöd av något slag. Externt stöd ges i det känsliga gränssnittet mellan nationellt och internationellt, vilket påverkar det nationella ägandet av författningarna, dess genomförande i praktiken och dess långsiktiga stabilitet. Rapporten publiceras i en tid, då konstitutionsbyggande verkar ha stannat av och i vissa fall vänts i sin motsats. Känsliga relationer mellan freds- och konstitutionsbyggande processer väcker nya frågor och geopolitiska förändringar gör det externa stödet än mer utmanande än tidigare.

Författningsbyggande är en politisk, snarare än en teknisk verksamhet som inkluderar förhandlingar, politiska lösningar av konflikter, övergångsperioder, utformning och godkännande av en konstitutionell text, dess tillkännagivande och genomförande. Allt detta sker i ett sammanhang som är beroende av karaktären hos den berörda staten, dess konstitutionella historia och dess relationer med andra stater, i närområden och globalt.

Det externa stödet är tänkt att ge vägledning eller hjälp till en författningsbyggande process. Det kan ges i form av finansiering, rådgivning och kunskapsförmedling, logistiskt stöd, kapacitetsuppbyggnad och utbildning, medling och politiskt stöd samt inflytande och opinionsbildning. Tre kategorier av aktörer ger externt stöd. Inom var och en av dessa kategorier finns en stor mångfald av aktörer, vilket visas i studien av Sverige som givarstat:

¹ I denna sammanfattning används termerna författnings- och konstitutionsbyggande synonymt.

- Givare (statliga och privata stiftelser) och dess diplomater;
- Organisationer av olika slag som ger programmatiskt stöd för konstitutionsbyggande; och
- Enskilda leverantörer av experthjälp som stödjer processer inom den konstitutionella staten.

Externt stöd har professionaliserats och institutionaliserats. Genomförande organisationer har incitament att engagera sig, samtidigt som omsorgen om deras eget rykte innebär en press att prestera och leverera. De har också sina egna mandat och prioriteringar, vilket påverkar den typ av hjälp de kan ge och till vem. Organisationerna ställs till ansvar, snarare inför andra externa aktörer, än inför statliga eller lokala icke-statliga aktörer i det författningsbyggande landet.

Externt stöd kan riktas till en eller flera aktörer, såsom politiska ledare, politiska partier, statliga institutioner, konstitutionella organ och deras medlemmar, eller civilsamhällsgrupper. Författningsbyggande stater och externa aktörer själva har gjort ansträngningar för att förbättra samordningen av stödet.

För en stat innebär externt stöd till författningsbyggande såväl möjligheter som utmaningar. **Möjligheterna** innefattar:

- Resurser som stöd för kostnaderna för författningsbyggande.
- Tillgång till jämförande kunskap och erfarenhet.
- Förståelse för hur normer och värderingar i internationell och regional rätt kan tillämpas.
- Tillgång till juridisk expertis, digital teknik, administrativt stöd till valprocesser och organisatoriskt stöd för konsulterande författningsorgan.
- Hjälp att medla mellan grupper och öka förtroendet för processen, genom de externa aktörernas oberoende från konkurrerande intressenter.

Utmaningarna med ett externt stöd för en konstitutionsbyggande process beror på att experterna är just externa. Dessa innefattar:

- Brist på kunskap och förståelse för aspekter av det lokala sammanhanget som kan vara relevanta för målen, utformningen och driften av en författningsbyggande process.
- Operativa utmaningar på grund av begränsad tid och resurser och den projektbaserade karaktären av externt stöd till utvalda aspekter av en konstitutionsuppbyggnad.
- Institutionella utmaningar, som ansvarighet gentemot givare snarare än mot lokala intressenter; begränsad flexibilitet inför oförutsedda händelser; handlingssätt som inte är optimala i sitt sammanhang; och konkurrens mellan leverantörer som riskerar att undergräva nationella ägande.
- Kulturella utmaningar som riskerar att förstärka en distinktion mellan ”vi” och ”dem”, som olika arbetsvillkor och ersättning till externa och lokala aktörer.

De processer genom vilka författningar skapas och förändras är betydelsefulla för demokratisering och långsiktig konstitutionell stabilitet. Även om externt stöd kan hjälpa till med att utforma och genomföra sådana processer ligger slutliga beslut hos statliga aktörer.

Externa aktörer och lokala intressenter har olika perspektiv på det externa stödet. Båda perspektiven är relevanta. När externa och interna perspektiv möts och samverkar ökar sannolikheten för positiva resultat. Där perspektiven skiljer sig väsentligt kan frågor uppstå om externt stöd överhuvudtaget ska ges eller accepteras.

Rapporten använder en begreppslig ram för effektivitet baserat på fyra faktorer som fångar de möjligheter och utmaningar som externt stöd står inför. Med hjälp av den bedöms *i vilken utsträckning externt stöd gör positiv skillnad för ett stabilt konstitutionellt system*. De fyra faktorerna är:

1. *Nationellt ägande och ledarskap.* Ett effektivt externt stöd både främjar och respekterar nationellt ägande och ledarskap. Nationellt ägande har två dimensioner. Dels lokalt snarare än externt ägande av en konstitutionsbyggande process, dels en bred inkludering i konstitutionsbyggande processer. Externt stöd ska stötta inkludering men måste göra det på ett sätt som respekterar och bevarar lokalt ägande. Detta kan kräva nyanserat engagemang och självbehärskning av dem som ger externt stöd.
2. *Mervärde.* Externt stöd ger mervärde när det erbjuder något som inte kan göras lokalt eller gör lokala processer mer effektiva och produktiva. Det externa stödet måste lämna utrymme för lokala initiativ, uppmuntra lokal förmåga och vara lyhört för behov, både i sak och form, något som kräver samarbete och ömsesidigt förtroende mellan externa och nationella aktörer.
3. *Kvalitet.* Åtgärder av externa stödgivare måste anpassas till sammanhanget, ha flexibilitet kring timing och förväntade resultat och möta behoven i författningsbyggandeprocessen. Externa stödgivare bör undvika överlappande och motsägelsefulla former av stöd.
4. *Mottagande och betydelse av externt stöd.* Effektivt externt stöd tas på allvar och påverkar i hög grad. Det kan förstärkas av den externa leverantörens kunskap, närvaro och förtrogenhet med lokala sammanhang och effektiviteten i lokala partnerskap.

Rapporten tillämpar dessa fyra faktorer för att identifiera vad som hjälper och vad som hindrar effektivt externt stöd inom två nyckelområden: inkluderande konstitutionsbyggande processer och konstitutionsbyggande i samverkan med fredsbyggande i samband med våldsamma konflikter.

Inkluderande författningsbyggande processer

Inkluderande författningsbyggande processer kan bidra till en konstitutions legitimitet och stabilitet genom att upprätthålla värdet av demokratiskt deltagande, ta itu med de grundläggande orsakerna till samhälleliga konflikter och skapa mer jämlika samhällen, inklusive jämställdhet mellan könen. Inkludering väcker en rad potentiellt svåra frågor i praktiken. Vilka bör ingå i ett konstitutionsorgan? Hur ska de väljas ut och hur kan olika grupper komma till tals på meningsfulla sätt? Det finns blandade belägg för, och olika åsikter om, syftet med allmänhetens deltagande. En viktig utmaning är balansen mellan inkludering och politiska realiteter. Olika elitors medverkan krävs i slutändan för att nå ett hållbart resultat.

Relevanta frågor kring inkludering i relation till var och en av de fyra faktorerna är:

- *Nationellt ägande:* Om externa stödgivare missförstår lokala förväntningar om vad allmänhetens deltagande innebär kan det nationella ägandet förringas. Ett annat problem uppstår om externa aktörer är oförmögna att hantera särskilda intressegrupper, vilka är en del av ett förhandlat resultat.
- *Mervärde:* Jämförande lärande och koppling av lokala intressenter, särskilt civilsamhället, till internationella nätverk kan stödja mer inkluderande författningsbyggande processer. Externt stöd som replikerar eller förminskar lokala initiativ och institutioner som arbetar för inkludering, eller där kostnaderna överväger fördelarna för de lokala intressenterna, ger inget mervärde.
- *Kvalitet:* Kvaliteten på externt stöd för inkluderande processer gäller exempelvis externa aktörers oberoende. Om externa aktörer arbetar selektivt med särskilda grupper kan det leda till oro för favorisering. Alltför strikta tidsplaner för allmänhetens deltagande riskerar att äventyra nödvändig flexibilitet inför behov som uppstår.

- *Mottagande:* Oenighet mellan externa leverantörer och lokala aktörer om behov eller omfattning av inkludering (till exempel vid lokalt motstånd mot internationella normer för jämställdhet) kräver diplomati eller stöd för dialog och påverkansarbete till grupper i det civila samhället.

Ett effektivt samarbete mellan externa stödgivare och lokala intressenter är ett övergripande krav för att förverkliga alla fyra faktorerna.

Fredsbyggande och konstitutionsbyggande

I länder som drabbas av våldsamma konflikter samverkar fredsprocesser (som inkluderar både medling och fredsbyggande) med processer för att bygga konstitutioner. Även om processerna ofta är sammanlänkade, kommer externa stödgivare av medling, fredsbyggande och konstitutionsbyggande stöd vanligtvis från olika bakgrunder, arbetar med olika färdigheter och mot olika mål. De som stöder författningsbyggande försöker hjälpa staten att utveckla en stabil konstitutionell demokrati, medan externa stödgivare för fredsbyggande försöker förändra konflikter. Fredsprocesser bygger mer på internationell rätt och förlitar sig på mjuk makt, medan konstitutionsbyggande processer sker inom inhemska rättsliga ramar.

I konflikttrabbade sammanhang står freds- och konstitutionsbyggande inför särskilda utmaningar, där geopolitiska intressen är starka, statliga institutioner svaga och samhällen på väg att återhämta sig från trauman. De fyra effektivitetsfaktorerna är användbara även i sammanhang där fredsprocesser pågår. Båda processernas komplexitet gör dock bestämningen av vad som är lämpligt, hjälpsamt och fördelaktigt särskilt svår. Rörelsen mot konstitutionell stabilitet kan därför vara osäker och långsam.

- *Nationellt ägande:* Externt stöd för konfliktlösning tenderar att i första hand riktas till parterna i konflikten. Dessa kan vara ovilliga att ge upp eller dela makten och är därför mindre lämpliga att leda en konstitutionsbyggande process. Strategiska och geopolitiska överväganden kan också hindra givare och organisationer från att ge stöd till vissa grupper. Å andra sidan gör konfliktkontexten det ännu viktigare att inkludera kvinnor och det civila samhället i fredsbyggande processer, vilket också kan gynna en konstitutionsbyggande process.
- *Mervärde:* Externt stöd kan ge oberoende, främja färdigheter i medling och förhandling och bidra till att bygga upp förtroende mellan motstridiga parter. Erfarenheten tyder på att konstitutionsbyggande kan komplettera, men inte ersätta, behovet för statliga aktörer att nå en politisk överenskommelse för att få slut på konflikten och ta itu med dess bakomliggande orsaker. Detta kan innebära en osäkerhet kring när och om man ska erbjuda externt stöd till författningsbyggande processer.
- *Kvalitet:* Kvaliteten på det externa stödet kan höjas genom större uppmärksamhet på förhållandet mellan fredsbyggande och konstitutionsbyggande processer, effektivare samarbete mellan de olika samhällena som tillhandahåller externt stöd och ömsesidigt lärande.
- *Mottagande:* Mottagligheten för externt stöd beror på sammanhanget och konfliktens karaktär. Konflikter som har potential att sprida sig och påverka regional och global fred kan utlösa externt engagemang som ger större inflytande. Externa stödgivare måste hitta en balans mellan öppenheten i att arbeta med alla parter, och risken att legitimera en illiberal process. Är det omöjligt bör de dra sig ur.

Slutsatser och rekommendationer

Rapporten erbjuder ett sätt att tänka kring effektiviteten i externt stöd till författningsbyggande processer genom de fyra faktorerna: nationellt ägande, mervärde, kvalitet och mottagande. Faktorerna varierar med de olika sammanhang där konstitutionsbyggandet sker. Rapporten avslutas med en rad rekommendationer under tre rubriker: generella, stater som erbjuder externt stöd samt organisationer och individer som erbjuder externt stöd.

De generella rekommendationerna i korthet:

- Säkerställ lokalt och brett inkluderande ägarskap av en konstitution och processerna för att ta fram den.
- Acceptera att författningsbyggande kräver såväl politiska som tekniska färdigheter.
- Dämpa förväntningarna på vad som kan uppnås genom en konstitutionell process, inklusive graden av efterlevnad av internationella normer.
- Var flexibel när det gäller tidsramar: processer för att bygga upp konstitutioner kan vara oförutsägbara.
- Konstitutionsbyggande, fredsbyggande och hållbar utveckling är ömsesidigt beroende av varandra. Det kräver en gemensam långsiktig vision, ömsesidig förståelse och samarbete.
- Verka för samordning mellan olika externa aktörer som ger stöd till en konstitutionell process och aktörer i den konstitutionella staten.
- Anpassa antaganden, attityder och praxis till ett allt mindre liberalt demokratiskt och mer öppet konkurrensutsatt globalt sammanhang. Var uppmärksam på risken för att konstitutionella demokratier undergrävs eller störtas och stöd lokala aktörer som försöker försvara demokratin.

Summary

This report draws on three decades of experience with external support to constitution building processes to examine what makes support effective and how its usefulness might be improved, in the interests of constitutional stability. The report is framed around questions set out by the Swedish EBA in an invitation to undertake the project. These included a particular focus on external support for inclusion in constitution building processes and for constitution building in the context of conflict. The EBA also asked about the external support provided by Sweden, which is used in the report as a case study of a donor state.

The last three decades have witnessed widespread constitution building activity, much of which has attracted external support of some kind. External support plays a sensitive role at the interface of the national and the international, with implications for national ownership of the constitution, its implementation in practice, and its longer-term stability. The report comes at a critical time, when constitution building appears to have stalled and in some cases been reversed, the relationship between peace and constitution building processes presents important new questions, and geopolitical shifts make external support more challenging still.

Constitution building includes all processes that relate to making a new constitution or amending an existing constitution, including the resolution of conflict and negotiation of a political settlement; the transitional period; the negotiation, design, drafting and approval of a constitutional text; its promulgation; and implementation. Constitution building is a political, rather than a technical activity. The contexts in which it takes place are diverse, varying with the features of the constitution building state, its constitutional history, and its relations with other states, in its immediate region and globally.

External support refers to the active provision of guidance or assistance to a constitution building process. It includes funding, advice and knowledge sharing (directly or through knowledge products), logistical assistance, capacity building and training, mediation and good offices, and political support, influence, or advocacy. Three broad categories of actors provide external support to constitution building processes. There is considerable diversity of actors within each of these categories, as the study of Sweden as one donor state suggests:

- Donors (state and private foundations) and diplomats;
- Organisations of various kinds that provide programmatic support for constitution building; and
- Individual providers of expert assistance who support processes within the constitution building state.

External support has become professionalised and institutionalised, with incentives to engage, pressures to perform, and concern for reputation and growth. Organisations also have their own mandates and priorities, which influence the kind of assistance they may provide and to whom they provide it. The principal lines of formal accountability usually lie to other external actors rather than to the constitution building state or local non-state partners.

External support may be directed to one or more in-country stakeholders, including political leaders, political parties, state institutions, constitution making bodies or their members, or civil society groups. There have been recent efforts by constitution building states or external actors themselves to coordinate the activities of external support providers working on the same constitution building process.

External support offers **opportunities** to a constitution building process, which can include:

- Resources to share the costs of constitution building.
- Access to comparative knowledge and experience.
- Access to understanding of how norms and values recognised in international and regional law might be applied in context, and to networks for their development over time.
- Logistical expertise not available in the constitution building state, including legal drafting, digital technology, administration of elections and organisational support for a deliberative constitution making body.
- Independence, in the sense of external actors operating at arm's length from competing stakeholders, which can help to mediate between groups or enhance confidence in the process.

External support for a constitution building process also faces **challenges**, all of which stem from being external. These include:

- Lack of knowledge and understanding of aspects of the local context that may be relevant to the goals, design, and operation of a constitution building process.
- Operational challenges arising from the limited time and funds available to external providers and the project-based nature of external support to selected aspects of a constitution building process.
- Institutional challenges that include lines of accountability to donors and within organisations rather than to local stakeholders; procedures that limit flexibility to respond to contingencies; normative mandates that dictate courses of action that may not be optimal in context; and competition between providers that encourages claims of credit with the potential to undermine national ownership.
- Cultural challenges that risk reinforcing a distinction between 'us' and 'them', including differential working conditions and remuneration for external and local actors.

Gauging the effectiveness of external support. The report suggests a measure by which to gauge the effectiveness of support and four factors to assist in doing so, elaborated by reference to the opportunities that external support offers and the challenges it faces.

The processes by which constitutions are made and changed are significant for democratisation and long-term constitutional stability. While external support can assist with designing such processes and putting them into effect, final decisions properly lie with state actors. We develop a conceptual framework for support and draw from it to gauge the relative effectiveness of external support: *the extent to which it makes a positive difference to an aspect of a constitution building process that is apt to lead to a more stable constitutional system.*

External providers and local stakeholders will have their own perspectives on whether external support is apt to make a positive difference. Both perspectives are relevant. External and internal perspectives may come together naturally or through collaboration, enhancing the likelihood of positive outcomes. Where perspectives diverge significantly, questions may arise about whether external support should be provided or accepted at all.

The conceptual framework identifies four broad factors that are thereafter applied in considering the effectiveness of external support. The factors as developed in this way are:

1. *National ownership and leadership.* Effective external support both promotes and respects national ownership and leadership. National ownership has two dimensions for this purpose. In the ‘thin’ sense, it refers to local rather than external ownership of a constitution building process. In the ‘thick’ sense, it requires broad-based inclusion in constitution building processes. Both are important. External support is apt to encourage and assist with inclusion but must do so in a way that respects and preserves local ownership. This can be a fine line, requiring skilful and nuanced engagement, and self-restraint, by those providing external support.

2. *Added value.* External support adds value when it offers something that cannot be done locally or makes local processes more efficient and productive. Adding value requires external support to leave space for local initiatives to encourage local capability. External support must also be responsive to need, in both substance and form. This requires collaboration and mutual trust between external and national actors.
3. *Quality.* Quality refers to the standard of all action taken through external support. It requires external support to be tailored to the context. It is enhanced by flexibility around timing and expected outcomes to meet the needs of the constitution building process. It is also enhanced by the effective alignment of external providers to avoid overlapping and contradictory forms of support.
4. *Reception and weight of external support.* Effective external support is taken seriously and has an impact to that extent. It can be enhanced by the suitability of the external provider in terms of their comparative knowledge, familiarity with context, and local presence and by the effectiveness of local partnerships. It is also enhanced by degrees of influence, arising from the quality of the external support, or in some cases, from leverage, exercised with due care to observe the necessary bounds of ‘support’.

Application of the factors. The report applies these four factors, thus understood, to identify what helps and what hinders effective external support in two key areas of constitution building: inclusive constitution building processes and constitution building alongside peace building in the context of violent conflict.

Inclusive constitution building processes

Inclusive constitution building processes can contribute to the legitimacy and stability of a constitution by upholding the value of democratic participation, addressing the root causes of societal conflict, and creating more equal societies, including through gender equality.

Inclusion raises a range of potentially difficult issues in practice. Questions arise about who is to be included in a constitution making body, how they are selected, and how decision-making procedures can give all groups a meaningful say. There is mixed evidence and different views about the purposes of public participation, which feed into questions about when it should occur in a constitution building process and the mechanisms for public involvement. A key challenge is balancing inclusiveness with the realities of political power and securing the elite buy-in necessary to reach a sustainable outcome.

This chapter applies the four factors outlined earlier to the specific context of external support for inclusive constitution building processes. Issues relevant to inclusion in relation to each of these factors include:

- *National ownership*: It can detract from national ownership if external support providers misunderstand local expectations about what public participation involves and how it should occur. A problem of a different kind, also affecting national ownership, arises if external actors are unprepared or unable to deal with particular stakeholders who are integral to a negotiated outcome.
- *Added value*: External support can add value to supporting more inclusive constitution building processes by providing opportunities for comparative learning and connecting local stakeholders, especially civil society, to international networks. External support does not add value where it replicates or diminishes local initiatives and institutions that work for inclusion or where the costs to local stakeholders of participatory or inclusive processes outweigh the benefits.
- *Quality*: Issues relating to the quality of external support for inclusive processes include the complexities of the independence of external actors, which can help to generate trust in a process, concerns about favouritism when external actors work selectively with particular groups to participate, and strict sequencing and timelines for public participation and inclusion that cannot respond flexibly to needs on the ground.

- *Reception:* Particularly difficult issues arise when external providers and local actors disagree on the need for, or extent of inclusion (for example, if there is local opposition to international norms for gender equality). In such cases, providers of external support may turn to diplomacy or provide selected support directly to civil society groups, undertaking dialogue and advocacy work.

Effective collaboration between external support providers and local stakeholders is a crosscutting requirement in the realisation of all four factors.

Peace building and constitution building

In countries affected by violent conflict, peace processes (which include both mediation and peacebuilding) interact with constitution building processes. Although the processes often interlink, external providers of mediation, peacebuilding, and constitution building support typically come from different epistemic communities working with different skill sets and different goals. Those supporting constitution building processes seek to assist the state to develop a stable constitutional democracy, while external support for peacebuilding seeks to transform conflict. Peace processes draw more extensively on international law and rely on soft power, while constitution building processes occur within domestic legal frameworks.

In conflict-affected contexts, peace and constitution building face particular challenges, including greater geopolitical interest, weak state institutions, and communities recovering from trauma.

The four factors used to gauge effective external assistance to constitution building processes also apply in contexts where peace processes are in train. However, the complexity of both processes makes the determination of what is appropriate, helpful, and beneficial particularly difficult, with the result that movement toward constitutional stability can be precarious and slow.

- *National ownership*: It is affected by the reality that external support for conflict resolution tends to be directed primarily to the parties to the conflict, who may be reluctant to surrender or share power and who may not be suitable to lead a constitution building process. Strategic and geopolitical considerations may constrain some donors and organisations from providing support to some groups. On the other hand, the context of conflict makes it even more important to include women and civil society in peace building processes, which also can benefit a constitution building process.
- *Added value*: External support can provide independence and foster skills in mediation and negotiation which can help to build trust between conflicting parties. Experience suggests that constitution building can complement, but cannot replace, the need for state actors to reach a political agreement to end conflict and address its underlying causes. This can pose difficult questions for those providing external support to constitution building processes about when to engage and if to engage at all.
- *Quality*: The quality of external support can be enhanced by closer attention to the relationship between peace building and constitution building processes, more effective collaboration between the different communities providing external support, and mutual learning.
- *Reception*: Receptiveness to external support depends on the context and, in particular, the nature of the conflict. Conflicts that have the potential to spill over and affect regional and global peace can trigger external involvement that offers greater leverage. External support to constitution building processes in other contexts must steer a path between openness to working with all parties to maintain influence and the risks of lending a veneer of respectability to an illiberal process. Where this is not possible, the ultimate sanction available to providers of external support is to withdraw altogether.

Conclusions and Recommendations

The report concludes by drawing together key points from the report in terms of the contributions external support has made to constitution building processes, the challenges it presently faces, and some possible ways forward. It notes, in particular, the significance of continuing geopolitical changes and the potential for continuing innovation and experimentation with both constitution building processes and external support for them.

The report offers a way of thinking about the effectiveness of external support to constitution building processes through the lens of the four factors of national ownership, added value, quality, and influence. How these factors apply will vary with the diverse contexts in which constitution building occurs. Nevertheless, the report concludes with a series of recommendations, formulated in broad terms and directed to external support generally, to states assisting external support, and to those involved in providing external support. We hope that the report will be useful to all of them.

1 Introduction

This report seeks to identify and explain factors that affect the outcomes of external support to constitution building processes, positively and negatively, and to draw insights from past experience for the future. It comes at a critical time for both constitution building and for constitutional democracy more generally.

The report takes stock of experience with constitution building processes and the dynamics of external support to them in the decades that followed the end of the cold war in the early 1990s, during which more than two-thirds of the Constitutions of the world were remade or significantly changed and much current practice evolved. It has a particular focus on external support for public participation in constitution building processes, inclusion in constitution building bodies, and the interrelationship between conflict resolution and constitution building processes, including the gender dimensions of each of these.

The report is framed around a series of research questions set out in the EBA's invitation to undertake this study. While most of these are designed to canvass global experience of external support to constitution building processes, they also ask about the external support provided by Sweden in particular, directly or indirectly. The interdisciplinary project team comprises Cheryl Saunders, Andy Carl, Anna Dziedzic and Samantha Smith. Between them, the team members bring to the project substantial experience in different aspects of the field of peace and constitution building and a range of perspectives on the subject-matter of the report. The project was conducted under the auspices of Verian (formerly Kantar Public).

It is hoped that the findings in the report are relevant to a broad audience, including those engaged in the provision of external support of various kinds, and those involved in constitution building processes, now or in the future. Many people actively engaged in the field have contributed their ideas and experiences to the study and their willingness to do so is greatly appreciated.

The last three decades have been a period of intense constitution building activity across the world, with all the consequences that followed. Most of this activity took place in post-colonial states, including states still grappling with elements of decolonisation. Most was associated with movement from authoritarianism or military rule to forms of democracy, with the resolution of intrastate conflict, or with both. Increasingly and with gathering intensity, most constitution building processes have attracted external support of some kind. While this was by no means a new phenomenon, the extent, purposes, forms, and modalities of support that evolved over these decades distinguished it from earlier periods of external support to constitution making, quantitatively and perhaps qualitatively.

Initially at least, outcomes seemed encouraging.² External support to constitution building processes was a feature of the wave of democratisation that characterised the 1990s.³ It was underpinned by optimism about the attraction and performance of liberal democracy, the relative ease with which it might spread, and its implications for sustainable development.⁴ It accompanied both the emergence of new constitutional democracies over this period and widening adherence to key international human rights, including the principle of gender equality. It became associated with peace making and state building and played a role in the prevention or resolution of intrastate conflicts.⁵ International and transnational institutions

² Richard Youngs, *The European Union and the Promotion of Democracy: Europe's Mediterranean and Asian Policies* (Oxford University Press 2002) ch. 1.

³ Although often seen as marking the beginning of internationally supported constitution making, the process in Namibia exhibits some of the connections and continuities with the earlier period of decolonisation constitution making: Hannah Birkenkötter, 'Beyond Peace and Security: The UN Transition Assistance Group in Namibia and Its Importance for Contemporary Constitution-Making' (2023) 117 *American Journal of International Law* 257.

⁴ Mark Sedra, 'From Hubris to Irrelevance: The Demise of the Western State-Building Project' (Centre for Security Governance 2022) CSG Papers No. 23 5, 7.

⁵ Charlotte Fiedler, 'Why Writing a New Constitution after Conflict Can Contribute to Peace' (German Development Institute 2019) Briefing Paper 11/2019.

were established or adapted to respond to both the opportunity presented by the wave of constitution building and the perceived need for more systematised external support.⁶

By the third decade of the 21st century, however, the trend in outcomes in terms of peace and constitutional stability have proved disappointing. Some conflicts have continued for decades despite external support for their resolution. Constitution building processes have not been completed. Constitutional performance and compliance are often weak, resulting in some cases in unconstitutional transfers of power. New Constitutions that were at least formally democratic have been overturned, often in coups, and replaced with authoritarian rule. Such outcomes may be attributable to a range of factors, including the challenging circumstances in which constitution building takes place, ongoing conflict, the impact of social and economic inequality and also, perhaps, to more general, global, democratic decline. Nevertheless, external support is often a significant part of what otherwise are complex national processes. The findings in this report suggest that while the outcomes of constitution building processes normally lie largely in the hands of national stakeholders, external support can make positive contributions to them. There are lessons to be learnt from experience, which we try to capture in this report.

Key terms in the report require brief explanation:

First, the focus of the study is on support to the processes of constitution building, rather than to the content of the Constitutions that are made. External support is commonly directed to both, however, and much of the report is applicable to either. The two also are connected, in the sense that decisions about a constitution building process may also affect the substance of the Constitution that emerges from it.

⁶ Sarah Nouwen, 'Peacemaking' in Eyal Benvenisti and Dino Kritsiotis (eds), *Cambridge History of International Law*, vol XII (Cambridge University Press Forthcoming) Preprint <https://papers.ssrn.com/abstract=4565091>

Secondly, constitution building is understood broadly to encompass all processes that relate to new or amended Constitutions, generally at the national level of government. These extend from laying the basic groundwork for new constitutional arrangements, conceptually or practically; to the resolution of conflict and negotiation of a political settlement; to a transitional period, possibly involving an interim Constitution; to the negotiation, design, drafting and finalisation of new constitutional arrangements; and to their implementation, after promulgation, in ways that contribute to their effectiveness in practice.

Thirdly, references to external support include all assistance that is actively and deliberately, directly and indirectly provided to a constitution building process by other states, foreign institutions, regional, international and intergovernmental organisations, non-governmental organisations and individual experts. The term thus excludes the migration of ideas by happenstance or through unilateral adoption by the constitution building state.⁷ The field is vast, nevertheless. A sketch of what it involves, organised around key characteristics, is provided in Chapter 3, to inform analysis of the challenges facing external support and how they might be met. An account of the external support provided by Sweden is provided in Chapter 5.

There is a large and burgeoning literature on constitution building, a part of which deals with external assistance. There also is extensive practical experience with external support to constitution building processes from the standpoint of both providers and recipients. These sources show that the issues raised by external support to constitution building processes are complex and may be contested, praised and criticised in equal measures, and that the outcomes of external support often depend on context to a significant degree.

⁷ Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2010); Matthew J Nelson and others, 'From Foreign Text to Local Meaning: The Politics of Religious Exclusion in Transnational Constitutional Borrowing' (2020) 45 *Law & Social Inquiry* 935.

They also show that the field is not static and continues to change with new theoretical perspectives, practical responses to experience and geopolitical dynamics. In both our findings and the insights that we draw from them, we have tried to avoid generalisations about the present and the future that cannot adequately be substantiated, relying instead on evidence and analysis to assist in determining what external support might be more or less productive in a particular constitution building process.

The report is structured as follows. The next two chapters set the scene for the report as a whole. Chapter 2 describes the methodology for the project. Chapter 3 provides a conceptual framework for analysing the practices of external support in order to determine what helps or hinders its effectiveness. Chapters 4 to 6 provide the findings in relation to the research questions that guide this study. Using the lens of external support, these deal respectively with constitution building processes generally; the map of support by Sweden; inclusive constitution building processes; and constitution building processes in the context of conflict resolution. The gender dimensions of each of these sets of issues are incorporated in the relevant chapters. Chapter 7 reflects on the outcomes of the project.

2 Methodology

The aim of this study is to map, synthesise, and analyse existing knowledge of external support to constitution building processes, identifying the factors that enable and hinder its effectiveness.

Four guiding research questions were adapted from the EBA's invitation to undertake this study:

1. What support to constitution building is conducted with direct or indirect Swedish support?
2. What knowledge exists concerning the functions, forms, and purposes of support to constitution building processes, and the factors and approaches that contribute to, or hinder, more stable constitutional systems?
3. What knowledge, based on professional experience, has been gained concerning external support for citizen participation in constitution building, inclusion in constitution-making bodies, the role of constitution building in conflict mediation and the relevant gender dimensions in these areas?
4. What lessons can be learned for future external support to constitution building processes?

The research tasks require the Report to canvass both the theory and practice of external support to constitution building processes. These tasks are made more challenging by the global reach of the study, the large number of constitution-building processes over the past 30 years, the extent of external support to them, and the diversity of constitution building contexts. To deal with these challenges, the Report uses research methods that complement and supplement each other, filling gaps in knowledge and enabling different perspectives from different contexts to be brought to bear. Research also was assisted by the diverse knowledge and experience of the project team and by insights from members of the Reference Group, with which the team also had productive interactions at key points.

The methodology for the project is explained in the sections that follow. The Report draws both on relevant literature (2.1) and on the insights of a wide range of people with practical experience of external support, through a series of Dialogues (2.2) and some interviews (2.3). Practical examples are used throughout the report to exemplify particular points, some of which are drawn from four diverse constitution building processes that team members developed holistically early in research for the project, to underpin a shared understanding of the dynamics of the relationship of external support to entire constitution building processes. The selection and purpose of these cases and other examples is explained in Part 2.4. Part 2.5 of this chapter outlines the approach taken to researching Swedish support for constitution building processes in response to the first research question.

2.1 Literature review

There is extensive literature on constitution building processes and some, although much less, on external support. The issues raised by the study span different academic disciplines, including legal studies, politics, sociology, anthropology, international relations and law, peace and conflict studies, development studies, and gender studies. Each discipline offers unique insights, sometimes leading to diverse conclusions. The literature reviewed for the project also includes reports, evaluations, and first-hand accounts by practitioners engaged in constitution building. The literature provided an entry point to examine external support to constitution building processes from the practitioner, recipient, and cross-disciplinary scholarly perspectives.

There are some limitations to the literature review. One is that the focus on literature in English gives rise to a bias towards sources published in the Global North and from a provider perspective. There is less literature from the perspective of those who receive external support, at least in English and accessible academic sources.

We also found only a small amount of literature on some of the other, less prominent, means by which external assistance is sought and provided: between neighbouring states, for example, or through personal connections. We sought to address these limitations through engagement with practitioners and scholars in states that had undertaken constitution building and had received external support and through other networks providing forms of external support, of which Francophonie is an example.

A second limitation is that it is rare for narratives of constitution building to describe in detail the modalities and outcomes of external support, although new literature on this point is developing.⁸ Some information is available through organisational monitoring and evaluation reporting, but here too, reporting tends to be restricted to outcomes of constitution building processes or outputs from specific activities, rather than explaining how these were achieved. Again, we sought to compensate for this limitation through engagement with those with experience in the field and whatever internal literature we were able to find that dealt with external support more specifically.

2.2 Dialogues

The Dialogues were the principal mechanism used for engagement with those with practical experience of external support to constitution building processes, either as providers of external support or as persons associated with constitution building processes that had received external support in some form. The Dialogues were interactive online forums, each lasting for four hours, involving a structured discussion of key issues for the study, framed by a concept note that was distributed well in advance (Appendix 1).

⁸ Hanna Lerner, David Futscher Pereira and Nina Sophia Schlager, 'International Constitutional Advising: Introducing a New Dataset' [2024] *The Review of International Organizations* Forthcoming Preprint <https://ssrn.com/abstract=4613590>

Four Dialogues took place, on 8, 9, 27 and 30 November 2023 in different time zones to facilitate broad regional participation.

The first two Dialogues sought participation from those with practical experience in providing external support to constitution building and peace processes, and from selected scholars who had made particular contributions to the field. The aim was to draw on the knowledge and insights of as wide a range as possible of experienced practitioners, practitioner/scholars and organisations involved in the provision of external support to constitution building processes. An initial list of 79 invitees (31 women, 47 men, one organisation) was compiled from primary and secondary literature in which providers of external support were identified; suggestions from others active in the field, including through interviews, on-line searches, and the knowledge of team members. In the end, 29 people took part in these two Dialogues (10 women and 19 men).

We were satisfied with this result. Participation in a Dialogue involved a substantial time commitment for busy people, and we had deliberately invited more people than we expected to accept or who could be accommodated in two interactive Dialogues. The depth of knowledge and range of participants were very useful for the purposes of the study. Each participant had significant insight into the provision of external support to stages of constitution building processes that variously including mediation and peace building, process design and implementation, public participation, inclusion, and gender equity. More than a dozen different organisations were involved, and the activities of participants covered external support in all key regions: Africa, Asia, the Caribbean, Europe, Latin America, the Middle East, and the Pacific. Following the Dialogues, some invitees who had been unable to attend provided observations in writing and some additional interviews were conducted with others whose expertise we were anxious to tap.

The second pair of Dialogues sought participation from those who had been involved in constitution building processes in their own states and had experienced the operations of external support, whether as members of constitution making bodies, political actors, state agencies, NGO communities, or in some other relevant capacity. The aim was to draw participants from a wide range of contexts, recognising that it was impossible to cover the field. The initial list of 57 invitees (26 women and 31 men) was compiled from primary and secondary literature, recommendations from others both inside or outside the constitution building state, and the knowledge of team members. In the end, 23 individuals with experience of constitution building from 15 different states participated in these Dialogues (5 women and 18 men).⁹

These latter Dialogues were important, to balance and place in context the insights from first pair of Dialogues. We had anticipated difficulties in securing agreement to participate, not only because of the time commitment but because of challenges with technology in many of the states in which invitees were based. We were pleased with the outcome, in terms of the number and enthusiasm of those who participated, the range of constitution building experiences represented and the close involvement of participants in diverse aspects of constitution building. As with the first pair of Dialogues, several invitees subsequently offered further information in writing.

A potential limitation of the Dialogues was the risk of selection bias, favouring English speakers and those with ready access to technology. Efforts were made to counter both by reaching outside the major English language provider organisations, communicating in writing in languages other than English where possible,¹⁰ issuing targeted invitations to fill gaps that we perceived, and encouraging communication in other forms for those unable to participate online.

⁹ Afghanistan, Armenia, Chile, Fiji, Gambia, Georgia, Micronesia, Moldova, Nepal, the Philippines, Solomon Islands, Somalia, Sri Lanka, Timor Leste, and Tunisia.

¹⁰ Some information was collected by email and interview in French, Spanish, Swedish and Russian.

The Dialogues proved to be an effective way to gather empirical information about the nature and modalities of support to constitution building, in many cases providing details that were undocumented. While the reach of the Dialogues was limited in comparison to the vast global experience with constitution building, we are confident that the range and character of the insights gathered in this way provide a reliable foundation for the analysis in the Report. Participants offered informed reflections and personal insights into the effectiveness of support. The interactive format encouraged engagement and debate, with participants offering a variety of views that were not always in agreement with each other. It was made clear that no views would be attributed to individual participants, to create a space in which frank reflections could be shared. To maintain confidentiality, material gathered in this way is attributed simply to the Dialogues.

2.3 Interviews

A second, supplementary, mechanism for engagement was through interviews, primarily in the early stages of research for the project. Interviews were necessary to gain an understanding of direct or indirect Swedish support to constitution building processes, complementing desk research (2.5). Some early interviews also were conducted to gain a preliminary understanding of the operation of organisations providing external support or of the four constitution building processes that we examined as a whole (2.4). A few more interviews or email exchanges were conducted after the Dialogues, to follow up some people who had been unable to attend, or key points.

Altogether, 28 interviews were conducted for these purposes. Participants were selected for their personal or organizational knowledge and identified through research or recommendations from others. Interviews were semi-structured around the research questions that guide this study. Interviews were confidential and

participants were assured that their views would not be attributed. To maintain confidentiality, material from interviews is cited by reference to a numeric identifier (e.g., Interview 1, Interview 2).

2.4 Case selection

This study examines support to constitution building processes as a global phenomenon. Throughout the report, however, practical examples are given of how constitution building processes work and the interaction of external support with them. Some of these examples are taken from four constitution building processes researched holistically at the outset of the project, through multiple published sources, interviews and the dialogues. The bases for selection of these cases and the purposes that they served are explained below. Other practical examples used in the report are drawn from the literature or gleaned from the dialogues or interviews. They provide empirical evidence for particular points and help to demonstrate their practical significance. As the report makes clear, however, every constitution building process is distinctive in some respects. The examples are valid for the purposes for which they are used, but care should be taken in extrapolating from them without further research.

The four constitution building processes developed by team members early in research for the project were designed to ground a shared understanding of how such processes work, how external support relates to them, and the implications of diverse contexts. The team wrote and continued throughout the project to revisit drafts of these four cases which drew together the history of the processes themselves and the lightly documented roles and effects of external support. The processes chosen were Georgia (1993–1995), Nepal (2006–2015), Tunisia (2010–2015) and South Sudan (2005–). All took place in the last 30 years, but long enough ago for some assessment of outcomes to be made. All received and were relatively open to external support, which came from a variety of sources. All

adopted processes that provided for inclusion in varying degrees, with Georgia an initial outlier. In two (Nepal and South Sudan) constitution building was linked to peace processes; in the others (Georgia and Tunisia) it accompanied transition from authoritarian government.

In other respects, these four processes were sufficiently diverse to provide a broadly representative sample, cautiously used. They took place in different regions (Asia, Africa, Europe and the Middle East) and were affected by different geo-political considerations. Social and economic conditions, the effectiveness of state institutions, the cohesion of the population and familiarity with constitutional government vary widely. The outcomes were different too, ranging from new Constitutions in Georgia and Nepal, which are presently in operation but encountering challenges of various kinds, to South Sudan, where peace and constitution building processes are still underway after almost 20 years, to Tunisia where a Constitution was finalised but overturned in 2022.

The development of these four cases contributed to the ideas and understandings around which the Report is framed; in particular, to Chapters 3 and 4. The cases were used to test findings and provide practical examples throughout the Report, where relevant. As research for the project proceeded, the cases also prompted a range of additional, instructive insights into, for example, the prevalence of delay and mishap in constitution building processes, the challenges of moving between peace and constitution building processes, and the fragility of democratic constitutions during the often lengthy implementation phase.

An overview of these four cases is provided in Appendix 2.

2.5 Swedish mapping

The EBA's invitation to undertake this study asked: 'what support to constitution building is conducted with direct or indirect Swedish support, either bilaterally, through the EU or through multilateral organisations?' Examining this question proved an interesting exercise, which also could be undertaken in relation to other donor states, although policy settings and institutional frameworks may well be different.

The question presented some methodological challenges. A preliminary mapping of Swedish funding and modalities was done using the OECD Creditor Reporting System Aid Activity database and Sida records on OpenAid. The results can at best be indicative, however. There is no dedicated code or category for reporting funding for support to constitution building. Instead, support is often reported under other broad categories, for instance 'legal and judicial development', 'women's rights organisations and movements, and government institutions,' and 'civilian peace-building, conflict prevention and resolution'. This may reflect the complexity of constitution building itself as a concept – an issue that is addressed in Chapter 4. Nevertheless, the lack of clearly identifiable reporting makes it hard to disentangle funding for support to constitution building from other related contributions.

Further information was gathered from Swedish policy, strategy, programme, and project documents, and supplemented by 10 interviews conducted with Swedish government officials, including representatives from the Ministry of Foreign Affairs, Sida, Folke Bernadotte Academy (FBA) and the Justice Department.

The results of this mapping are presented in Chapter 5.

3 Conceptual framing

This chapter develops four key concepts that are needed to understand the functions, forms, and purposes of external support for constitution building processes. The concepts deal, respectively, with the contexts for constitution building, the national/international interface in the provision of external support, the landscape of external support, and measures of the effectiveness of external support. These concepts inform the discussion in the remainder of the report.

These concepts are also used to identify key factors that contribute to the effectiveness of external support, around which we structure our analysis of what helps and what hinders external support. The factors are drawn together at the end of this chapter, where it also is noted that perspectives may differ on whether and how the factors are satisfied. Chapter 4 shows how the opportunities that external support offers and the challenges it faces inform the application of the factors in the chapters that follow.

3.1 Contexts for constitution building

The distinctive contexts in which constitution building occurs affect both the processes followed and effective external support for them. Context is also relevant to any assessment of outcomes.

The idea of a written constitution setting out a framework for government in the form of fundamental law enforceable through independent courts originated in North America and Western Europe, where it evolved further over several centuries to provide some protection for democracy and human rights. It is often described in terms of a social compact. It assumes a relatively cohesive demos that is accepted as ‘sovereign’, effective state institutions and the rule of law, none of which necessarily is replicated elsewhere.

Making a new written Constitution has always been a huge undertaking. It involves a break with the past, is expected to last for generations (whether it does so or not) and controls the exercise of public power. It thus places a premium on the perception and acceptance of its legitimacy. At the outset, the legitimacy of a new Constitution derives in large part from the process by which it was made, which historically has varied across constitutional traditions. Experience shows that, in time, legitimacy and acceptance also may rely on how well the Constitution works for the people of the state concerned.

This idea of a constitution spread around the world, through colonisation by various imperial powers, imitation, and more recent forms of globalisation. Superficially, many constitutions now look much the same. Their underpinnings may differ, however, with the contexts in which they are made and evolve over time. Some differences may be obvious: the people may be deeply divided, for example, or state institutions may be weak or non-existent. Less tangible but equally important are differences in what the philosopher Charles Taylor refers to as the ‘social imaginary’: the assumptions the people at large make about how society works, their relationship with others, and the structures of authority.¹¹ The challenges of making a new Constitution may be further exacerbated by the ambitious roles that many new constitutions are expected to play in ‘transforming’ society or tackling underlying causes of conflict.

None of these contextual features preclude effective constitution building, but they may have implications for the substance of constitutions, the processes by which they are made, and the time frame within which outcomes can reasonably be expected and evaluated. They also have implications for the nature and modes of effective external support.

¹¹ Charles Taylor, *Modern Social Imaginaries* (Duke University Press 2004).

It is obvious enough that those providing external support need an adequate understanding of context for the purpose. It is harder to acquire it in practice. The context in which any constitution building process takes place involves a multiplicity of interlinked features, at least some of which are likely to be elusive. The remainder of this segment groups them in three categories, listing some of the features most commonly relevant in a constitution building context.

3.1.1 State of the state and its people

Many features of the state affect the nature of the challenges of constitution making and implementation, the design and operation of constitution building processes, and the kinds of outcomes that can be expected. Questions to consider include:

- Is society relatively cohesive or divided in ways that are substantial and significant?
- Is there a national political settlement, formal or informal? Are there unsettled aspects of it that are relevant to constitution building?
- Are there sectors of society systematically excluded from government?
- Are there cultural, religious, or traditional impediments to gender equality?
- Is there, or has there been, internal armed conflict? How are its legacies being dealt with? Are there still dynamic conflict issues?
- Are there territorial divisions that require consideration in constitution building? Is there a serious push for secession from any parts of the territory?
- How established is the state? Is it a primary focus of allegiance, or are there other affiliations in competition with it, religious, tribal, local, or otherwise? Is state law the primary source of law or does it co-exist with other sources of law? Does the authority of the state extend across its whole territory?

- Are there effective state institutions, that can carry out state-type functions and provide services to the people of the state?
- Is there a rule of law, and how is it understood?
- How weak or strong is the economy? What are the levels of education, poverty, and literacy? Is there an informal, unregulated, illicit economy? Is there significant corruption?
- Is there an active and influential civil society?

3.1.2 Constitutional history

The past and present constitutional history of a state may have a bearing on the goals of constitution building, the design of constitution building processes, the attitudes of political leaders to constitution building, and public understanding of constitution building. Questions to consider include:

- Is there a previous history of experience with democracy, constitutionalism, or constitution making? How long ago and for how long? Was it influenced by a particular imperial constitutional tradition?
- What are the present drivers of constitutional change? Who wants it, and why? Who is opposed, and why?
- Is there a peace agreement that requires constitutional change? Does it prescribe a process for constitution building or have implications for substance?
- Is a previous constitution still in existence? Is the plan to amend or replace it? How difficult are any formal requirements for change?
- Has a constitution making process been determined? What are its elements? What stage has been reached?

- Are current political leaders broadly in favour of constitutional change? Are there significant sources of likely disagreement?
- Are current political leaders open to comparative ideas and international norms and standards? Is the state party to relevant human rights treaties?

3.1.3 Implications of geopolitics

Geopolitics often affects the attitude of a state to constitution building and its receptiveness to external support. It also affects the nature of the support that it receives, the sources from which support comes, and the approaches taken by those providing external support. Questions to consider include:

- Are there factors that may make the state more or less receptive to external support? For example, is the state a member of an influential regional organisation? Is it dependent on development assistance? Are there other relevant transnational linkages or sources of influence, including leverage? Is the state a new state, seeking international recognition? Has it had negative experience of external support in the past?
- What interests of neighbouring states may be relevant to this constitution building process? Are they likely to affect the process? If so, is the effect likely to be positive or negative?
- Is the constitution building state of interest to major global powers in terms of investment, resources, strategic positioning or national security? How strongly do they exert influence in these interests?
- Are there competitive sources of external support or influence?

3.2 National/international interface

External support to constitution building occurs at a potentially sensitive interface between the national and the international. This creates tensions, both theoretical and practical, which infuse the dynamics of external support and affect the ways in which it is provided and received.

Constitutions are closely linked to a state and its people.¹² The legitimacy on which a constitution depends derives from sources within the state. In the case of democratic constitutions, legitimacy depends on the consent of the people of the state, however determined. A constitution may become a significant state symbol, reinforced by shared understanding of what it stands for and why. In practical terms, also, an effective constitution is dependent on the state. National political leadership is needed at the point of constitution making and over time. The implementation and maintenance of a new Constitution rely on institutions of the state. Political actors and public institutions are best held to account by the people of the state. The more ambitious the constitutional project, the more important the commitment of state actors to it.

Constitutions have always been affected by the outside world in varying degrees and both the nature and extent of external influence have increased further during the current phase of globalisation.¹³ To take only a few examples, regional integration makes inroads into the autonomy of member states; international human rights and other standards have implications for the substance and operation of constitutions including, potentially, constitution-making processes; global economic interdependence and inequality affect the operation

¹² Cheryl Saunders, 'International Involvement in Constitution Making', *Comparative Constitution Making* (Edward Elgar Publishing 2019).

¹³ Jiunn-rong Yeh and Wen-Chen Chang, 'The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions' (2008) 27 *Penn State International Law Review* 89; Charles Manga Fombad, 'Internationalization of Constitutional Law and Constitutionalism in Africa' (2012) 60 *The American Journal of Comparative Law* 439.

of constitutions in practice; expanding conceptions of threats to international peace and security legitimise international intervention through sanctions and, very occasionally, force.

Even so, state sovereignty and the autonomy associated with it remain forces to be reckoned with. They are assumed by the formal architecture of the international state system and by state actors themselves. In recent years, their continuing practical relevance has been evidenced in pushback by individual states against aspects of globalisation, and by insistence on the distinctive conditions and needs of the large and diverse body of states in the so-called ‘global south’.¹⁴

External support to constitution building processes operates at the interface of the national and the international, with potential to push the boundary one way or another, provoking reaction. On one view, it is a merely a distinctive form of development assistance, with all its strengths and weaknesses, in which those with knowledge and experience of established constitutional systems assisting others seeking to adopt democratic forms and to comply with international standards.¹⁵ On the other hand, constitutions are closely linked to state sovereignty. External support may be used to press preferred external outcomes to an extent or in a form that is resented or resisted by key actors or is unworkable in the constitution building state.¹⁶ The potential for tension is heightened by the reality that

¹⁴ Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (Oxford University Press 2020).

¹⁵ Even here, there are issues to be navigated: see Joseph Geng Akech, ‘Foreign Influence and the Legitimacy of Constitution Building in South Sudan’ (2023) 67 *Journal of African Law* 367.

¹⁶ Eg. in South Sudan see Katrin Seidel, ‘Involvement and Impact of External Actors on Constitution Making in South Sudan and Somaliland: A Comparative Study’ (Käte Hamburger Kolleg / Centre for Global Cooperation Research 2017).

donor states and external organisations have their own mandates and their own lines of accountability to external sources.¹⁷

On the face of it, awareness of and sensitivity to these issues is built into current arrangements for external support, at least in principle. Support that involves presence in the constitution building state requires an invitation or at least acquiescence from a source with authority to give it, reflecting principles of sovereignty and non-intervention.¹⁸ Acceptance of external suggestions or advice is voluntary, at least in principle. External entities can be engaged at any appropriate stage of the process to provide tailored assistance, ‘which can range from limited advice on a particular issue to long-term support’.¹⁹ Initially, the terminology of support to constitution building was avoided altogether in favour of references to technical, rule of law, capacity building or state building support. That phase has passed, but current United Nations guidance nevertheless stresses that constitution making is a ‘sovereign process’ which should be ‘nationally owned and led’, while also ‘promoting ... international norms and standards.’²⁰

¹⁷ Al-Ali and Dann express particular concern about this when individual states provide assistance: Zaid Al-Ali and Philipp Dann, ‘The Internationalized Pouvoir Constituant: Constitution-Making Under External Influence in Iraq, Sudan and East Timor’ (2006) 10 *Max Planck Yearbook of United Nations Law* Online 423, 461.

¹⁸ Constitutional assistance can be offered on request or under a Security Council Resolution or enforcement under the United Nations Charter Ch VII: Anne Peters, ‘International Organizations as Constitution-Shapers: Lawful but Sometimes Illegitimate, and Often Futile’ (2023) 8 *UC Irvine Journal of International, Transnational, and Comparative Law* 61, 76; United Nations, ‘Guidance Note of the Secretary General on United Nations Constitutional Assistance’ (2020) 1.

¹⁹ United Nations, ‘Guidance Note of the Secretary General on United Nations Constitutional Assistance’ (n 18) 6.

²⁰ Ibid Principle 2. The earlier United Nations, ‘Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes’ (2009) Principle 3 included similar language. For discussion of the meaning of national ownership see Saunders (n 12) 81–3.

In practice, underlying tensions persist and may surface if external support and advice is or becomes unwelcome, for whatever reason. Compliance may be induced, at least in the short term, through conditionality and other types of pressure.²¹ Requirements for an invitation from the state may be managed through strategic partnerships from within a broad range of local stakeholders, including for example, public institutions, political parties, dissident groups, and civil society.²² There remains a tendency to fall back on procedural or technical framings of support to justify external involvement and bolster its legitimacy.²³

‘National ownership and leadership’ is an ambiguous term with at least two meanings.

Most obviously, in a thin sense, it requires local, rather than external or international leadership and ownership. Even in this limited sense, national ownership is not straightforward where questions arise about the legitimacy of incumbent leaders to represent the state; an issue that we pursue more fully later in Chapter 6. The general idea is clear enough, however. In principle, it also enables the local leadership to be seen to be responsible for the decisions taken by them and to be held to account, nationally and internationally, however difficult this may be in some contexts.

²¹ Vijayashri Sripati, *Constitution-Making under UN Auspices: Fostering Dependency in Sovereign Lands* (Oxford University Press 2020).

²² Sumit Bisarya, ‘Advice on Applying Mediation Fundamentals in UN Constitutional Assistance’ (United Nations Department of Political and Peacebuilding Affairs 2022) 16; Michele Brandt and others, *Constitution-Making and Reform: Options for the Process* (Interpeace 2011) 282.

²³ Graham Teskey, ‘Thinking and Working Politically: What Have We Learned since 2013?’ (TWP Community of Practice 2022); Peters (n 18) 97; Sara Kendall, ‘“Constitutional Technicity”: Displacing Politics through Expert Knowledge’ (2015) 11 *Law, Culture and the Humanities* 363; Felix-Anselm van Lie and Katrin Seidel, ‘Constitution Making’ in Marie-Claire Foblets and others (eds), *The Oxford Handbook of Law and Anthropology* (Oxford University Press 2022) 577.

In a thicker sense, national ownership also refers to the breadth of effective involvement in the constitution building process. Used in this way, it contrasts a process that meets the requirements of ‘national’ ownership with one that is monopolised by a few political leaders or excludes women, unpopular minorities, or political opponents.²⁴

This latter understanding of national ownership resonates with theories of popular sovereignty as the authority for democratic constitutions. It also reflects the practical need for instruments of democratic government that are intended to last over time to be accepted by all segments of the national community and to be responsive to their needs. This is particularly relevant in constitution building processes that involve a transition from authoritarian rule or armed conflict, many of which, typically, attract external support. In such processes, power is initially concentrated in the hands of a few, who, in addition, may not be suited to the different requirements of civilian leadership in a system of democratic government. In these circumstances, in principle, broad engagement in constitution building processes potentially lays foundations for a more stable democratic future.

External support for national ownership in this sense is most productive where national authorities and those that provide external support come to share a broadly common vision, which is achievable in context. Where national authorities are resistant to broadening ownership of the process or providers of external support misunderstand what is needed or achievable in context, there is potential for a stalemate to which there is no fully satisfactory solution.²⁵

²⁴ Office of the High and Commissioner for Human Rights, ‘Human Rights and Constitution Making’ (United Nations 2018) 13.

²⁵ Zaid Al-Ali, ‘Constitutional Drafting and External Influence’, *Comparative Constitutional Law* (Edward Elgar Publishing 2011).

3.3 Providing external support

The landscape of external support to constitution building processes is wide and diverse. It has evolved significantly over the past three decades in response to both experience and geo-political changes with consequences that are noted in Chapter 4. This segment identifies features of the current landscape for external support that assist understanding of how it presently works and suggests the relevance of suitability and influence as factors that can help or hinder effective external support.

Throughout the report, external support is understood to include the active provision of guidance or assistance to constitution building processes at any stage, by any external actors, and in any form, whether formally identified as ‘constitution building’ support or not, and whether support is a regular or only intermittent undertaking.²⁶ Until relatively recently, most though not all, institutionalised external support has been based in developed democracies,²⁷ although all collaborate with local partners and some of the larger organisations have regional and/or country offices in parts of the world in which they work, often engaging local staff.²⁸ The large network for external support for constitution building that communicates primarily in English as a mutually accessible language is the primary focus of this report. There are other significant language networks as well, however, including Francophonie.²⁹ In practice, external involvement in constitution building processes emanates from many quarters, governmental and non-governmental,

²⁶ The range of descriptors can be seen in the non-exhaustive list of 46 organisations involved in international constitutional advising in Lerner, Futscher Pereira and Schlager (n 8) 20.

²⁷ Lerner et al show that 44 of the 46 institutions they identify are based in ‘long-standing Western democracies’: *ibid* 12.

²⁸ Eg. International IDEA, headquartered in Sweden, has offices in 19 other countries: <https://www.idea.int/where-we-work>

²⁹ Organisation Internationale de la Francophonie; see also the support and advice offered by Spanish institutions to constitution building in some Latin American countries (eg. Centro de Estudios Políticos y Constitucionales).

including neighbouring states or organisations, and regional or religious groupings.³⁰ A significant development in recent years has been the provision of forms of support for constitution building processes from within the global south,³¹ including through regional and sub-regional organisations.³²

For clarity of analysis in this report, we group the roles of those contributing to external support into three broad categories: donors, diplomats, and other influencers; organisations; and individual providers.

- Donors provide financial support, directly or indirectly, and with or without a directive policy agenda. Diplomats and other high-profile individuals offer conduits for influence at critical junctures in a constitution building process. Typically, donors are states, and diplomats represent states, but some donors are private philanthropists and influencers may act in at least a semi-private capacity.³³
- Organisations provide the necessary institutional backup for external support across multiple projects, potentially becoming repositories of experience and expertise across states and over time.
- Individual providers deliver external support directly, requiring relevant expertise in their own right.

There may be overlap between these categories and they could be disaggregated or embellished further. Grouped in this way, however, it is possible to see that different actors play different roles in

³⁰ Eg. Micha Wiebusch, 'Constitution Building in the African Union: Law, Policy and Practice' (Institute of Development Policy, University of Antwerp 2020).

³¹ Eg. the Somali Dialogue Platform implemented by the Rift Valley Institute, <https://riftvalley.net/projects/horn-of-africa/somali-dialogue-platform/>

³² Eg. the Intergovernmental Authority on Development in Eastern Africa.

³³ Eg. Open Society Foundation and George Soros in Georgia; and the role of The Elders following post-election violence in Kenya in 2008: <https://theelders.org/news/message-kenyans-elders-chair-desmond-tutu>

constitution building support and may face distinctive challenges in ensuring that support is effective.

External support may take myriad forms, delivered by the appropriate actors, and adapted to each constitution building context. Some of the most common forms include funding; advice and knowledge sharing, directly or through knowledge products; logistical assistance for purposes ranging from service delivery to drafting; capacity building and training; mediation and good offices; and political support, influence, or advocacy.³⁴ An exhaustive account is not possible; novel forms of support can emerge in response to need. The inclusion of international members in the Committee of Experts as a component of the innovative Kenyan constitution making process in 2008 is only one of many examples.³⁵

Yet another dimension of the landscape of external support that helps to understand how it operates in practice, concerns the type of organisation through which support is provided. We identify five significant categories for the purposes of this report, noting that they are not necessarily watertight or exhaustive.³⁶

³⁴ See also Clare Castillejo, 'Inclusive Constitution Making in Fragile and Conflict-Affected States' (Norwegian Centre for Conflict Resolution 2018) 6–7; Tom Ginsburg, 'Some Advice on Constitutional Advice' in Jorgen de Poorter and others (eds), *European Yearbook of Constitutional Law 2021: Constitutional Advice* (TMC Asser Press 2022) 18–19; Lerner, Futscher Pereira and Schlager (n 8); Sripathi (n 21) 64.

³⁵ Christina Murray, 'Making and Remaking Kenya's Constitution' in Sumit Bisarya and Tom Ginsburg (eds), *Constitution Makers on Constitution Making: New Cases* (Cambridge University Press 2022).

³⁶ For other mappings of organisations, on which we draw, see Brandt and others (n 22) [2.3.12]; Jorgen De Poorter and others, 'Introduction: Mapping the Emerging Field of Constitutional Advice', *European Yearbook of Constitutional Law 2021: Constitutional Advice*, vol 3 (TMC Asser Press 2022); Lerner, Futscher Pereira and Schlager (n 8); Saunders (n 12) 73–5; Rhodri C Williams, *Constitutional Assistance and the Rule of Law in Post-Conflict Transitions: An Overview of Key Trends and Actors* (Folke Bernadotte Academy 2013) 44–57.

- *Global international organisations*, of which the United Nations (UN) is the paradigm case, working through relevant agencies, including the Department of Political and Peace Building Affairs, the UN Development Programme, and UN Women.³⁷
- *Regional, sub-regional or sub-global organisations* with states as members including the European Union, the Council for Europe and its constitutional advisory body the European Commission for Democracy through Law (Venice Commission), the African Union, the Economic Community of West African States, the Commonwealth, Francophonie, the Organisation of American States, and International IDEA.
- *Individual states* through relevant government ministries, agencies, or affiliated agencies. In Sweden these include the Swedish International Development Corporation (Sida) and the Folke Bernadotte Academy; and in the United States the US Agency for International Development and the United States Institute of Peace.
- *Non-government organisations and foundations*, of which the Carter Center, the Max Planck Foundation for International Peace and the Rule of Law, Konrad Adenauer Stiftung and Interpeace are examples.
- *Professional, academic and private organisations*, including university centres (e.g., the Edinburgh Centre for Constitutional Law), lawyers' associations (e.g., the American Bar Association, Lawasia, International Commission of Jurists), and law firms acting pro bono.³⁸

³⁷ For analysis of the constitution building work of UN agencies see Christina Murray and Cindy Wittke, 'International Institutions, Constitution-Making and Gender', *Constitutions and Gender* (Edward Elgar Publishing 2017) 112–5; Sripati (n 21).

³⁸ Cindy Daase, 'Making the Client's Peace: Privatizing Peace – Global Law Firms Offering Pro Bono Services in Post-Conflict Settings' (2014) 21 *Indiana Journal of Global Legal Studies* 423.

Individual providers are often supported by an organisation of one of these kinds as employees or consultants. Some are employed by universities or religious or other organisations; some are effectively embedded, working within state or non-state institutions.³⁹

Categorisation by organisational type draws attention not only to the range of institutions commonly engaged in the provision of external support but to the existence and relevance of organisational frameworks within which support takes place. Each organisation providing external support does so within its own frame of reference, which at least in part reflects organisational type but otherwise may differ from the frameworks of others. These frameworks structure the activities of the body, prescribe priorities, set standards and procedures, and establish a hierarchy for decision-making. They may identify measures of success for internal purposes and for accountability to donors.

Organisational frameworks have a bearing on the ways in which external support is provided. They may constrain organisations – and the individual providers that they use – to uphold and promote certain normative standards. This can have a bearing on what external support is provided and how. By way of an obvious example, the UN's mandate to promote respect for international norms and standards requires the UN and its agencies to advocate compliance and may require it to 'speak out' when a constitution building process is not perceived to meet these standards.⁴⁰ As the discussion in Chapter 5 shows, Swedish support to constitution

³⁹ Eg. Anthony Regan in Bougainville: Anthony Regan, 'Conflict Resolution through Constitution-Making: Insights from the Pacific and Asia' (Australian National University, 29 September 2023).; Noah Feldman in Tunisia: Alicia Pastor y Camarasa, 'Demystifying How Constitutions Are Made – External Actors' Modes of Actions in the 2014 Tunisian Constitution' [2022] *Michigan Journal of Law & Society* 51, 75.

⁴⁰ United Nations, 'Guidance Note of the Secretary General on United Nations Constitutional Assistance' (n 18); Williams (n 36) 28–9. Other organisations have their own criteria for engagement, eg. the Max Planck Foundation for International Peace and the Rule of Law will provide 'politically neutral' support 'inclusive of all peaceful and non-radical actors': www.mpfpr.de/foundation/

building processes is characterised by emphases on national ownership, inclusion and values-based development co-operation. Each other state that is active in the field is likely to have its own overarching policy positions and preferences for support modalities.

Organisational frameworks also dictate lines of accountability within the organisation and to those on whom the organisation relies, including donors and, sometimes, external governments. An inevitable feature of external support to constitution building processes is that formal accountability is also external to the state and entities receiving support. An accountability relationship between organisations through which external support is provided and the recipients of support might be established through formal mechanisms such as agreements or memoranda of understanding.⁴¹ By their nature, however, these arrangements are consensual, relying for their effect on mutual understanding and goodwill, and subject to the possibility that a constitution building state might withdraw its consent to an external actor, or an external actor its support to the constitution building process. Alternative avenues of accountability might potentially arise from the development of a 'community of practice' among providers, although the establishment of the field as a discrete profession or industry with its own ethical guidelines seems some way off.⁴²

The range of actors engaged in external support prompts questions about which organisers and providers best fit particular constitution building projects. The question may seem utopian in what sometimes appears to be a global marketplace in which external support is offered and received. It raises considerations that deserve attention, however, not least from local stakeholders and donors. Two sets of criteria suggest themselves: suitability and influence.

⁴¹ Brandt and others (n 22) 179.

⁴² Ginsburg (n 34) 27.

Suitability refers to the fit between the capabilities of those providing external support and a constitution building context. Considerations may include familiarity with the context, experience in the field, relevant comparative knowledge, local presence, and a methodological approach that is apt to deal with the challenges likely to be encountered.⁴³ Suitability may also require consideration of whether those providing external support are constrained by domestic political or geopolitical considerations in ways that affect its usefulness in context. An inability to deal with key actors in a peace building or constitution building context for geopolitical reasons is one example.⁴⁴

Influence comprises factors that increase the likelihood that recipients will receive external support positively. Influence in this sense may derive from the recognised professional competence of providers and from linkages between local stakeholders and the source of external support in the form of, for example, shared language, religion, culture, history, or geographical proximity. Influence may also derive from leverage,⁴⁵ and other forms of power with a more

⁴³ Bisarya recommends that constitutional advisors have expertise, experience as a participant and adviser in different contexts, ‘soft skills’ that promote close working relationships such as humility and sensitivity, familiarity with local context, language skills and real and perceived impartiality: Bisarya (n 22) 4–5. He recommends building teams of persons with diverse skills and experience, see also Gianni Buquicchio and Simona Granata-Menghini, ‘The Venice Commission Twenty Years On: Challenges Met but Challenges Ahead’ in Marjolein van Roosmalen and others (eds), *Fundamental rights and principles: liber amicorum Pieter van Dijk* (Intersentia 2013) 246.

⁴⁴ Eg. the exclusion of the Taliban from the constitution making process in Afghanistan: Shamshad Pasarlay, ‘External Assistance to Constitution Building and Culture: The Case of Afghanistan’ (Melbourne Forum on Constitution Building in Asia and the Pacific, Constitution Transformation Network and International IDEA 2018).

⁴⁵ Steven Levitsky and Lucan A Way, ‘Ties That Bind? Leverage, Linkage, and Democratization in the Post-Cold War World’ (2005) 7 *International Studies Review* 519.

coercive edge.⁴⁶ In contemporary constitution building experience, for example, external support connected with a regional organisation that the constitution building state seeks to join is a powerful form of leverage.⁴⁷ Options for influence ranging from persuasion to (virtual) coercion can take many other forms as well, including diplomacy, conditionality, and sanctions.⁴⁸ Initiatives that make inroads into the autonomy of a state on an issue readily linked to sovereignty risk backlash, however, and need to be deployed cautiously. Overreach has the potential to work against national ownership of a constitution making process in either the thin or thick sense, jeopardising constitutional stability once the constitution-making phase is over.

3.4 Gauging effectiveness

The research questions for this study ask us to consider the ‘factors and approaches’ that ‘contribute to or hinder’ external support to constitution building processes that lead to ‘more stable constitutional systems.’ They thus require a framework within which to determine whether and to what extent external support has made a positive contribution to a constitution building process and whether there are ways in which its effectiveness might be improved, informed by research and experience to date.

⁴⁶ On these distinctions, including the emergence of ‘smart’ power, see Craig Cohen, Joseph S Nye Jr and Richard L Armitage, ‘A Smarter, More Secure America’ (Center for Strategic and International Studies 2007) 6–8.

⁴⁷ For example, Hoffmann-Riem suggests that seeking and adopting the advice of the Venice Commission on constitutional matters may be ‘prompted by the prospect of documenting that the state is affiliated with the community of democracies committed to the rule of law, sometimes paired with the hope of stronger political connectedness and/or support in ongoing political conflicts’, citing Georgia as an example: W Hoffmann-Riem, ‘The Venice Commission of the Council of Europe: Standards and Impact’ (2014) 25 *European Journal of International Law* 579, 591.

⁴⁸ Corinne Graff (ed), *Addressing Fragility in a Global Pandemic: Elements of a Successful US Strategy* (United States Institute of Peace 2020) 25–32.

Designing such a framework is complicated by the realities of constitution building itself. On any view, a considerable length of time is likely to elapse between the start of a constitution making process and achievement of formal constitutional change during which, in addition, there may be unforeseen setbacks and restarts.⁴⁹ In any event, a written Constitution is only a means to an end, although often an important one; what really matters is the effectiveness of a constitution in practice, on which stability depends. An even longer period, which may also be unsettled, is likely to be needed before it becomes clear whether and to what extent constitutional stability that offers good governance has been achieved. In addition, in many cases, a constitution making process fails to result in new formal constitutional arrangements at all but arguably may have strengthened the foundations for constitution building in the future or had potentially positive effects of other kinds.

Outcomes of constitution building processes are affected by a variety of factors most of which, in one way or another, depend on actions and reactions within the constitution building state. External support can be significant too but is only part of a much larger picture. We suggest in this segment that the relative effectiveness of external support should be gauged by the extent to which it makes a positive difference to an aspect of a constitution building process that is apt to lead to a more stable constitutional system in the relevant context. We examine each of the three elements of this formulation more closely below.

The segment concludes by setting out factors that assist in applying the test in order to determine what helps and what hinders the effectiveness of external support, and whose perspective matters in making such assessments. We draw on these factors in the chapters that follow.

⁴⁹ Eg. Nepal and South Sudan.

A more stable constitutional system. The EBA's invitation to undertake this study uses 'a more stable constitutional system' as convenient shorthand to describe the ultimate goal of a constitution building process that attracts the forms of external support with which this study is concerned. The ultimate goal is relevant to the design of the constitution building process. Used in the context of constitution building, the components of such a system can be assumed to be intended to include at least democracy, human rights, and a rule of law. A constitutional system designed in the aftermath of armed conflict may reflect requirements for a sustainable peace as well.

This goal should be understood in general terms, however, important details of which are subject to negotiation and agreement and may not meet the expectations of some providing external support. Every constitution is a compromise. Democracy takes many forms. Particular human rights may be controversial in context, requiring compromise on the scope of their protection in constitutional form. There may be tensions between stability and aspects of democracy, affecting priorities and timing. In discussions in the Dialogues, one participant argued for an emphasis on constitutionalism, in the sense of precluding the exercise of arbitrary public power, rather than on democracy; another urged greater focus on 'sustainable human development' in articulating the ultimate goal of constitution building. These live questions about the ultimate goal of constitution building are likely to be further affected as time goes on by broader debates about the forms and meaning of constitutionalism in the global south and democratic decline globally, including in parts of the global north.⁵⁰

⁵⁰ See Tom Gerald Daly and Dinesha Samararatne (eds), *Democratic Consolidation and Constitutional Endurance in Asia and Africa: Comparing Uneven Pathways* (Oxford University Press 2024). On democratic decline see 'Democracy Index 2023: Age of Conflict' (Economist Intelligence Unit 2024). An associated phenomenon may be an apparent divergence of global values: 'Western Values Are Steadily Diverging from the Rest of the World's' *The Economist* (3 August 2023).

A process apt to lead to a more stable constitutional system. The significance of constitution building processes and the role of external support in their design and execution are the subjects of the chapters that follow. The point here is an obvious one: that for external support to a constitution building process to make a positive contribution to the ultimate goal of a stable constitutional system, the process needs to be apt to lead to such a goal, whether or not it actually does so. The bar is not high, and the link generally can be established readily enough, including through the assessment of local partners. Aspects of a constitution building process that involve public participation and broader inclusion are assumed to contribute to establishing a more stable constitutional system, at least in principle; an assumption that is examined more closely in Chapters 6. Nevertheless, this step in considering the impact of external support underscores the importance of understanding the ultimate goal of a particular constitution building process in context and the ways in which aspects of the process could contribute to achieving it.

External support that makes a positive difference. This aspect of the formulation is more evaluative and more challenging for that reason. How it works depends to some extent on the nature of the support provided. Logistical support for the conduct of a referendum, for example, can more readily be seen to have made a positive difference than advice drawn from comparative experience about decision-making arrangements in a Constituent Assembly. In cases of the latter kind, which are common, perceptible impact depends on actions taken by local decision-makers. Outcomes are not necessarily a reflection on the external advice, which may also have had a more subtle influence of some kind.

Institutions and agencies providing external support often have formulations of their own by which to measure effectiveness. To take one example, International IDEA identifies the aim of external support as to ‘inspire and support’ categories of local stakeholders and uses carefully stipulated behaviours, relationships and practices of such stakeholders to understand the extent to which the aim has

been met.⁵¹ Approaches of this kind, developed through long experience in the field, offer useful indicators by which to measure positive difference.

3.5 Factors relevant to the effectiveness of external support

The discussion in this chapter of the conceptual framework for external support for constitution building processes suggests four factors, or broad sets of factors, that might be used for assessing the effectiveness of external support and identifying ways in which it might be improved. The factors are mutually reinforcing and cumulative. They are listed here to establish their connection with the foundations for external support. Their content is fleshed out in Chapter 4, in the light of the discussion in that chapter of the opportunities offered by external support and the challenges it faces. They are applied in Chapters 6, dealing respectively with external support for inclusive constitution building processes and for constitution building in the context of conflict. They feed into the recommendations in the concluding chapter of the report.

The first factor draws on the concept of *national ownership and leadership*. The earlier discussion showed the complexity of that concept, in many of the contexts in which constitution building occurs. Effective external support requires nuanced and skilful engagement to ensure national ownership in the thin sense while assisting and encouraging a level of inclusion that satisfies national ownership in the thick sense, so far as it is possible to do so.

⁵¹ International IDEA, 'Learning-Based Management at International IDEA' (2020) Annex 7 <https://www.idea.int/sites/default/files/file_attach/learning-based-management-at-international-idea_2020-02-04.pdf>. One measure, for example, is that constitution makers apply increased knowledge and skills to make informed choices regarding constitutional design and process. Others are that advisers to constitution makers utilise International IDEA's knowledge and networks, and civil society holds constitution makers accountable and informs the public on constitution building processes.

The second factor invokes the *raison d'être* of external support: whether it *adds value* to a process that could not readily have been secured in other ways.

The third factor points to the *quality of the external support*. This includes the way it is delivered and the extent to which it is adapted to context.

The fourth factor is the *weight accorded to external support* by local decision-makers. This may be a product of recognition of its worth, of the suitability and influence of the external provider, or of an effective collaborative relationship based on mutual respect.

Recipients and providers of external support will each, inevitably, have their own perspectives on whether external support has made a positive difference and advanced progression towards more stable constitutional arrangements. Both perspectives are relevant to assessing the contribution that external support has or could make. The task is most straightforward, and outcomes more likely to be enhanced, when the perspectives come together, naturally or through effective collaboration. When perspectives diverge, the reasons need to be understood and factored into an assessment of the contribution of external support. Divergence may be instructive, and used to enhance external support, to the extent that this is consistent with what may legitimately be different priorities. Where the divergence of perspectives is too great to be bridged, however, a question arises whether external support should be provided or accepted at all. In research for the project, we were told of several instances, which were extreme but may be growing in number, where support was refused, or not offered, or withdrawn on bases that can be understood in this way.⁵²

⁵² Dialogue, 'Lessons Learned from Support to Constitution Building Processes', November 2023.

4 Modalities of external support to constitution building processes

This chapter deals generally with the modalities of external support for constitution building processes. It has several purposes. One is to provide an overview of constitution building processes as a whole, as necessary context for the examination of particular aspects of it in Chapters 6. Secondly, the chapter explains how external support interacts with constitution building processes, the opportunities that it offers and the challenges it faces. Finally, the chapter shows how these opportunities and challenges can be used to flesh out the factors that we identified in Chapter 3 as useful for determining what helps or hinders the effectiveness of external support. These factors, developed in this way, are used in the chapters that follow to consider how external support for particular aspects of constitution building processes might be enhanced.

4.1 Processes of constitution building

The process by which a constitution is made or changed has always been an important aspect of constitution building. It helps to distinguish constitutions from other law and day-to-day politics. It is a key to establishing the legitimacy on which acceptance of the constitution depends in the early years before legitimacy can also build on performance. In practical terms, the process followed may be decisive in determining whether new constitutional arrangements are finalised and the form that they take.

Over the course of the past thirty years, the significance of the process used for constitution building has become widely accepted. An early influence on the emphasis now placed on it was the widely admired process in South Africa that began with negotiations between the incumbent government and the then banned African National Congress in the mid-1980s and succeeded in producing a similarly

admired Constitution in 1996, despite the immense challenges it faced.⁵³ Shortly afterwards, reflecting on this experience, the Commonwealth Human Rights Initiative (CHRI) urged governments to ensure that ‘the process of constitution making is, and is seen to be, as important as the substantive content of a constitution itself’.⁵⁴ In 2003, in another influential contribution, Vivien Hart argued for the significance of democratic constitution making processes, stressing the difficulties of reaching a constitutional settlement in the conditions of division and conflict that characterised so many states at the turn of the century, and claiming a need to treat constitutions as an ongoing ‘conversation’ rather than as a ‘contract’ set in place for all time.⁵⁵

One aspect of the South African process that attracted significant attention was its focus on inclusion and public participation, with their concomitant requirements for transparency and openness. These also were the characteristics on which the CHRI and Hart placed particular emphasis. Hart argued, for example, that the 21st century had ‘redefined the long tradition of expert constitution making ... bringing it into the sphere of democratic participation’.⁵⁶ Following Hart, some now claim that there is an emerging international law requirement for participation in constitution making.⁵⁷

⁵³ Christina Murray, ‘A Constitutional Beginning: Making South Africa’s Final Constitution Essay’ (2001) 23 University of Arkansas at Little Rock Law Review 809.

⁵⁴ Commonwealth Human Rights Initiative, ‘Promoting a Culture of Constitutionalism and Democracy in Commonwealth Africa’ (Recommendations to the Commonwealth Heads of Government 1999) para 4.1.

⁵⁵ Vivien Hart, ‘Democratic Constitution Making’ (United States Institute of Peace 2003) Special Report 107.

⁵⁶ Ibid.

⁵⁷ Markus Böckenförde, ‘International Law and Constitution-Making: Sudan’ in David S Law (ed), *Constitutionalism in Context* (Cambridge University Press 2022) 161–2.

As the South African process also shows, however, and recent experience in Chile has confirmed, constitution-building is a complex affair, with many facets that contribute to success. It begins with the earliest initiatives for constitutional change, which in some cases may stem from a peace process. It includes all the steps needed to ‘make’ a constitution, including negotiation, drafting, approval, and ratification. It extends to implementation in practice after a constitution has come into force and sustaining it over time. In current conditions, it might also be argued to include processes directed to averting or recovering from forms of democratic ‘backsliding’,⁵⁸ and to reinforce the integrity of critical constitutional bodies.⁵⁹

In the course of a constitution-building process many decisions are made that may be critical to success. These include decisions about whether to make a new constitution and, if so, how, or whether instead to amend a constitution that already is, or has been, in place, following a stipulated amendment process.⁶⁰ They may involve sensitive, context-dependent choices about the timing of elections and the order in which steps in the constitution making process are taken.⁶¹ Some processes establish multiple transition periods that are

⁵⁸ Much of the current literature on backsliding deals with constitutional design. There is more work to be done on the role of process, including the part that external support might play, but it is already evident that some design options (for example, delay in constitutional change) leave room for process: Sumit Bisarya and Madeleine Rogers, ‘Designing Resistance: Democratic Institutions and the Threat of Backsliding’ (International IDEA 2023).

⁵⁹ See, for example, the role of the Organization of American States in overseeing the election of judges in Guatemala: ‘Guatemala Reform Agenda Hinges on Crucial High Court Elections’ (*Guatemala Reform Agenda Hinges on Crucial High Court Elections*) <<https://elfaro.net/en/202404/opinion/27307/guatemala-reform-agenda-hinges-on-crucial-high-court-elections>> accessed 9 May 2024.

⁶⁰ Constitution Transformation Network and International IDEA, ‘Constitutional Beginnings: Making and Amending Constitutions’ (Melbourne Forum on Constitution-Building: Constitutional INSIGHTS No 1 2018).

⁶¹ William Underwood, Sumit Bisarya and Kimana Zulueta-Fülscher, ‘Interactions between Elections and Constitution-Building Processes in Fragile and Conflict-Affected States’ (International IDEA 2018).

subject to different rules and use additional mechanisms to secure a satisfactory outcome that range from National Conferences to Interim or transitional Constitutions.

And no constitution building process operates in a vacuum. All co-exist with the need to carry on the ordinary business of government, which may be managed in a variety of ways. Many operate in parallel with other processes as well, of which peace making and building and transitional justice procedures are common examples.

The experiences of the past 30 years suggest other insights into the dynamics of constitution making processes that also may be critical to outcomes and may have a bearing on external support. These include the following:

- What is considered legitimate and what is feasible depend on local context.⁶²
- Local political leadership and commitment matter in both the short and longer term.
- Different local stakeholders will have different needs and interests, requiring compromise and mechanisms for reaching sufficient consensus.⁶³
- While it is helpful to design and understand a constitution building process as an integrated whole, setbacks are common, calling for flexibility and innovation.⁶⁴

⁶² See generally Saunders (n 12) 85. An example is South Africa, where the constitution building process was informed by preferences for legal continuity, the avoidance of referendum, and the role of the Constitutional Court.

⁶³ Nicholas Haysom and Sujit Choudhry, 'Mechanisms for Resolving Divisive Issues in Constitutional Negotiations' (Interpeace 2010).

⁶⁴ The constitution building experiences of many countries involved such setbacks, for example, Nepal (with the dissolution of the Constituent Assembly in 2012 for failure to meet its deadlines); Kenya's constitution building process of 2000-2005, which ended when the constitution was rejected in a divisive referendum); and Tunisia, where the work of the Constitutional Assembly was suspended following political assassinations, boycott, and protest.

- Timing is always a relevant consideration, pitting the need for an appropriate process against the advantage of seizing the constitutional moment.
- If at the end of a process no new constitutional arrangements have been put in place it is necessary to fall back on other means of providing a framework for government that works well enough and is sufficiently legitimate for the time being.⁶⁵

4.2 Modalities of external support

One of the recommendations of the Commonwealth Human Rights Initiative in 1999 was that ‘Constitution makers should have sufficient and easy access to international experience, precedents and materials to enable them to make informed decisions.’⁶⁶ Over the ensuing decades, access has become increasingly available through the mechanisms of external support, although the digital revolution and developing comparative knowledge in-country also are important for this purpose. Almost every constitution making project, at least in the developing world, now attracts external support for issues of process as well as constitutional content. Successes have included broad acceptance of inclusive constitution-building processes and effective gender equity, at least as matters of principle.

This development has affected the landscape of support itself. The range of those involved, in one way or another, has dramatically increased, in response to both need and opportunity. The growth of organisations supporting the involvement of women in constitution making including, from 2011, UN Women, illustrates the point in only one specific but important sector. Support has become professionalised and institutionalised, with all that this implies in

⁶⁵ Eg. in The Gambia (2018–2020) and Chile (2020–2023), draft constitutions were not adopted, leaving in place old Constitutions tainted by association with authoritarian government that nevertheless provide structure for government.

⁶⁶ Commonwealth Human Rights Initiative (n 55) para 5.6.

terms of incentives to engage, pressures to perform, and concern for reputation and growth.⁶⁷ The emergence of a ‘community of practice’ enables knowledge, experience, problems and even standards to be shared.⁶⁸ This project is, in a sense, an example of this phenomenon. It remains the case, however, that external support operates within an often competitive knowledge market that has a bearing on its operation in practice.

The modalities of external support in any particular case depend on variety of factors, including the characteristics of the body organising the support, the type of support provided, the stakeholders to whom support is provided, and the constitution building context within which support is offered and received. Some generalisations nevertheless can be made about when external support is offered and by whom and about common issues that arise.

When? External support is sometimes available at the outset of a constitution making process, as a derivative of peacebuilding or other developments that were a catalyst for constitutional change or as an extension of pre-existing development assistance or similar programs.⁶⁹ More usually, however, external support enters the picture after a process is underway and initial decisions about at least its contours have been made. External actors usually are engaged to assist with particular aspects of a process, although some may be available for the duration. Until relatively recently external support tended to end once constitutional change was secured, but the importance of the implementation phase is now widely recognised

⁶⁷ Dialogue, ‘Lessons Learned from Support to Constitution Building Processes’, November 2023. See also Tom Ginsburg, ‘Constitutional Advice and Transnational Legal Order’ (2017) 2 UC Irvine Journal of International, Transnational, and Comparative Law 5; Lerner, Futscher Pereira and Schlager (n 8).

⁶⁸ Williams (n 36) 23.

⁶⁹ For example, German Stiftungen and the UNDP, already active in Tunisia at the time of the Arab Spring, shifted the focus of their activities from economic development to support for democracy: Pastor y Camarasa (n 39) 73–4.

and may also attract external support.⁷⁰ More recently still, external support for significant problems that arise in the course of operating a constitution, including corruption and democratic backsliding, is extending the practice further into the life cycle of constitutions.

By whom? In Chapter 3 we identified broad categories of external actors who may be involved in support to constitution building processes. All play a role in most processes.

- *Donors* invariably are required, although the vehicles through which funding occurs vary and continue to evolve. Common forms include bilateral or multi-donor funding to a specific organisation for a specific project; core funding to organisations that provide support to constitution building or associated activities, to be used at its discretion; and consortium or pooled funding mechanisms by way of, for example, a multi-donor trust fund. Donors also indirectly channel funds to constitution-building processes. This may occur, for example, through contributions to UN entities pursuant to the UN funding compact⁷¹ or in support of specific projects through UN inter-agency pooled funds or through single-agency thematic funds that are used to support the constitution-building processes.
- *Diplomats* offer a critical conduit for high level communication on matters concerning external support and, in some cases, for persuasion.

⁷⁰ Andrew Ladley, 'Constitution-Building after Conflict: External Support to a Sovereign Process' (International IDEA 2011) 12.

⁷¹ See 'Repositioning of the United Nations Development System in the Context of the Quadrennial Comprehensive Policy Review of Operational Activities for Development of the United Nations System' (United Nations General Assembly 2018) A/RES/72/279; 'Implementation of General Assembly Resolution 71/243 on the Quadrennial Comprehensive Policy Review of Operational Activities for Development of the United Nations System, 2019: Funding Compact' (United Nations General Assembly Economic and Social Council) A/74/73/Add.1–E/2019/14/Add.1.

- *Organisers* are the core of most external support projects, attracting funding, managing the forms of support, and arranging the delivery of programs. The nature of their accountability to donors varies with the funding vehicle but is a significant influence on their operations.
- *Individual providers* execute projects for external support, dealing directly with stakeholders and in country, in many cases. They may be staff members of the organising body but often are separately contracted for the purpose. The Swedish government agency, the Folke Bernadotte Academy or the Japanese Ministry of Justice's section for international co-operation are examples of donors taking a more hands-on approach to providing support.

External support may be directed to one or more in-country stakeholders, as appropriate. Possibilities include political leaders, political parties, state institutions, constitution making bodies or members of them, civil society groups including women's organisations, and sub-national entities. Memoranda of understanding or similar instruments may guide the relationship between organisers of external support and stakeholders covering, for example, expectations, decision-making procedures, and mechanisms for feedback. External support that is delivered in country or involves state institutions also requires state consent, which may be based on a standing or project specific agreement and may be withdrawn, as some well-known examples show.⁷² The relative openness of a constitution building state to external support may vary over time.⁷³

⁷² For example, Fiji's military government rejected the Constitution drafted by a Commission led by Yash Ghai: Matt Siegel, 'Fiji's Government Rejects Proposed Reform Constitution – The New York Times' *New York Times* (11 January 2013).; UN Envoy in Somalia, Nicholas Haysom, was declared persona non grata by the Somali government in 2019: Max Bearak, 'Somalia Expels Top U.N. Official after He Criticizes Crackdown on Dissent' *Washington Post* (3 January 2019).

⁷³ Dialogue, 'Lessons Learned from Support to Constitution Building Processes', November 2023.

Co-ordination is one of several *common problems*, widely recognised but still a work in progress, in an essentially unregulated field of activity with a wide range of actors in a form of competition with each other, not all of whom are necessarily part of the same broad network of providers. Without co-ordination, the multiple projects for external support that exist in many constitution building processes may overlap, may be contradictory, may leave gaps or miss synergies with which, in principle, external support could assist.

Attempts have been made over time to formalise the co-ordination of external support in particular processes through joint committees of various kinds. The ‘unusually co-ordinated’ support in Albania in 1998, through the Administrative Center for the Coordination of Assistance and Public Participation, was an early example.⁷⁴ More recently, the task of coordination of official support has been undertaken by international organizations, such as the UNDP.⁷⁵ The UN and UNDP Guidance Notes⁷⁶ expressly recognize coordination among international and domestic stakeholders and within the UN itself as important principles to observe.

The geopolitical context has affected the dynamics of external support over the last 30 years and continues to do so, in ways that affect both its modalities and impact. The decade or so following the end of the cold war was characterised by optimism about the global spread of liberal democracy and about the capabilities of a relatively united ‘international community’. High water marks of international intervention in ways relevant to constitution building during this period included the Dayton Accords, effectively imposing the

⁷⁴ The Center worked extensively with the Government of Albania and domestic and external support providers during the drafting of the 1998 Albanian Constitution: Scott N Carlson, ‘The Drafting Process for the 1998 Albanian Constitution’ <<https://constitutionnet.org/vl/item/drafting-process-1998-albanian-constitution>>.

⁷⁵ United Nations Development Programme, ‘UNDP Guidance Note on Constitution-Making Support’ 17.

⁷⁶ United Nations, ‘Guidance Note of the Secretary General on United Nations Constitutional Assistance’ (n 18) 4–8; United Nations Development Programme (n 76) 14–15.

Constitution for Bosnia-Herzegovina, UN administration of East Timor during the period of constitution making, regime change in Iraq and Afghanistan, and invocation of the ‘responsibility to protect’ to justify the use of force in Libya, albeit somewhat later, in 2011.⁷⁷ Whatever the original cause, the outcomes of each in these cases now represents a cautionary tale that informs global experience of international intervention.

Subsequent geopolitical changes, leading to a more divided United Nations and a lessening of Western influence, also mean that external support now operates in a global context in which even milder forms of coercive action are less feasible, whether through international institutions or at the behest of powerful states. This places a premium on persuasion and advocacy in relation to the benefits of constitutional democracy and raises the stakes for the quality of international support.

4.3 Opportunities and challenges for external support

Any constitution making project presents opportunities and faces challenges, whether external support is provided or not. The opportunities lie in the potential of a constitutional moment to lay the foundations for a fresh start in ways on which there is broad-based consensus across the state. The challenges stem from resistance to change, power asymmetries between incumbent leaders and their rivals, an impoverished and often traumatised and divided public, and the risks of division in attempting a new constitutional settlement, where the stakes are so high.⁷⁸ The opportunities are greater, and the challenges heightened, in many of the contexts in which constitution making has occurred over recent decades. They

⁷⁷ Kendall (n 23).

⁷⁸ Brendan O’Leary, ‘Making Constitutions in Deeply Divided Places: Maxims for Constitutional Advisors’, *Comparative Constitution Making* (Edward Elgar 2019).

may include, for example, people in positions of authority in a state who are ill-equipped for leadership of a democratic constitution building process, unsympathetic with its goals and unable to rise above their own short-term interests.

These opportunities and challenges are part of the context for many constitution building processes that receive external support. They have a bearing on the outcomes of constitution building and so, indirectly, on the outcomes of external support. They are assumed but are not the primary focus of this study, which is concerned with the value that external support can add to any constitution building process and how it might be enhanced. This segment of this chapter, therefore, deals with the distinctive opportunities that external support offers to a constitution building process and the distinctive challenges that it faces in doing so. Both opportunities and challenges are connected in some way with the properties of externality.

4.3.1 Opportunities

Some of the most common opportunities offered by external support to constitution building processes are set out below. Others may be suggested by a particular constitution building context.

External support can offer *resources* that share and defray the costs of constitution building in states where resources are scarce. Support of this kind may be direct or indirect and take the form of funding or of the provision of services or infrastructure in kind.⁷⁹ External contributions of this kind can make possible aspects of a constitution

⁷⁹ Eg. in Tunisia the UNDP provided the Constituent Assembly with an electronic voting system, computers, printers, information communications technology and video equipment: Pastor y Camarasa (n 39) 78. In Nepal, Japanese funding included provision for ballot boxes: Jörn Grävingholt and others, 'Struggling for Stability: International Support for Peace and Democracy in Post-Civil War Nepal' (Deutsches Institut für Entwicklungspolitik 2013) Discussion Paper 27/2013 27.

building process that could not otherwise have been achieved, or achieved as effectively, within the resources of the state. Some of the costliest processes are those that extend across the entire territory of the state for purposes that may include community outreach, the distribution of materials, organising and collating the insights from public participation, and conducting elections and referendums. Other processes are resource intensive in other ways: administrative support for a Constituent Assembly is an example. Relevantly for the purposes of this report, the external provision of resources may provide critical opportunities for inclusive constitution building processes, which often attract external support for that reason.

Secondly, external support offers access to *comparative knowledge and experience* when this is not otherwise readily available within the state, or available to particular groups of stakeholders. This may be helpful in myriad ways. Comparative knowledge can offer insights into particular constitution building processes or combinations of processes that have operated effectively elsewhere; awareness of the problems that particular processes have encountered, including how they have been handled, and with what results; and information about the procedures of constituent assemblies or similar bodies that have been used in other contexts. Comparative knowledge should also be able to assist stakeholders to understand the relevance of experience elsewhere for their own particular context; to adapt it to fit; and to appreciate how and why certain processes are conducive to better outcomes. Good comparative expertise also can assist to problem-solve, drawing on innovations that have been used or are emerging elsewhere to assist with significant issues in the constitution building state.

Thirdly, and in a broadly similar vein, external support offers access to knowledge and networks, about how *norms and values recognised in international and regional law and practice* are relevant to the current case, why they matter and how they might best be applied so as to work in context. The now extensive experience with provision for gender equity in the design of constitution building processes, which

disseminated and further encouraged through international networks of women's organisations, is an example of this kind,⁸⁰ but the point can be extended to cover inclusive processes generally.

Fourth, external support may also offer *logistical or other forms of technical expertise* that is not available, or not adequate, in the constitution building state. Examples include legal drafting, translation of materials, the administration of elections or referendums including voter registration, and organisational support for a constituent assembly. In these and similar examples, external expertise may be provided directly, through capacity building or both.

Finally, external support may offer useful *independence* where external actors operate at arm's length from the central protagonists in a constitution building process. In this case, all else being equal, external support may help to mediate between leaders or other key stakeholders, strengthen cohesion within parties or groups, enhance confidence in the integrity of particular processes through monitoring or by other means, and offer service as witness or guarantor. Where external support engenders trust, external actors may have influence or even leverage that can be used to bring parties to the table, break a stalemate between key stakeholders, or overcome hesitations about more inclusive processes.

4.3.2 Challenges

The distinctive challenges faced by external support also are connected, in one way or another, with the dynamics of externality. They are broadly similar to challenges encountered in development assistance generally and in external support to state building. They are familiar to many of those providing external support and some already have been factored into changes in the approach to providing external support in recent years.

⁸⁰ Ruth Rubio-Marín and Helen Irving, 'Women as Constitution-Makers: The Promises and the Challenges of Participation' in Helen Irving and Ruth Rubio-Marín (eds), *Women as Constitution-Makers: Case Studies from the New Democratic Era* (Cambridge University Press 2019) 4.

One series of challenges are inevitable consequences of being an *outsider* to a constitution building state.⁸¹ Those engaged in providing external support necessarily lack knowledge and understanding of a host of local issues that may be relevant to the goals, design and operation of a constitution building process. These may encompass, for example, the rationales behind a preference for a particular process, aspects of the political or social dynamics, and the impact of broader social, economic and security factors. This kind of challenge can be exacerbated by differences in language and the limited range of connections within the state that outsiders may have. An inadequate understanding of local context potentially affects all forms of external support. In providing comparative knowledge, for example, it may encourage assumptions of similarity that are wrong and preclude the adaptation of comparative experience to local conditions to enhance its influence and fit.⁸² It may cause local capacity to be overlooked and displaced, and opportunities for building local capacity to be missed. It may inhibit those providing external support from fully grasping what national ownership might involve in a particular case.

The status of outsider can pose other, divergent, challenges that relate to how external support is represented within the constitution building state. On the one hand, the presence of active external support can provide domestic actors with a veneer of legitimacy, avoiding accountability for their actions.⁸³ Several participants in the Dialogues expressed concern that external assistance could be used to claim an international imprimatur for undemocratic or otherwise

⁸¹ Rosalind Dixon and Vicki C Jackson, 'Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests' (2013) 48 Wake Forest Law Review 149.

⁸² Cheryl Saunders, 'Towards a Global Constitutional Gene Pool' (2009) 4 National Taiwan University Law Review 1.

⁸³ Laura Grenfell, 'The UN and "Rule-of-Law" Constitutions' in Jeremy Farrall and Hilary Charlesworth (eds), *Strengthening the Rule of Law Through the UN Security Council* (Taylor & Francis Group 2016).

problematic constitution building processes or outcomes.⁸⁴ A risk of another and opposite kind, however, is that the presence of external support may be used to dismiss or discredit ideas or groups. One common example is the claim that national NGOs and other groups representing women speak for western interests and values.⁸⁵

A second group of challenges are *operational*, and flow from the constraints within which external support is provided. Some of these relate to timing. External support may arrive after key decisions about the process have been made, requiring those providing external support to understand what is planned, to adapt accordingly or to mount a persuasive case for change. All external support is time limited in any event, creating a risk that external actors will favour proposals for processes that attempt too much too soon⁸⁶ or are too short-term in nature to assist meaningful change. International experts engaged by organisations providing support are usually unable or unwilling to spend a significant period in-country or to return frequently, making it hard to develop the mutual understanding and trust on which effective support may depend. Considerations of these kinds may contribute to the rigidity of timelines for external support, precluding the flexibility to adapt to contingencies that arise.

Some other operational challenges relate to the project-based nature of much external support. Most external support is provided for particular aspects of a constitution building process, each of which is part of a larger whole that needs to work in an integrated way. There is a risk in these circumstances that aspects of a process may be prioritised in a way that distorts the process as a whole or causes other parts of it to work less effectively. In Nepal, for example, the

⁸⁴ Dialogue, 'Lessons Learned from Support to Constitution Building Processes', November 2023. See also Muna B Ndulo, 'Constitution Making: The Role of External Actors' (2014) 1 Southern African Journal of Policy and Development 9.

⁸⁵ Rubio-Marín and Irving (n 81) 27.

⁸⁶ 'The Challenge of Sustaining Peace: Report of the Advisory Group of Experts for the 2015 Review of the United Nations Peacebuilding Architecture' (United Nations 2015) para 33.

focus of some external support on particular groups of members of the first Constituent Assembly may have diverted their attention from the workings of the Assembly as an institution, contributing to the dominance of party leaders.⁸⁷

A third, connected group of challenges is *institutional*. Many of these derive from the structures of external support within donor states and other donor organisations, within bodies organising the provision of external support and between donors, organisers, and individual providers.

Some examples illustrate the point. Elaborate accountability requirements for expenditure and outcomes that are taken for granted by donors and constitution building organisations may place onerous burdens on constitution building states, ultimately discouraging take-up of support.⁸⁸ The expectations of donors and organisers may affect not only overall time-lines for external support for a process but also the speed for a move towards outcomes that impress external stakeholders, such as elections or promulgation of a new Constitution, which may be counterproductive in context.⁸⁹ Agreements between donors and organisations may be too rigid to allow a ready response to the contingencies that often arise in the course of a constitution building process. The policy settings or normative values of donors or organisers may dictate preferential treatment of some stakeholders or the exclusion of others or may to maintain the authority of leaders for geopolitical reasons unconnected with the success of a constitution building process. The policy settings of states contributing to external support in any event may change, following elections or

⁸⁷ Bikram Timilsina, 'The Role of External Actors in Nepal's Peace Process' (PhD thesis, Griffith University 2022).

⁸⁸ Dialogue, 'Lessons Learned from Support to Constitution Building Processes', November 2023; Ladley (n 71) 16.

⁸⁹ Eg. in Somalia: Böckenförde (n 58) 160–61; Afyare Abdi Elmi, 'Revisiting the UN-Controlled Constitution-Making Process for Somalia' (*E-International Relations*, 2 September 2012) <<https://www.e-ir.info/2012/09/02/revisiting-the-un-controlled-constitution-making-process-for-somalia/>>

other political developments, in ways that destabilise processes that they previously supported.

Other institutional challenges arise from the incentive structures for external support. The business model for organisations providing external support encourages competition for access and funding, contributing to a multiplicity of actors, with potentially conflicting approaches and perspectives, many of whom seek to claim credit for the achievement of certain outcomes. It can also encourage those involved to claim (and overclaim) credit for having assisted a constitution building process in ways that sour relations with local stakeholders and undercut the emergence of persuasive national constitution-making story.⁹⁰

A final group of challenges are cultural in nature, in the sense of reinforcing a *distinction between 'us' and 'them'*. These encompass tendencies for those providing support to feel, or to convey an impression of feeling, a sense of superiority vis-à-vis the constitution building state, its institutions, and its stakeholders; a familiar problem in development assistance.⁹¹ In practical terms, this may be manifested in differential working conditions and remuneration between local and international personnel, creating resentment on the part of recipients of external support. It may be manifested also, even if inadvertently, in actions and attitudes including, for example, impatience with local spoken English and the processes of local institutions. Challenges of these kinds may be exacerbated by still unresolved or unsettled historic relationships, stemming from colonisation or slavery. They affect the development of a productive working relationship between the recipients and providers of external assistance. They may affect the operations of collaborative

⁹⁰ Bisarya (n 22) 15.

⁹¹ To quote from one critique: 'Donors tend to assume the role of teaching "them" (politicians and people of so-called fragile states) how to do "our" (the western developed donor states) institutions better local ownership clearly means "their" ownership of "our" ideas': Volker Boege and others, *On Hybrid Political Orders and Emerging States: State Formation in the Context of 'Fragility'* (Berghof Research Center for Constructive Conflict Management 2008) 15.

and consultative procedures, already under stress from the power dynamics between provider and recipient and the inequalities between states.⁹² They may sideline local institutions, missing the opportunity both to learn from them and to contribute to capacity-building. They may downplay local perspectives on issues and options in the constitution building process, wasting insights that they could offer a productive way forward.

4.4 Help and hinder for positive external support to constitution building processes

Effective external support to constitution building processes, in the sense used in this report, essentially involves maximising the opportunities discussed above and minimising the challenges as far as it is possible to do so. To make this exercise less impressionistic, this report incorporates the opportunities and challenges into the four factors drawn from the conceptual framework for external support set out in Chapter 3. Understood in this way, the factors can be used to analyse what helps and what hinders external support to any aspect of constitution building, including the constitution building processes that are the focus of this report.

The factors stand alone but are also mutually reinforcing. They are potentially relevant, although in different ways, to all those offering external support to constitution building processes: donors, diplomats, organisations, and individual providers. They are applied to the particular contexts of inclusive constitution building and constitution building in connection with peace processes in Chapter 6. They guide the conclusions and recommendations from the study, which are set out in Chapter 7.

⁹² Babatunde Fagbayibo, 'The (Not So Hidden) Elephant in the Room: Confronting International Constitution-Making's Eurocentric Gaze' (2023) 117 240.

4.4.1 National ownership and leadership

The first of the four factors identified in Chapter 3 was respect for and promotion of national ownership and leadership. National ownership and leadership are widely agreed to be critical for the outcomes of constitution building. On the other hand, as Chapter 3 also noted, it has two dimensions. One, which we describe as ‘thin’, refers to local, as opposed to international, ownership. The other refers to a thicker sense of ownership, requiring broad-based support across the community of the constitution building state.

Both are relevant for progress towards constitutional stability, in the short and the longer term. National ownership and leadership of a constitution building process helps to ensure that it is fit for purpose, that those responsible for implementation are committed to it, and that those making decisions about the process can be held to account.⁹³ It can encourage creative solutions that are locally owned when problems arise during constitution making process.⁹⁴ It contributes to the foundations for a national constitutional story that can help to withstand future challenges. The claim for the Constitution of Kenya as a ‘Peoples’ Constitution’, for example, has been used strategically in judicial reasoning in politically sensitive cases.⁹⁵

For the purposes of this factor, external support needs to act both positively and negatively: facilitating and encouraging a suitable process and exercising self-restraint so as to remain within the boundaries of ‘support’. This balance is easier to achieve when the

⁹³ Commenting on the lack of external support in Somaliland one participant described it as ‘a blessing in disguise’ because ‘at least the mistakes are ours and we can live with our mistakes’: Seidel (n14) 35.

⁹⁴ Examples include the National Dialogue process initiated by four civil society organisations when the Tunisian constitution making process was at a standstill; and the interim arrangements agreed by political parties under the temporary leadership of the Chief Justice to provide governance between the two Constituent Assemblies in Nepal.

⁹⁵ See eg. *Attorney General v Ndii* (Building Bridges Initiative Case) Supreme Court of Kenya, Petition No. 12 of 2021.

goals of local decision-makers and external actors broadly align. When they do not, more delicate questions may arise about the bases for disagreement, the room for reconciliation, the appropriate limits of persuasion and alternative course of action available to either side.

Most of the opportunities and challenges identified earlier inform this factor in some way. In terms of opportunity, external support can offer resources needed to advance the thicker notion of ownership. It can provide comparative knowledge about processes that have been effective elsewhere and how they might apply in the current context, and understanding and application of international norms and standards, including access to relevant networks. Challenges faced by external support in the course of meeting the requirements of national ownership include adequately understanding relevant context and adapting advice and other contributions accordingly, having sufficient flexibility to respond to changing needs, being modest in claiming credit for activities and outcomes, and working collaboratively with local stakeholders and agencies.

There is potential for tension between national ownership and ideals of constitutional democracy that evolved from the experiences of what now are prosperous and established democracies. It requires those providing external support to widen their understandings and indicia of what a constitution making process should look like to be more inclusive of global constitutional experience.⁹⁶ This may involve taking up new ideas or accepting that older ideas are necessarily modified by context, in the interests of the continuing development of constitution making processes that fit the expectations of communities and work effectively in practice.⁹⁷

⁹⁶ Peters (n 18) 106.

⁹⁷ Steven Ratuva, 'The Gap between Global Thinking and Local Living: Dilemmas of Constitutional Reform in Nauru' (2011) 120 *The Journal of the Polynesian Society* 241, 247.

4.4.2 Adding value

The second factor that can be used in gauging the effectiveness of external support is the extent to which it adds value to a constitution building process. The earlier discussion of opportunities shows that it has the potential to do so in a host of ways: providing resources, offering insights into comparative experience, explaining international norms and standards, providing logistical expertise, and bringing a measure of independence that may be useful for some purposes.

The challenges suggest that other considerations also have a bearing on the extent to which this factor is satisfied. One is the quality of the support provided, the requirements for which are taken up in discussing the next factor. Another, which is more complex, involves consideration of need.

External support adds value when it offers something that cannot be done locally. Even in this case it can be further enhanced in many cases by leaving space for local initiatives and encouraging the development of local capability. Adding value also requires support to be responsive to exactly what is needed and in a form that is most useful. An example mentioned in the course of the Dialogues was of a provider who began by asking what the local constitution building group wanted to know or was presently struggling with, adapting the support given accordingly.⁹⁸

This factor thus places a premium on collaboration and partnership, a requirement that assists other factors as well. In an ideal form, such a relationship blurs the boundary between provider and recipient in an association based on mutual trust between competent external actors and national stakeholders, including civil society, to develop and apply a collective body of knowledge.⁹⁹

⁹⁸ Dialogue, 'Lessons Learned from Support to Constitution Building Processes', November 2023.

⁹⁹ Mariana Mazzucato and Rosie Collington, *The Big Con: How the Consulting Industry Weakens Our Businesses, Infantilizes Our Governments, and Warps Our Economies* (Penguin Press 2023).

Consideration of need may also raise questions about whether and when a process to make a new Constitution is appropriate at all. These are particularly pertinent in conflict-affected contexts, to which we return in Chapter 6. Wholesale constitutional reform is not always conducive to a more stable constitutional system. At least some aspects of constitution building exacerbate, rather than resolve division. In order to add value to a process, external support should be conscious of and responsive to this possibility. This may involve sensitivity to potential flashpoints: the Venice Commission, for example, does not issue its opinions during an electoral campaign, when its advice is more likely to be politically exploited.¹⁰⁰ It may also involve pointing to the risks of constitution building, noting alternatives drawn from comparative experience and directing external assistance to reviving existing institutions of government or to other governance or rule of law projects.¹⁰¹

4.4.3 Quality

The quality of external support is a third factor by which to gauge its effectiveness and to work out what helps and what hinders productive outcomes. Some characteristics of external support are intrinsic to quality for the purposes of constitution building including breadth of comparative knowledge, methodological capability, cross-cultural and interpersonal skills, integrity, and efficiency. Quality also requires the challenges identified earlier to be minimised. All of these are connected in one way or another to externality, although externality also brings opportunities too.

Drawing on the earlier discussion of challenges, some of the principal considerations relevant to the quality of external support are the following.

¹⁰⁰ Buquicchio and Granata-Menghini (n 43) 243.

¹⁰¹ Williams (n 36) 19; Seidel, 'Involvement and Impact of External Actors on Constitution Making in South Sudan and Somaliland: A Comparative Study' (n 16) 35.

Effective external requires an adequate understanding of relevant context, to which it is responsive. For this purpose, context includes the entire constitution building process as a whole and an appreciation of where the aspect of the process receiving external support fits into the whole. Without this, there is a risk of external support for one set of issues distorting the operation of others. Context also includes the broader social and political context for constitution building as explained in Chapter 3. Context in this sense is necessary for understanding the society for which the constitution building process must provide and the comparative knowledge that is relevant for the purpose. It can help to avoid inadvertent favouritism, through dealing with groups that are more accessible to external actors, in terms of language or comprehension of constitutional issues, or because of past relationships with external support providers.¹⁰²

Context also can assist with the promotion of international norms and standards, by enabling them to be explained, presented and, if necessary adapted, in ways that are more readily grasped and accepted locally. This way of proceeding is the antithesis of ‘checklists’ or ‘toolboxes’ of good or best practice, which risk being taken as inflexible standards divorced from context, or as ‘recipes’ from which local actors can choose standards to combine according to their own interests or entrenched power relations.¹⁰³

¹⁰² Eg. external providers tend to favour elite urban women who speak an international language: Murray and Wittke (n 37) 119.

¹⁰³ Katrin Seidel, ‘The Promotion of Rule of Law in Translation: Technologies of Normative Knowledge Transfer in South Sudan’s Constitution Making’ in Tobias Berger and Alejandro Esguerra (eds), *World Politics in Translation* (Routledge 2018) 84–6.

Support adequately tailored to context in these senses might be achieved through the choice of organiser and provider, through the suitability and effectiveness of local partnerships, or both. Considerations that might influence choice for this purpose include presence and connections in the constitution-building state; a local workforce; continuity of connection with the constitution building process;¹⁰⁴ the relevance of south/south knowledge; and other linkages through geography, language, religion, culture, or legal system. Some practitioners highlighted the value of immersion in the country, either by living and working there or through sustained consultations with citizens and focussed research.¹⁰⁵

The organisational and institutional challenges for external support also offer insights for what quality involves. External support needs to be sensitive to the impact of onerous accountability requirements on recipients to whom they are unfamiliar and who have limited resources. External support also can be enhanced by realism about the difficulties of a constitution building process and readiness to be flexible around timing and expectations of outcomes. Reaching tangible milestones of the kind typically specified as goals of external support often takes longer than predicted. Glitches are common along the way. External support needs to be tailored to the rhythm of a process that otherwise is working well. Moving too quickly can be divisive and counterproductive. Moving too slowly, which can be problematic too, may suggest deliberate blockage on the part of key parties, in ways with which strategic action by external actors also might assist.

Overlapping and sometimes contradictory external support has been another problem stemming from institutional realities that has detracted from its quality and the outcomes it is able to achieve. There have been advances in the co-ordination of both funding and

¹⁰⁴ Dialogue, 'Lessons Learned from Support to Constitution Building Processes', November 2023.

¹⁰⁵ Regan (n 39). Dialogue, 'Lessons Learned from Support to Constitution Building Processes', November 2023.

support activities in recent years, through multi-party trust funds and basket funds with a single administrator, and the adoption of the UN funding compact. Co-ordination can enhance external support, by maximising funding, channelling funds in an effective and efficient manner to avoid the risk of duplication, reducing administration costs, and limiting the likelihood of mixed messages from external sources.¹⁰⁶ On the other hand, co-ordination among external actors could deepen a sense of ‘us’ and ‘them’ detracting from the relationship between external providers and recipients of support. Co-ordination by institutions of the constitution-building state, or involving the state as equal partner, may be preferable for these reasons.¹⁰⁷

4.4.4 Reception and weight

The final factor by which to gauge the effectiveness of external support concerns its impact, in terms of the weight accorded to it and the extent to which it is taken seriously, whether it ultimately affects outcomes or not. This factor also draws in various ways on each of the opportunities and challenges.

¹⁰⁶ Based on an empirical study of twenty critical junctures, including constitution-building moments, in Burundi, Nepal, Kenya, Kyrgyzstan, Senegal, and Timor-Leste, Fiedler et al. conclude that external support could potentially generate better results for the recipient state if it is extended in a well-coordinated manner. Charlotte Fiedler and others, ‘Gradual, Cooperative, Coordinated: Effective Support for Peace and Democracy in Conflict-Affected States’ (2020) 21 *International Studies Perspectives* 54.

¹⁰⁷ Eg. The Gambia, where the Constitutional Review Commission was mandated to review the existing constitution, conduct consultations with stakeholder groups and the wider public, and draft a new Constitution. Funding from external sources for constitution building was channelled to the government, not the Commission. The Commission engaged its own external providers where required, pursuant to its governing legislation. This was done so that the Commission was not subject to foreign influence, nor seen to be. Dialogue, ‘Lessons Learned from Support to Constitution Building Processes’, November 2023.

The requirement for weight is most readily satisfied when local decision makers are open to external support and maintain a positive attitude towards it throughout the relevant constitution building period. This stance may be attributable to the orientation of stakeholders within the constitution building state itself. They may recognise the opportunities that external support brings, or value the international kudos associated with receiving external support and collaborating with it.

Openness to external support and its continuation over time also can be encouraged by the qualities of the external support itself, in ways that assist understanding of how weight can be achieved. Key considerations include the usefulness of the support provided, in the form in which it is provided and the standing of those providing support, in terms of experience, reputation, and demonstrated familiarity with the instant case.¹⁰⁸ Familiarity in turn can effectively build on linkages of the kind discussed in relation to the quality factor, which include shared history, language, religion, culture and legal system and can be fostered by continuity with the constitution building state over time.¹⁰⁹

A constructive relationship between local stakeholders and providers is critical to the positive reception of external support. It facilitates a shared understanding of the goals of the constitution building project and agreement on the modalities of external support. It requires effective, regular, consultative arrangements for feedback and, if necessary, adjustments, characterised by mutual understanding and respect.

Leverage potentially also plays a role in ensuring external support is taken seriously. Where leverage is exercised through diplomatic channels co-ordination is necessary within contributing states to ensure that those responsible for diplomacy and constitution

¹⁰⁸ For an example of indicators to measure performance in this regard, see International IDEA, 'Constitution Building Programme Progress Markers'.

¹⁰⁹ Dialogue, 'Lessons Learned from Support to Constitution Building Processes', November 2023. See also Brandt and others (n 22) [2.3.6].

building assistance are mutually informed and in a position to support each other. Leverage may involve, for example, the continuation of external support, other forms of conditionality, or promises of future political, economic, or other advantage. It needs to be exercised with care to avoid being counterproductive. In current geopolitical conditions it is also necessary to consider the potential impact of competitive sources of support.

The requirement for weight to be accorded to external support is more complex where key stakeholders suspicious of or hostile to external support even where, formally, it is accepted. Those in positions of leadership may be opposed to any developments that impinge on their power, putting difficulties in the way of an effective process for constitutional change or to counter democratic decay.

Even in conditions like these, many of the measures identified in this part as conducive to the reception of external support are still applicable. Skilful diplomacy, including strategic leverage, may be effective after all. And even if political leaders remain opposed, as long as segments of civil society, particular communities, territorial groupings, or alternative leaders are in a position to benefit from external support, it may be able to play a constructive role that ultimately contributes to a more stable constitutional system.

In the end, however, there may be circumstances in which external support for constitution building should not proceed, although other forms of assistance might take its place. In discussions in the Dialogues, we were told of cases where progress seems impossible, at least in the short term, and of at least one case where an external organisation had withdrawn. External support can give credence to processes and leaders where this is not warranted. Withdrawal of support in such cases may be conducive to better outcomes in the long run. It would be useful for donors and organisers to understand and accept that this may be an appropriate course of action, as a last resort, that does not necessarily reflect on what has been done already.

5 Swedish support to constitution building processes

This chapter maps the nature and extent of support provided by Sweden to constitution building processes. It responds to a question asked by the EBA about the support provided by Sweden and in doing so, offers an insight into these arrangements from a donor perspective. It shows that the organisation, priorities, and policy preferences of individual states also help to shape external support to constitution building. Sweden is a significant donor to constitutional building processes and offers one, significant example. Other donor states may have different structures and different priorities.

5.1 Swedish frameworks for external support

Mapping Sweden's support to constitution building is made difficult by the fact that 'constitution building' is rarely explicitly mentioned in overarching policies and policy frameworks for Sweden's development cooperation.¹¹⁰ The 2008 policy for global development may have approached it most closely with its emphases on democracy, human rights, conflict prevention and the rule of law in the poorest states.¹¹¹ The Aid Policy Framework of 2013/14 noted

¹¹⁰ Neither 'constitution building' nor 'constitution making' is explicitly mentioned in the policies or policy frameworks since 2003: see *Shared Responsibility: Sweden's Policy for Global Development* Govt Bill 2002/03:122; *Global Challenges – Our Responsibility: Communication on Sweden's Policy for Global Development*, Govt Comm.2007/08:89; *Aid Policy Framework: The Direction of Swedish Aid*, Govt Comm.2013/14:131; *Policy Framework for Swedish Development Cooperation and Humanitarian Assistance*, Govt Comm.2016/17:60.

¹¹¹ *Global Challenges – Our Responsibility: Communication on Sweden's Policy for Global Development*, Govt Comm.2007/08:89, p 10.

that a constitution is the basis of a democratic state, but did not identify a specific role for Sweden.¹¹² Government strategies setting thematic, country or regional objectives also did not explicitly mention constitution building or constitution making.

Interviews with representatives of the Swedish Ministry for Foreign Affairs and the Swedish Development Agency (Sida) clarified that support to constitution building tends to fall under three different areas:

1. Human rights, democracy, and the rule of law. A constitution is regarded as the basis for democracy and effective democratic institutions and the foundation for protecting and realising human rights. The constitution building process is regarded as an opportunity for advancing democracy.
2. Peaceful and inclusive societies. Constitution building also is associated with Sweden's efforts in conflict prevention, peacebuilding, and resolving grievances within a society.
3. Gender equality and women's rights. The equal participation of women in political processes is one of Sweden's priorities. Constitution building is seen as an opportunity to promote greater inclusion and participation.¹¹³

Consistently with this policy framework, support to constitution building does not have a single explicit institutional home in Sweden but rather is spread across several government bodies. Institutions and actors that work on Sweden's support to constitution-building include the Ministry of Foreign Affairs, with Sida and the Folke Bernadotte Academy as important adjuncts and also, historically, the

¹¹² Aid Policy Framework: The Direction of Swedish Aid, Govt Comm.2013/14:131, p 20.

¹¹³ Interviews 22, 23, 24, 25, 26 and 30.

Ministry of Justice.¹¹⁴ Staff are predominantly based in Stockholm but are supported by a network of staff located around the world.¹¹⁵

The Ministry of Foreign Affairs is broadly responsible for policy-making, co-ordination amongst official Swedish actors and implementation. The Ministry is structured into directorates that are further broken down into departments that have thematic or geographic responsibilities. Work on support to constitution building occurs in the departments for international law and human rights, UN policy, conflict and migration, and the geographic departments. Other areas are responsible for managing overarching relationships with multilateral partners relevant to Sweden's support to constitution building.

Sida supports constitution building as part of development cooperation. Sida is organised into sections that focus on particular countries or regions, with a single section for thematic work. Sida is responsible for managing framework agreements and contributions to civil society organisations, which are also key partners in implementing Sweden's support to constitution building.¹¹⁶ Further agreements with local civil society organisations are managed through Sida's thematic and geographical units or through Swedish embassies.¹¹⁷

¹¹⁴ Ministry of Justice officials provided support to Baltic countries in the 1990s, but there is not much information available on this work.

¹¹⁵ Sida estimates that nearly a quarter of its 845-member workforce is based overseas: <https://www.sida.se/om-sida/organisation>. At the time of writing there were approximately 100 Swedish embassies: <https://www.government.se/government-of-sweden/ministry-for-foreign-affairs/organisation/>

¹¹⁶ There has been criticism of Sida's partnerships with Swedish and international civil society organisations from the aid community as part of a larger movement to decolonise. It is suggested that more funding should go directly to local civil society organisations: 'Time to Decolonise Aid: Insights and Lessons from a Global Consultation' (Peace Direct 2021).

¹¹⁷ Sida, 'Support to Civil Society Organisations' <https://www.sida.se/en/for-partners/civil-society-organisations>

The Folke Bernadotte Academy is a Swedish government agency for Swedish agency for peace, security, and development. It engages with constitution building when it arises in its thematic focus areas dialogue and peace processes; rule of law, human rights, and elections; and women, peace, and security.¹¹⁸

5.2 Swedish funding for support to constitution building

The methodological challenge of this mapping exercise was described in Chapter 2.5. There is no explicit mention or coding for constitution building in the available databases. As a result, constitution building activities are reported under such other related headings as democracy and human rights, gender equality, or peaceful and inclusive societies, and/or geographic desks. For the purposes of this report, constitution-building related activities were identified using the title and description of contributions; further clarification was obtained through interviews with staff from Sida and the Ministry of Foreign Affairs. Contributions may have been missed if they did not explicitly refer to constitution-building activities in the title or description.

The analyses here focus on the period 1998–2023, for which records are available.

Sweden provides two main types of funding:

- Specific contributions, in the sense of funding for specific projects related to constitution building; and
- Core funding, that is provided to organisations that work on constitution building.

¹¹⁸ Folke Bernadotte Academy, ‘Areas of Expertise’ <https://fba.se/en/areas-of-expertise/>

5.2.1 Specific contributions

This section estimates specific contributions provided for projects related to constitution building. The amounts are only indicative; in many cases, support to constitution-building was part of a larger programme. In these cases, the total amount was divided by the number of priorities/focus areas, with results set out below.¹¹⁹

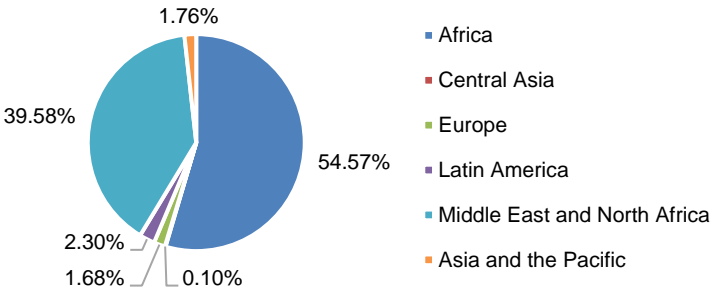
Where were specific contributions directed?

Specific contributions for constitution building processes were directed predominantly to Africa and the Middle East.

Figure 1 shows that over the period 1998–2023, the largest portion of Swedish funding for constitution building went to Africa at 54.57% (approximately 50,086,806 USD), followed by the Middle East and North Africa at 39.58% (approximately 36,329,518 USD). The remaining funding of just over 5% is spread between Asia and the Pacific, Central Asia, and Europe.

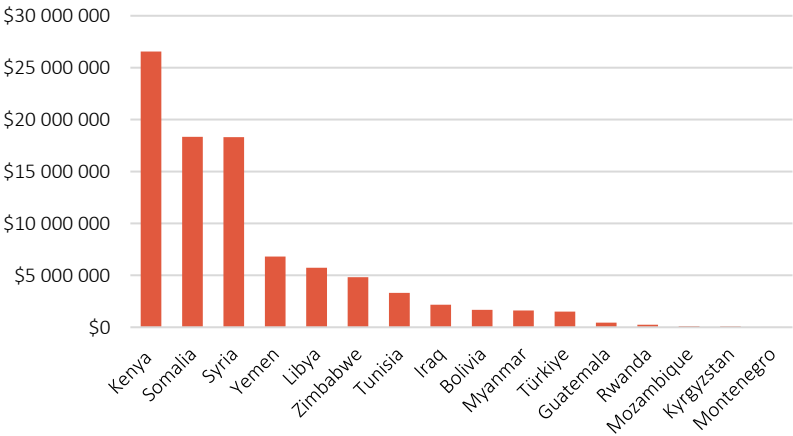
¹¹⁹ To illustrate, if the total amount was 100 USD for a rule of law programme and the programme had four focus areas, one of which was constitution building, 25 USD (one quarter of the total) was recorded as support to constitution-building. If the duration of constitution-building activities was shorter than the lifespan of the whole programme, then only the amounts for the relevant years were used. The cost of constitution-building activities per year may vary, but as contributions were not recorded to this level of detail it was necessary to estimate.

Figure 1: Estimated Swedish funding to constitution building by region, 1998–2023¹²⁰



The mapping identified 16 countries which received assistance for constitution building from Sweden (Figure 2). The top five recipients of Swedish support were Kenya (28.94%), Somalia (19.99%), Syria (19.94%), Yemen (7.42%), and Libya (6.24%). Together these five countries received 83% of Sweden’s specific contributions for constitution building.

Figure 2: Estimated Swedish funding to constitution building by country, 1998–2023¹²¹



¹²⁰ Data from OpenAid on recorded disbursements from 1998 to 2023.

¹²¹ Ibid.

The decision to direct funding to a specific country is informed in part by that country's context, in particular whether constitution building is occurring. There are also considerations connected with 'supply' that inform the decision to support a particular constitution building process, and the nature of that support.

Interview data and an analysis of policy documentation, literature and funding flows suggest three main factors that influence Sweden's decision to provide specific contributions for constitution building in the 16 countries identified here.

1. **Bilateral cooperation:** In 11 of the 16 countries that received specific contributions for constitution building, there was an established bilateral development arrangement in place prior to the constitution building process. This existing assistance was then adapted to include support for the constitution building process.
2. **Poverty reduction:** Swedish official aid and development cooperation has focused on poverty reduction since its inception some 50 years ago.¹²² All 16 countries that received specific contributions for constitution building were ODA recipients at the time.
3. **Conflict prevention and peacebuilding:** Swedish aid and development cooperation has long focused on peacemaking and conflict resolution.¹²³ Eight of the 16 or the countries that received specific contributions were undertaking constitution building in contexts affected by conflict.

¹²² Mats Härsmar, 'Poverty Focus in Selected Swedish Aid Portfolios' (Expertgruppen för Biståndsanalys (EBA) 2014) Working Paper.

¹²³ Ada Nissen, 'A Historical View on the Nordic "Peace Brand": Norway and Sweden: Partners and Competitors in Peace' in Antoine de Bengy Puyvallée and Kristian Bjørkdahl (eds), *Do-Gooders at the End of Aid: Scandinavian Humanitarianism in the Twenty-First Century* (Cambridge University Press 2021).

Table 1 sets out how each of these factors arose in the 16 states at the time of the constitution building process. Other factors influencing Sweden's decision to provide support in those states that may be relevant but are harder to isolate. These include political decisions and specific staff competence in supporting constitution building.

Table 1: Contextual factors in countries receiving specific contributions from Sweden to support constitution building

Country	Prior bilateral cooperation	ODA recipient ¹²⁴	Conflict ¹²⁵
Bolivia	Yes	Yes	No
Guatemala	Yes	Yes	No
Iraq	Yes	Yes	Yes
Kenya	Yes	Yes	No
Kyrgyzstan	No	Yes	Yes
Libya	No	Yes	Yes
Montenegro	Yes	Yes	No
Mozambique	Yes	Yes	No
Myanmar	Yes	Yes	Yes
Rwanda	Yes	Yes	Yes
Somalia	Yes	Yes	Yes
Syria	No	Yes	Yes
Tunisia	No	Yes	Yes
Türkiye	Yes	Yes	No
Yemen	No	Yes	Yes
Zimbabwe	Yes	Yes	No

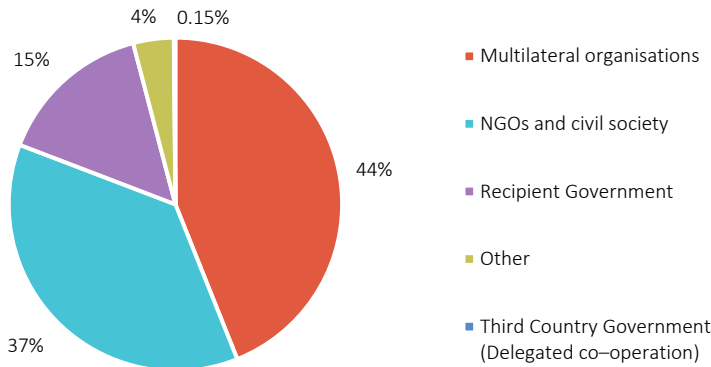
¹²⁴ Determined by considering the lists of DAC recipients in the year in which support to constitution building was provided
<https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/>

¹²⁵ The existence of conflict close to the time to the provision of support to constitution building was coded using the Uppsala Conflict Data Program
<https://ucdp.uu.se/>

What kind of organisations receive specific contributions for constitution building?

Sweden has a clear preference for channelling specific contributions for constitution building via multilateral organisations (which received 44% of the total funds, approximately USD 40,331,638) and NGOs and civil society (which received 37%, approximately USD 33,834,701). This preference is confirmed by noting that the 15% that was provided to governments (USD 13,864,595) consists of only one incidence, which was provided directly to the Kenyan government.

Figure 3: Estimated Swedish funding to constitution building by partner type, 1998–2023



The funding provided to multilateral organisations is almost exclusively provided to the UN Development Programme, with a small percentage (0.3%) provided to an ‘unspecified’ multilateral organisation.

The category for NGOs and civil society groups can be subdivided into three categories: developing country-based NGOs (often based in the recipient country or a neighbouring country), international NGOs, and donor country-based NGOs). Table 2 shows that developing country-based NGOs receive a slightly higher proportion

of the funding. The total amount given to developing NGOs may, in fact, be larger, as Sida engages with international and Swedish NGOs which further distribute funding to NGOs and civil society groups in partner countries.

Table 2: Estimated Swedish funding to NGOs by NGO type, 1998–2023¹²⁶

Partner type	Total	Percentage
Developing country–based NGOs	USD 16,263,084	48%
International NGOs	USD 12,532,186	37%
NGOs based in Sweden	USD 5,039,430	15%
Total	USD 33,834,700	100%

5.2.2 Core funding

Sweden also provides core funding to a number of organisations that work on constitution building and related activities.

Table 3: Non-exhaustive list of organisations receiving core funding from Sweden, 1998–2023¹²⁷

Organisations	Total
Institute for Integrated Transitions	USD 2,000,000
Centre for Humanitarian Dialogue	USD 5,464,047
CMI	USD 10,000,000
Conciliation Resources	USD 61,500,000
European Institute of Peace	USD 5,770,000
InterMediate	USD 598
International IDEA	USD 64,685,835

¹²⁶ Data from OpenAid on recorded disbursements from 1998 to 2023.

¹²⁷ Ibid.

5.3 Characteristics of Swedish support

Official documentation and academic analysis of Sweden's overseas development policies emphasise some of the key values that shape its provision of support for constitution building processes.

5.3.1 National ownership

In keeping with broader Swedish development cooperation policies, support to constitution building seeks to promote national ownership. An in-depth study on Swedish development assistance to the legal sector noted that Sida does not and should not promote Swedish solutions but rather Sweden's role was that of catalyst and stimulator of the country's own resources.¹²⁸

Consistently with this value, Sweden's preference appears to be to support the sharing of broad comparative knowledge to enable local actors to determine what is most suitable to their context.¹²⁹ Sweden does not promote its own governance arrangements as a model for others, apart from the principles to which Sweden adheres. This may be due in part to awareness of the difficulty of transplanting Swedish constitutional arrangements, but it is consistent with a commitment to national ownership.

Consistently also, the Swedish government has not built up an internal capacity dedicated to constitution-building that can be deployed to support processes in other countries or to engage in institutional partnerships. Rather, Sweden tends to provide support via multilaterals such as the EU, OSCE, and the UN, or to build local capacity in the form of local and regional civil society and NGOs.

¹²⁸ Sida, 'Swedish Development Cooperation in the Legal Sector' (Division for Democratic Governance 2022).

¹²⁹ Ibid 18.

5.3.2 Values-based development cooperation

Sweden's policy frameworks that anchor support to constitution building are driven and characterised by a commitment to international values and norms, such as democracy and human rights, peace, gender equality, and poverty reduction. The countries selected for support tend to be poorer and/or affected by conflict, chosen with a view to supporting democratic transitions and achieving sustainable peace. Interviews with Swedish government representatives and national and multilateral counterparts with knowledge of Swedish assistance, further reinforced the importance of these values to Sweden's support to constitution building.

This is consistent with the broader narrative of Swedish development cooperation, which has long been associated with the concept of 'Nordic exceptionalism'. This is the idea that Nordic states are seen to be motivated by altruistic and idealistic goals of humanitarianism and solidarity, in contrast to the more self-interested policies of the great powers.¹³⁰

For example, Sweden has been labelled a 'moral superpower',¹³¹ an 'agent of a world common good' and a 'global good Samaritan' because of its focus on poverty reduction, democracy, human rights, sustainable development, multilateralism, and considerable ODA commitments.¹³²

¹³⁰ Carol Lancaster, *Foreign Aid: Diplomacy, Development, Domestic Politics* (University of Chicago Press 2007); Antoine de Bengy Puyvallée and Kristian Bjørkdahl, 'Introduction: On the Resilience of the Scandinavian Humanitarian Brand' in Antoine de Bengy Puyvallée and Kristian Bjørkdahl (eds), *Do-Gooders at the End of Aid: Scandinavian Humanitarianism in the Twenty-First Century* (Cambridge University Press 2021); Olav Stokke, 'The Drivers of ODA: What Can They Tell About the Future?' in Olav Stokke (ed), *International Development Assistance: Policy Drivers and Performance* (Springer International Publishing 2019); Christine Ingebritsen, 'Norm Entrepreneurs: Scandinavia's Role in World Politics' (2002) 37 *Cooperation and Conflict* 11.

¹³¹ Ann-Sofie Dahl, 'Sweden: Once a Moral Superpower, Always a Moral Superpower?' (2006) 61 *International Journal* 895.

¹³² de Bengy Puyvallée and Bjørkdahl (n 131).

5.3.3 Swedish support seeks to foster inclusion

Sweden's approach to development cooperation seeks to foster social, political, and economic inclusion, both as a general priority and in the context of its support to constitution building. This is illustrated by Sweden's rights-based approach to development cooperation, which emphasises the right of all persons to influence and participate in government and focuses on empowering individuals as active participants in the process of development.¹³³

A distinctive feature of Sweden's work on inclusion is bottom-up, grassroots origins, which continue to play an important role in shaping and implementing Swedish development cooperation. Swedish development has its roots in the work and contacts of missionary groups and various types of popular movements, such as trade unions, and solidarity across special interest groups. As such, Sweden has developed strong links with domestic and international civil society in the areas of democracy, human rights, rule of law, gender equality, LGBTQI rights, and peacebuilding.¹³⁴

In doing so, a significant part of Swedish funding has built local capacity within civil society organisations and NGOs that provide resources for marginalised groups to engage in political processes, such as constitutional processes. For example, long term international support from Sweden, amongst others, contributed to building the capacity of Georgian civil society to participate in constitutional reform processes.¹³⁵

¹³³ *Gemensamt ansvar: Sveriges politik för global utveckling* Prop. 2002/03:12; Rickard Mikaelsson, *Promoting Democracy: Sweden and the Democratisation Process in Macedonia* (Linköping University 2008).

¹³⁴ OECD, 'Sweden', *Development Co-operation Profiles* (OECD Publishing 2023).

¹³⁵ Delegation of Georgia to the OSCE, 'Georgia: Recent and Upcoming Democratic Reforms June 2008-August 2010' (OSCE Review Conference RCDEL/29/10 2010) Status Update.

5.3.4 Gender equality

Gender equality is a long-standing priority of Sweden's foreign policy and international development cooperation. Sweden is a world leader in terms of gender-marked development cooperation and generally spends well above like-minded donors in the OECD and the DAC average on targeted funding.¹³⁶ Sweden uses a gender equality policy marker to record ODA activities that target gender equality. There are three categories ranging from 'not targeted' at the lowest level to 'principal objective' at the highest. The gender policy marker has not been recorded for 40% of the specific contributions from Sweden for constitution building support. This may be due to the age of the records and human error, amongst other factors. However, where it was recorded, specific contributions for constitution building recorded gender equality as a principal objective in 65% of cases (approximately USD \$19,272,260) and a significant objective in 35% (approximately USD \$35,103,788). Sweden also provides core funding to international organisations and institutions engaged with the gender dimensions of constitution-building and peace-making such as UN Women,¹³⁷ the International Development Law Organisation,¹³⁸ and Swedish NGO Kvinna till Kvinna.¹³⁹ An example is Sweden's support to Coordinadora de la Mujer, a network of NGOs that coordinated the women's movement in the Bolivian constitutional process, including indigenous women.¹⁴⁰

¹³⁶ Donor Tracker <https://donortracker.org/sweden/gender>

¹³⁷ 'Partners for Change: UN Women and Sweden'

<https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Partnerships/Donor%20Countries/Partners-for-change-Sweden-en.pdf>

¹³⁸ 'Partners for Change: UN Women and Sweden'

<https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Partnerships/Donor%20Countries/Partners-for-change-Sweden-en.pdf>

¹³⁹ Kvinna till Kvinna, kvinнатillkvinna.org/about-us/what-we-do/wps/

¹⁴⁰ Interview 22.

6 External support for inclusive constitution building processes

This chapter deals with external support for inclusive constitution building processes. In particular, two aspects of inclusion are dealt with: inclusion in constitution building bodies (6.1) and inclusion as public participation (6.2). The second part of the chapter (sections 6.4 to 6.6) deals with external support for constitution building processes in the context of conflict, where inclusion has special significance and presents additional challenges.

Written constitutions are usually made and changed through processes that differ from those for ordinary law-making. These processes help to legitimise the status of constitutions as fundamental law which provide the framework for the government of complex national communities. Exactly what such processes involve has varied over time and between constitutional traditions. Democratic systems claim the people, in one way or another, as the ultimate source of authority for a constitution. Until relatively recently, however, the involvement of the people beyond engaged elites and legal experts (usually men) typically has taken place through representatives, at best.¹⁴¹ This has changed significantly over the last few decades and there is now much greater emphasis on the breadth and depth of inclusion in a constitution making process. This was the feature of the South African constitution making process in the early 1990s that attracted the attention of the CHRI in 1999.¹⁴²

¹⁴¹ Writing in 1995, Tully noted that constitution-making is the single activity in “modern politics that has not been democratized”: James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press 1995) 28. See also Vivien Hart, ‘Constitution Making and the Right to Take Part in a Public Affair’ in Laurel Miller and Louis Aucoin (eds), *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute of Peace Press 2010) 20.

¹⁴² Commonwealth Human Rights Initiative (n 55).

Both the theory and practice of inclusion developed rapidly from this time. Although the nature and extent of inclusion varies with context, it is now widely accepted that the social and potentially also the normative legitimacy of constitution making depends on inclusive procedures, including the substantial involvement of women, with gender equality as the ideal. The significance attached to inclusion is consistent with the nature and role of a written constitution and is now also informed by the insight that inequality and exclusion – economic, socio-cultural, gender, ethnic, religious, territorial, or otherwise – underlie much of the conflict between groups within a state. Inclusive constitution making is sometimes said to be a requirement of international law¹⁴³ and in any event complies with international expectations, as reflected in the thick understanding of national ownership.¹⁴⁴ It is a common object of external support.

The emphasis now placed on inclusive constitution building processes is driven by considerations similar to those that make inclusion desirable in development assistance and peace building. These include the value of democratic participation in public life and the recognition that exclusion is a root cause of conflict. The context of constitution building also offers the potential opportunity to create more equal societies around a new social contract, including through gender equality.¹⁴⁵

¹⁴³ Article 25 of the International Covenant on Civil and Political Rights provides for the right of every citizen to ‘take part in the conduct of public affairs, directly or through freely chosen representatives.’ The application of this right to constitution making has been affirmed by the Human Rights Committee in *Marshall v Canada* (1991) and General Comment 25, para 6(b). As Hart explains, the legal authority of these sources and the scope of the right remain uncertain: Hart (n 142) 31.

¹⁴⁴ United Nations, ‘Guidance Note of the Secretary General on United Nations Constitutional Assistance’ (n 18) 3.

¹⁴⁵ Jason Gluck and Michele Brandt, ‘Participatory and Inclusive Constitution Making: Giving Voice to the Demands of Citizens in the Wake of the Arab Spring’ (United States Institute of Peace 2015) 3; Christine Bell, ‘New Inclusion Project: Building Inclusive Peace Settlements’, *Navigating Inclusion in Peace Processes*,

Inclusion in constitution building bodies and public participation are key components of inclusive constitution building, on which this project was asked to focus by the EBA. Many constitution building processes also include a referendum or some other kind of direct popular vote, which can be another significant mechanism for inclusion. Referendums raise a host of issues of their own, which are the subject of a large literature and considerable experience.¹⁴⁶ Where they are used, they contribute, at least in principle, to the inclusiveness of a process and may also affect the design of other aspects of the process.

Constitution building processes seek an outcome, in terms of a sufficient consensus on constitutional change that can and will be implemented. Measures to ensure inclusion are important, but ultimately part of a larger whole, which also seeks buy-in and commitment by those in positions of political leadership whose agreement matters to securing change and putting it into effect.¹⁴⁷ Even where there is general agreement about the need for inclusion, at least in some form, there is potential for tension between inclusive processes and a concrete outcome, demonstrated most recently in Chile. The failure to finalise a constitution during the highly inclusive constitution making processes in Chile no doubt is attributable to

Accord Issue 28 (Conciliation Resources 2019) 12–13; Abrak Saati, ‘Participatory Constitution-Making as a Transnational Legal Norm: Why Does It Stick in Some Contexts and Not in Others’ (2017) 2 UC Irvine Journal of International, Transnational, and Comparative Law 113, 118–19.

¹⁴⁶ Stephen Tierney, ‘Reflections on Referendums’ (International IDEA 2018) Discussion Paper 5/2018.

¹⁴⁷ Christina Murray, ‘Political Elites and the People: Kenya’s Decade-Long Constitution-Making Process’ in Gabriel Negretto (ed), *Redrafting Constitutions in Democratic Regimes Theoretical and Comparative Perspectives* (Cambridge University Press 2020); Gabriel Negretto, ‘Constitution-Making and Liberal Democracy: The Role of Citizens and Representative Elites’ (2020) 18 International Journal of Constitutional Law 206.

factors that include the use of the referendum but holds lessons for the design and management of inclusion as well.¹⁴⁸

6.1 Inclusion in constitution building bodies

Inclusion in constitution building bodies refers to the systemic representation of diverse interests in any institutionalised part of a decision-making process to make or amend a constitution. This form of inclusion is a key aspect of the design of a constitution building process. Most of the practitioners who contributed to the research for this project, and many of the local stakeholders with experience of constitution building, stressed its importance.

Effective inclusion in constitution building bodies serves a range of purposes. It has the potential to lay the foundations for a new social contract, giving citizens a sense of ownership of the state and the constitution. It can assist transition from the practices and culture of authoritarianism or military rule to democratic civilian government by diffusing power more broadly and providing a framework for its exercise. It is a means by which previously excluded groups can be actively and symbolically involved in public life. It provides opportunities to recognise and realise gender equality and redress the discriminatory exclusion of women and other groups. It can provide fora for people to engage with each other and build trust. It can ensure that a wider range of perspectives are considered in framing the new constitutional order, influencing the substance of the constitution that emerges from it, and tackling the underlying

¹⁴⁸ See Luis Eugenio García-Huidobro, 'Elite Non-Cooperation in Polarized Democracies: Constitution-Making Deferral, the Entry Referendum and the Seeds of the Chilean Failure' [2023] *Global Constitutionalism* 1; María Cristina Escudero, 'Institutional Resistance: The Case of the Chilean Convention 2021–22' [2023] *Global Constitutionalism* 1; Samuel Issacharoff and Sergio Verdugo, 'The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond' (2023) 78 *University of Miami Law Review* 1.

political, social, and economic problems that provided the impetus for the constitution building project.

These and other potential benefits of inclusion in constitution building bodies may receive different emphases and face different challenges in different constitution building contexts. Nevertheless, the more generalised need for what is accepted in context as national ownership in the thick sense is relevant to constitution building processes everywhere.

Perhaps the most familiar constitution making body, for which inclusion patently is relevant, is a representative, usually elected, assembly of some kind often, but by no means always, termed a Constituent Assembly. Where these fit in an overall process varies significantly. Some assemblies double as a legislature. Some have authority to draft and adopt a constitution while others depend on ratification by another body or by referendum. Some rely on a draft prepared by a commission or other expert body which they may have full, or only limited authority to change. Each of these and other variations may be driven by a range of factors, including legal requirements, consistency with tradition and past practice, political strategy, and practicalities. The choices have implications for the nature and extent of inclusion achieved and for the constitution making process overall.

There may be other bodies in a constitution building process in which inclusion is relevant as well. These include any group that initiates and makes decisions about the ambit of the constitution building process; the body designing and approving an interim constitution; any national conference or dialogue formed to contribute to the constitution building process, whether its conclusions are binding or not; and an expert body or commission. The nature and extent of inclusion that is appropriate or possible varies between these bodies, but failure to deal adequately with inclusion in any of them may miss valuable opportunities to build consensus around a workable constitutional settlement, cause

criticism and resentment as the constitution building process proceeds and have implications for constitutional stability.

Inclusion in constitution building bodies needs to be considered in the light of the whole process. For example, extensive and effective inclusion in one or more constitution building bodies may justify less emphasis on public participation, and the converse also is true. Other aspects of a constitution building process with ‘downstream’ effects, including a referendum, may affect the decisions that an inclusive representative body is able to reach without jeopardising final approval.¹⁴⁹ Inclusion in constitution building bodies also needs to allow for negotiation and compromise between key players, on which an outcome ultimately may depend.

Two further sets of issues that arise in connection with inclusion in constitution building bodies may be relevant to external support. They are sketched below from the standpoint of principle, but we draw attention also to the realities of practice. Constitution making is a political exercise. Those making key decisions about inclusion typically are incumbent governments, possibly in conjunction with other political forces, naturally inclined to favour structures that suit their own interests and preferences. There may be a role for external support, in collaboration with local actors, to broaden perspectives on inclusion.

Who should be included? The groups to be included in a constitution building body may be defined by identity (eg. women, members of minority groups, young people, people with disabilities) or by interests (eg. political affiliations, trade unions, civil society organisations). Traditional modes of representation, which are eroding in any event in many contexts, are further challenged by the realities of plural societies where inclusion potentially involves ‘hundreds and thousands of groups’ to quote one Dialogue

¹⁴⁹ Jon Elster, ‘Forces and Mechanisms in the Constitution-Making Process’ (1995) 45 Duke Law Journal 364.

participant.¹⁵⁰ Principles for the selection of groups and interests to be included will be driven by the broader context and the size and functions of the constitution building body. Different considerations apply, for example, to large representative bodies such as broad-based national dialogues and deliberative assemblies, and smaller bodies which make initial decisions about the ambit of the process in the form of pacts or interim constitutional arrangements.

Functioning political parties or other groupings in a state are likely to be represented in constitution building bodies unless specific measures are taken to exclude them. One difficult issue is how this traditional concept of representation can be adapted for adequately inclusive constitution building purposes. The answer is suggested by both experience and the purposes of inclusion. Gender is always relevant, as might be expected for a group that comprises 50 percent of the population; parity was achieved in the Chilean Conventions, setting an influential benchmark.¹⁵¹ Territorial spread, diaspora, youth, Indigenous communities, religious organisations, and other significant minorities and marginalised groups also require consideration for inclusion, with emphases that can be expected to vary with context.¹⁵² It was helpfully suggested during the Dialogues that all these options should be considered within the framework of a matrix requiring both political and social diversity.¹⁵³

There are other categories of people whose inclusion in constitution building bodies may be less obvious or more contentious but who, in at least some cases, have significant capacity to affect outcomes. Such groups might include the military in cases of transition from military rule; rebel or secessionist groups; and others of whom key internal stakeholders or powerful members of the international

¹⁵⁰ Dialogues, 'Lessons Learned from Support to Constitution Building Processes', November 2023.

¹⁵¹ Nanako Tamaru and Marie O'Reilly, 'How Women Influence Constitution Making After Conflict and Unrest' (Inclusive Security 2018) 3–4.

¹⁵² See García-Huidobro (n 149).

¹⁵³ Dialogues, 'Lessons Learned from Support to Constitution Building Processes', November 2023.

community may disapprove.¹⁵⁴ There is tension between the inclusion of those with the potential to spoil and their exclusion, with the risk of undermining the constitution building project in other ways.

In principle, the goal is to secure the benefits of broad-based inclusion in ways that are compatible with timely movement towards more stable democratic constitutional arrangements. There may be divided views about what this means in any particular case, within states, and between states and those providing external support. As we explain later in Chapter 6, where there is or has been conflict, the issue is further complicated by potential tension between the two distinct projects of wide societal inclusion on the one hand, and narrow inclusion for the settlement of conflict on the other.¹⁵⁵ Whatever the cause, in the event of disagreement, articulating the principle and exposing the competing views may be preferable to muddling through.

How should inclusion operate? The diversity of the groups for potential inclusion in constitution building bodies raises questions about the methods of their selection. Most representative assemblies and similar bodies are chosen by election, as the most familiar mechanism in contemporary practice for securing legitimacy. Where a representative assembly is constituted for the purposes of constitution building it is possible to devise electoral systems that will promote diversity of representation, including quotas or parity, as the examples of Nepal and Chile show.¹⁵⁶ Where election is not available, or will not secure the inclusion sought, other mechanisms for selection may be needed. Options include the nomination and appointment of members by certain groups to represent their interests (for example, ‘reserved’ seats) or the appointment of

¹⁵⁴ Eg. the Taliban in Afghanistan: see Pasarlay (n 44).

¹⁵⁵ Bell (n 146) 11.

¹⁵⁶ Rosalind Dixon and Marcela Prieto Rudolph, ‘Parity Constitutionalism’ [2023] Global Constitutionalism 1; ‘Nepal’s Constitution-Building Process, 2006–2015’ (International IDEA 2015) 11–12.

existing officials (such as members of parliament or heads of local government).¹⁵⁷

Whatever the method of choice, further questions arise about the meaning of ‘representation’ of groups demarcated by a particular identity or interests in a constitution making body. It is well recognised that there is intersectionality and diversity within and across identity groups: one person does not speak for all simply because they share an identity characteristic. One purpose of inclusion is to bring diverse voices with different perspectives, experiences, ideas, and community connections to a constitution building process. On the other hand, where members are elected or selected by a particular sectoral group or constituency, there may also be an expectation that they will speak for that group or constituency. There is often considerable ambiguity about the extent to which members of a constitution building body are free to make their own decisions on the issues that arise or are bound by some implicit mandate, however determined.¹⁵⁸

The purposes of inclusion are better served if it is meaningful, rather than symbolic or tokenistic. This requires attention to structures, including the design and composition of any committee system; to decision making rules that enable views to be heard and considered; to clear and fair procedures; and to administration that is effective in context. In some cases, it may be necessary to provide for special majorities to ensure a sufficiently broad-based consensus, or to give minority groups a veto on issues core to their interests to prevent them being outvoted in an otherwise majoritarian exercise. To avoid stereotyping and systemic discrimination, meaningful inclusion also requires respect for diversity, including gender equality, in assigning leadership roles,¹⁵⁹ and sensitivity to the risk of indirect

¹⁵⁷ Kimana Zulueta-Fülscher and Sumit Bisarya, ‘(S)Electing Constitution-Making Bodies in Fragile and Conflict-Affected Settings’ (International IDEA 2018) Policy Paper No 16.

¹⁵⁸ These questions also arise in relation to representation in general.

¹⁵⁹ On the significance of having a woman vice president preside over the National Constituent Assembly of Tunisia see Tamaru and O’Reilly (n 152) 37.

discrimination through expectations about language, dress code, working hours, and accessibility.¹⁶⁰

Given the novelty of the occasion for many and perhaps most of the participants, inclusion requires action to create a reasonably level playing field, in terms of understanding both constitution building process and substance, for all participants in a constitution-building body. There is now considerable global experience, both positive and negative, with the organisation of constitution building bodies to pursue the purposes that inclusion is designed to serve, which external support can offer.

6.2 Public participation

Public participation refers in this project to the direct engagement of the public in groups or at large at specific points over the life of a constitution building process. It may be organised formally by public institutions, either directly or in partnership with civil society.¹⁶¹ It may also be organised by interested groups outside the formal process, with a view to supplementing and informing it. This section focusses primarily on public participation that is formally organised, although much of what follows is also relevant to civil society initiatives.

Components of public participation commonly include:

- public education on issues pertinent to the constitution building project;
- the dissemination of information about the constitution building project;
- invitations for members of the public to make submissions, respond to questionnaires, or react to drafts, orally, in writing or online;

¹⁶⁰ Ibid 51.

¹⁶¹ Gluck and Brandt (n 146) 28.

- discussion and deliberation in public, sectoral, or other meetings, focus groups, and online forums;¹⁶²
- Interaction with constitution building bodies or committees or members of them;
- Collation and consideration of public views and feedback in some form.

There is no limit to the innovative forms that public participation might take to suit particular circumstances, with which external support might assist. The Syrian Civil Society Support Room (SCSR), established by the Office of the Special Envoy for Syria to involve leaders from civil society indirectly in the formal political talks, is a mechanism that might be adapted more generally for constitution building purposes.¹⁶³ The nationwide dialogues that preceded a national conference in South Sudan from 2016–2020 is another example of a distinctive, if flawed, form of public participation, from which there is much to be learned.¹⁶⁴ Recent experimentation with citizens’ assemblies or ‘mini-publics’ for deliberation on constitutional change suggests yet another approach that might be adapted to broaden public involvement in constitution building processes.

Public participation has become an essential feature of constitution building processes.¹⁶⁵ Public participation commonly attracts external support, for a range of reasons. It contributes to the thick understanding of national ownership. It resonates with the human

¹⁶² Ibid 25–27; Brandt and others (n 22) 126–138.

¹⁶³ Rim Turkmani and Marika Theros, ‘A Process in Its Own Right: The Syrian Civil Society Support Room’ (LSE Conflict Research Programme 2019).

¹⁶⁴ Augustino Ting Mayai, ‘The South Sudan National Dialogue: What Next?’ CSRF *South Sudan* <<https://www.csrf-southsudan.org/repository/the-south-sudan-national-dialogue-what-next/>>

¹⁶⁵ It is now ‘inconceivable that a government would attempt to draft a new constitution without at least a nominal commitment to a process in which the public is consulted’: Coel Kirkby and Christina Murray, ‘Constitution-Making in Anglophone Africa: We the People?’ in Muna Ndulo and Mamoudou Gazibo (eds), *Growing Democracy in Africa: Elections, Accountable Governance, and Political Economy* (Cambridge Scholars Publishing 2016) 87.

development goals of many foreign aid programs.¹⁶⁶ It is a vehicle for advancing equality for women, which also has a potential to influence gender equality in the constitution. It has been acknowledged as an international norm, thanks largely to diffusion by international actors providing support to constitution building.¹⁶⁷ And it is a potentially productive aspect of constitution building that, at least superficially, seems a less sensitive subject for external involvement. Practitioners consulted for the purposes of the project noted that they encountered little, if any, pushback against the principle of public participation on the part of constitution building states receptive to external support.¹⁶⁸

Research for the project encountered reservations about public participation on the part of some practitioners and stakeholders which, although not universal, need to be weighed against its expected benefits and factored into design and delivery. These also are echoed in the literature. Issues raised include the demands of public participation in terms of time and money; the potential for public participation to create delays, prolonging transitional rule or missing a valuable constitution making moment; the potential for public participation to destabilise a political settlement or to deepen divisions and increase polarisation; and the risk of raising public expectations in ways that cannot and perhaps should not be met.¹⁶⁹

There are different views about whether public participation is a valuable end in itself, distinct from its instrumental value to the

¹⁶⁶ Saati, 'Participatory Constitution-Making as a Transnational Legal Norm' (n 146) 119.

¹⁶⁷ Hart (n 142) 31; Saati, 'Participatory Constitution-Making as a Transnational Legal Norm' (n 146) 122–3.

¹⁶⁸ Dialogue, 'Lessons Learned from Support to Constitution Building Processes', November 2023.

¹⁶⁹ Ibid; Interview 12. See Gluck and Brandt (n 146) 15–17; Amal Sethi, 'Reassessing Public Participation In Constitution-Making Processes' (2023) 32 *Dikaion* e32121, 12–16.

constitution building process or the constitutional text.¹⁷⁰ On any view, however, public participation is part of a larger constitution building process with component parts that provide for inclusion in other ways and also require leadership, negotiation, compromise, and commitment. Ideally, all parts of a process should work together as a whole, to secure the ultimate goal of a workable constitutional system that stabilises over time.

There are some standard issues for the design and operation of public participation, with which external support needs to engage. Why is it undertaken? When should it occur? Who should be involved? And how should it be structured? These questions are interrelated: the goals of public participation, for example, affect when it occurs, who is involved and how it is structured.¹⁷¹ Experience with constitution building over the past three decades offers insights into each of these problems. It also helps to explain the current levels of uncertainty that feed into the cautious tone of some discourse around public participation.

Why provide for public participation? The potential purposes of public participation are not always clearly articulated. They fall into four broad categories.¹⁷²

¹⁷⁰ Drawing on theories about the value of participation in public life in the work of JS Mill and Rousseau: Abrak Saati, 'Public Participation in Constitution Building: An Effective Strategy for Enhancing Democracy?' (Expertgruppen för Biståndsanalys (EBA) 2015) Development Dissertation Brief 2015:04 6.

¹⁷¹ Anna Dziedzic, 'Consultation, Deliberation and Decision-Making: Direct Public Participation in Constitution-Building' (Melbourne Forum on Constitution-Building: Constitutional INSIGHTS No 4, Constitution Transformation Network and International IDEA 2020); Erin C Houlihan and Sumit Bisarya, 'Practical Considerations for Public Participation in Constitution-Building: What, When, How and Why?' (International IDEA 2021).

¹⁷² Public participation is sometimes directed to less common purposes as well, such as breaking a deadlock. One example arose in Uganda, where a broadly representative Constitutional Commission undertook wide consultations, resulting in over 27000 submissions. The Commission members were unable to reach agreement amongst themselves on 10 contentious issues, and so agreed to adopt the preferences of the majority of the submissions on those issues: see

- Public participation might assist nation building and transition to constitutional democracy in practical ways; by giving people familiarity with democratic participation, deliberation, and inclusion; by raising levels of public understanding of the requirements of democracy once the constitution is in place; by encouraging a sense of collective citizenship; and by building trust.
- Public participation might influence the substance of the Constitution, by putting a broader range of issues on the table or making concrete suggestions regarding particular provisions.
- Public participation might contribute to the legitimacy of a constitution symbolically and practically, underpinning the authority of the Constitution in the early critical years of implementation and helping to create a culture whereby people care about and support the Constitution.
- Public participation might contribute to the international credibility of the constitution making process.

The extent to which these goals are likely to be achieved or are even achievable needs to be considered in designing a constitution building process. There is mixed evidence about the practical impacts of public education and awareness raising on democratisation and answers may depend both on context and design. Long term effects of this kind in any event are hard to judge.¹⁷³ There is also mixed evidence about whether, in practice,

Regan (n 39). Public participation might also be adapted for use against constitutional backsliding, including non-compliance with term limits.

¹⁷³ For example, Moehler found that public participation in the constitution building process in Uganda helped to create an informed citizenry, with political knowledge and energy that carried over into later politics: Devra C Moehler, *Distrusting Democrats: Outcomes of Participatory Constitution Making* (University of Michigan Press 2008). On the other hand, Saati's empirical study concludes there is no relationship between public participation in constitution building processes and higher levels of democracy: Abrak Saati, 'The Participation Myth: Outcomes of Participatory Constitution Building Processes on Democracy' (Universitet Umeå 2015).

public participation is likely to affect decisions taken on the substance of a constitution.¹⁷⁴ Again, however, there are cases in which this has occurred, and the possibility is at least open.¹⁷⁵ In particular, public participation may reinforce initiatives by women in constitution building bodies to achieve gender-sensitive constitutional design,¹⁷⁶ although it will not necessarily do so.¹⁷⁷

Whatever the constitutional or legal requirements for constitution making, public participation can help to underpin the sociological legitimacy of the Constitution and hence its acceptance by the people. It thus contributes to national ownership in the thick sense.¹⁷⁸ It also encourages a greater measure of transparency in a constitution building process than might otherwise have been the case. Outcomes of these kinds are significant for the longer-term stability of the constitution and its effectiveness in practice.

When should public participation occur? Public participation can occur at any point in a constitution building process, from initiation, through consultation, design and drafting the constitution, to finalisation and ratification, and potentially implementation over time. Views in the literature about the timing of public participation range from a presumption for public participation at every stage of the process,¹⁷⁹ to modelling it on an hourglass, in which public participation occurs

¹⁷⁴ Alexander Hudson, *The Veil of Participation: Citizens and Political Parties in Constitution-Making Processes* (Cambridge University Press 2021).

¹⁷⁵ Eg. 43% of the proposals made by the public were included in the constitutional text in Tunisia in 2014: Tofigh Maboudi, 'Reconstituting Tunisia: Participation, Deliberation, and the Content of Constitution' (2020) 73 *Political Research Quarterly* 774.

¹⁷⁶ Erin C Houlihan, 'Women Constitution-Makers: Comparative Experiences with Representation, Participation and Influence, First Annual Women Constitution-Makers' Dialogue, Edinburgh 2019' (International IDEA 2020) 8.

¹⁷⁷ Dialogue, 'Lessons Learned from Support to Constitution Building Processes', November 2023.

¹⁷⁸ Sethi (n 170).

¹⁷⁹ Ibid 23.

at the beginning and end of the process;¹⁸⁰ to making provision for public participation after an adequately inclusive elite pact is in place.¹⁸¹ It may be that, in principle, an appropriate form of public participation should be at least considered at each stage. In practice, however, the choice will depend on the roles public participation is intended to play and what legitimacy requires in context. Timing may also depend on a conducive environment for safe and secure participation by the public.

Who should be involved in public participation? Procedures for public participation are, by definition, open to the public at large. However, public participation may include specific mechanisms to encourage and facilitate the participation of particular groups to ensure greater inclusion, including women, youth, minorities, and marginalised, disadvantaged, and other historically excluded groups. There are also questions about how far public participation should extend. Whether to involve the diaspora or groups with the capacity to disrupt or spoil a constitution building process and what to do about such other dissident or self-excluding groups as secessionists or rebels are problems that recur. They can be resolved only in context, by reference to the risks of manipulation by powerful actors, considerations of legitimacy and the demands of future stability.

Involvement in public participation typically relies on self-selection, favouring those with time, education, opportunity, and interest,¹⁸² unless effective remedial action is taken. Social norms and stereotypes can affect perceptions of who is competent to participate, leading to reticence on the part of women and young people in particular.¹⁸³ On any view, only a portion of the public is likely to be engaged. Without dedicated effort, engagement might

¹⁸⁰ Jon Elster, 'The Optimal Design of a Constituent Assembly' in Hélène Landemore and Jon Elster (eds), *Collective Wisdom: Principles and Mechanisms* (Cambridge University Press 2012).

¹⁸¹ Examples include Nepal and South Africa: Abrak Saati, 'Participatory Constitution-Building in Nepal: A Comparison of the 2008-2012 and the 2013-2015 Process' (2017) 10 *Journal of Politics and Law* 29.

¹⁸² Hudson (n 175) 183.

¹⁸³ Tamaru and O'Reilly (n 152) 51.

not extend outside the capital city and beyond relatively constitutionally sophisticated circles of civil society. These realities need to be factored into support for the design of processes of public participation to achieve the desired goals. The potential of digital technology for these purposes is being actively explored.

How should public participation occur? The manner of public participation again depends partly on purpose, context, and feasibility. There is a gathering consensus around a series of basic principles. First, to be meaningful, public participation must be more than performative. A typology developed by Saati identifies five types of public participation: false, symbolic, limited, consultative and substantive.¹⁸⁴ Views may vary on which of these is achievable and desirable in context but false participation, at least, should be avoided. Secondly, while a plan for public participation often is built into a constitution building project from the outset, there must be flexibility to adjust to the needs of the process and realities on the ground.¹⁸⁵ Third, any form of public participation requires public education and awareness raising to provide a platform of understanding.¹⁸⁶ To do this effectively presents immense challenges, going beyond conveying constitutional ideas in lay form to assisting segments of the public to understand the potentially alien concept of a written constitution operating at the level of the central state.¹⁸⁷ There is some experience now with how this might be done, including by drawing on local culture and using a range of media but this still provides only a start.¹⁸⁸ And fourth, expectations of the public arising from public participation need to be contained and managed, to avoid disillusionment that might have a negative effect on the outcome of the constitution building process.

¹⁸⁴ Saati, 'Public Participation in Constitution Building: An Effective Strategy for Enhancing Democracy?' (n 171) 10–13.

¹⁸⁵ Sethi (n 170) 23.

¹⁸⁶ Dialogue, 'Lessons Learned from Support to Constitution Building Processes', November 2023.

¹⁸⁷ Ibid.

¹⁸⁸ See Gluck and Brandt (n 146) 26. In Eritrea: Saati, 'Participatory Constitution-Making as a Transnational Legal Norm' (n 146) 131.

6.3 Help and hinder in external support for inclusive constitution building processes

6.3.1 Collaboration as a cross-cutting need

This segment applies the four factors for effective external support developed in Chapter 4 to explain what helps and what hinders effective external support for inclusive constitution building processes, with particular reference to inclusion in constitution building bodies and public participation.

A common requirement of all factors, in relation to many forms of external support, is effective collaboration between organisations providing external support and local stakeholders. The precise form that collaboration takes depends on a variety of circumstances, including the openness of state institutions to external support and the character of both the external provider organisation and the local stakeholders with whom they partner. Whatever form it takes, however, effective collaboration is critical for ensuring national ownership (in both the thick and thin senses), for adding real value to a constitution building process, for the quality of the support provided, and for the weight accorded to it by local decision-makers.

Collaboration that meets these needs requires attention to a range of considerations. One is the choice of a willing and useful local partner(s), with local insight and influence that is adequate for the purpose. Another is a working relationship that provides for adequate interchange and feedback, leading to the adjustment of external support as necessary and providing a form of mutual accountability. A third is a willingness to listen, think laterally, respect different views and approaches, and acknowledge the essential equality of a relationship in which each party brings essential, if different, knowledge to the table and each has the capability to bring

it to an end. The development of a productive relationship will be further assisted by continuity of connection with the constitution building project on the part of provider organisations, and their own employment of local staff.

6.3.2 National ownership and leadership

The first factor by which to gauge the effectiveness of external support for inclusive constitution building processes is by reference to its contribution to national ownership and leadership, with the benefits accepted to follow from it.

At first glance, the factor is readily satisfied. External support for inclusion is directed to national ownership and leadership, at least in the thick sense. Positive contributions external support can make from this perspective include providing resources to facilitate public participation; offering comparative insights into inclusive processes elsewhere; explaining the rationales for international emphases on inclusion, gender equality and minority rights; providing technical expertise in relation to elections to a constitution making body; and offering an independent resource where trust between parties might be assisted in this way.

The effectiveness of external support for inclusion also can be hindered in various ways, however, detracting from national ownership in the thick sense, the thin sense, or both.

First, external support may come with an understanding of what inclusion requires that reflects practices elsewhere but does not accord with local expectations on which legitimacy depends. This is a particular issue for public participation, which is heavily dependent on interaction with a wide range of stakeholders in contexts that may involve indigenous, religious, or customary institutions.

Where the form of inclusion that attracts external support does not correspond with local expectations of what legitimacy requires, external support falls short in promoting national ownership and the

benefits associated with it. It may also create resentment and more generalised mistrust of external involvement. The risks are obvious, and we came across several examples in the course of the project, in Nauru and Tuvalu, where external support failed adequately to understand how group discussion, negotiation and persuasion occurs.¹⁸⁹ A comparable problem might arise if the structure of the society around, for example, tribes or clans rather than other political affiliations, is not adequately factored into procedures for inclusion, either because the strength of such groupings is underestimated or overestimated or because it is overlooked altogether. Solutions lie in awareness of these risks, the engagement of external actors with familiarity with the context and relevant experience, effective local collaboration, and greater reliance on south-south perspectives and insights.

A variation on the theme of what broad-based national ownership requires involves both the extent of inclusion and exclusion. In terms of inclusion, public participation may involve outreach to segments of the community who are reticent about engaging, for whatever reason. External support faces challenges in designing and conducting adequately inclusive public participation for these purposes, without the insights that insiders bring. Without such insights, they may be satisfied by the inclusion of groups that are more accessible to outsiders in terms of location, language, or culture or fit generic categories of groups for inclusion.¹⁹⁰

Consideration of the application of this factor so far has focussed on issues that affect external support for national ownership in the thick sense. As explained in Chapter 3, however, a thinner sense of national ownership – equally important for constitutional stability in both the short and long term – requires local, rather than

¹⁸⁹ Dialogue, 'Lessons Learned from Support to Constitution Building Processes', November 2023. Ratuva (n 98) explains how in Nauru aspects of external support for public participation processes were inconsistent with the ways in which Nauruans share and assess information and convene group discussions, contributing to the failure of the process.

¹⁹⁰ Interview 13.

international, ownership of a constitution building process. This sense of national ownership is more obviously threatened by external support. To preserve it requires providers to understand the boundaries within which they can properly encourage inclusion, and to be modest in the claims publicly made for their own role, to protect the appearance as well as the reality of local ownership. By extension, it also is necessary for providers not to overclaim. During the Dialogues, we were told of one extreme case where an external provider took advantage of a photo opportunity with local stakeholders for promotional purposes on a website and appeared to play no other role in the process.¹⁹¹

It may be relatively straightforward for external support to meet the requirements for national ownership in both the thin and thick senses when those in positions of political authority in the constitution building state are open to external support and broadly agree with both the goals and modalities of inclusion. Such conditions do not always exist or persist, however.

Even where external support is well received initially, enthusiasm for it may wane or disagreements may arise between providers and recipients over aspects of inclusion or over the balance between inclusion and other aspects of a constitution building process. Such disagreements should be taken seriously. They may cast light on the meaning of inclusion in local context, with the benefits expected to follow. They may also reveal competing priorities, in terms of the resolution of conflict or the management of security or social and economic development, which are compatible with ultimate constitutional stability, but suggest a different path to that end, which requires consideration.

If disagreement persists, external providers face difficult decisions about support for a constitution building process that fails to meet their own standards for inclusiveness. How they respond may

¹⁹¹ Dialogues, 'Lessons Learned from Support to Constitution Building Processes', November 2023.

depend in part on the nature of the organisation and of the subjects of disagreement. There may be different responses, for example, from organisations with a general brief and those dedicated to specific values, such as human rights or gender equality, where these are at risk.¹⁹² We revisit the problem again below, in examining the factor involving the weight accorded to external support. In the end, however, it may be necessary to accept a level of inclusion that does not fully accord with external preferences, ensuring that local leaders to be seen to be responsible for the decisions that are made.

These issues present themselves in a more challenging form where inclusion is resisted and there is room for doubt about the credentials of local decision-makers to represent local views in any meaningful way. Several stakeholders in the Dialogues, for example, expressed a concern that efforts to achieve inclusion were not as effective as had been hoped because they were circumvented by decision-makers unwilling to share power.¹⁹³ The problem thus presented may be acute in constitution making in the context of conflict, where the political leadership is held and contested by armed protagonists. To resolve what may become a standoff may require the full panoply of strategic measures and skills in negotiation to be brought to bear. As a last resort, the only answers lie in the rejection of external support on the one hand or refusal to provide it on the other.

6.3.3 Added value

There are myriad ways in which external support can add value to strategies for broad inclusion in a constitution building process, which could not otherwise have been achieved. In principle, they incorporate all the opportunities offered by external support that were canvassed in Chapter 4, as applied to the multifaceted and often

¹⁹² Interview 12; Bell (n 146) 12–13.

¹⁹³ Dialogue, 'Lessons Learned from Support to Constitution Building Processes', November 2023. See Christine Bell, 'Introduction: Bargaining on Constitutions – Political Settlements and Constitutional State-Building' (2017) 6 *Global Constitutionalism* 13, 28.

complex issues associated with inclusive constitution building processes explained earlier in this chapter. The contributions to an inclusive process that external support can make by defraying costs, offering knowledge about comparative experience and international norms, and providing technical assistance and a measure of impartiality are potentially important in their own right. In making them, external support can assist with some of the most difficult and critical aspects of the design and operation of a constitution building process.

So, for example, external support can identify ways to enhance public participation in an otherwise representative constitution building process, as in Tunisia, and can advise on an electoral system to adopt in conditions of extreme diversity, as in Nepal. It can not only press for the adequate representation of women in a constitution building process but can demonstrate how this has been done elsewhere and provide links to international networks. It can draw on comparative experience to assist with decisions that can work in context about, for example, the sequencing of constitution-making and elections, the relevance of inclusion in making an interim constitution, and the balance between public participation, representation and, where used, direct democracy. It can assist to break deadlocks and disagreements over key issues that might otherwise bring a constitution building process to a halt. Going forward, external support might add value in other ways. Emerging usages include more effective reliance on digital technology to enhance public participation, techniques to stem the spread and impact of misinformation, deliberate or otherwise, and consideration of how the ways in which inclusive processes of the kind developed for constitution making might be adapted to inhibit constitutional reversals and democratic decline.

As a measure of effectiveness of external support, however, this factor requires it not only to provide but to add value to inclusion in a constitution building process.

If other external providers already are supporting inclusion, a question may arise about whether an additional source of support usefully adds value. The answer will depend on what is being done, and how. Extending the reach of public participation may benefit from multiple providers, although loose co-ordination could help to avoid overlap and minimise gaps. Providing public information on, for example, decentralised systems of government as a platform of knowledge for public participation may benefit from multiple providers, but not if their views about decentralised government are inconsistent and cause confusion. Some projects clearly require only one external provider: the administration of a constituent assembly is an example.

External support for inclusion that could be undertaken locally raises other considerations relevant to the application of this factor. As constitution building knowledge grows within the global south, the possibility of overlap of this kind always merits consideration. It adds additional weight to an earlier suggestion by Gluck and Brandt that external support should be directed to assisting local actors with training, knowledge, skills, and experience to design a process that is responsive to their own context.¹⁹⁴ In going down this path care must be taken to avoid disadvantage to groups that do not commonly receive recognition and support.¹⁹⁵

As a variant on this problem, there also are cases where a local institution exists but may not be fully up to the task; a local election commission is a possible case in point. This assessment also requires caution, so as not to mistake difference for incapacity. Where it exists, however, external support adds value by working with the local institution in what should be understood as an opportunity for mutual learning.

¹⁹⁴ Gluck and Brandt (n 146) 24.

¹⁹⁵ Ibid.

To add value, external support also needs to be meaningful in the context in which it is provided. In many cases, legitimacy will be assumed to require a constitution making process to have certain features; legal continuity, a referendum or a sovereign constituent assembly are examples. There may be no point in external support advising otherwise. Whether support is meaningful or not can also depend on the way in which it is provided, to ensure that it is responsive to live local questions about inclusion. The difficulty of implementing this approach should not be underestimated. Local stakeholders may be reticent about explaining their own concerns at the outset of such an engagement or at all, and it is easy enough for stakeholders and external providers to talk past each other without realising it. To overcome these and other hurdles requires persistence, insight, and respect.

6.3.4 Quality

The quality of external support for participation and inclusion requires a good grasp of all relevant aspects of local context including the overall constitution building process and the challenges it faces, local political dynamics, social mores, and aspirations for the future. It also requires a good grasp of comparative experiences with inclusion, combined with the ability to adapt such experiences in forms that might be applicable in the immediate context. The quality of both the organising agency and the end provider are necessary for this purpose, although donors are affected at least indirectly as well, to the extent that quality has implications for flexibility and conditionality. Quality in this sense is built by knowledge and experience over time and, perhaps, space; continuity of engagement with the local context; and responsiveness to local feedback for the duration of the project receiving external support.

In Chapter 4 we identified independence as one of the characteristics of external support that could make a useful contribution to a constitution building process, including to the design and execution

of inclusive aspects of it through, for example, building trust, and assisting to resolve contested issues. To understand how quality works in this regard, the idea of independence itself requires some unpacking. Independence is never absolute in this context; all those providing external support to a constitution building process have preferences, predilections, and commitments to ideas and to institutions or states that affect the support they provide. This reality flows from the nature of external support, is relatively transparent and does not necessarily reflect the quality of 'independence' in a relevant way. What matters is for external support to have sufficient impartiality and integrity to be able to make any contribution to inclusion that relies on being at arms' length from the parties, having no personal interest in the outcome, and being able to generate trust.

Being an outsider can also present challenges for external support that impinge on quality unless those providing external support are conscious of them and take steps to neutralise them. The implications of an adequate understanding of the context for the quality of external support have been canvassed already and fit in again here. Other challenges that derive from the institutional operations and organisational structures of external support may also have implications for quality, to which attention is drawn through selected examples.

First, the project nature of external support, which flows from its institutional operation, can have implications for quality unless adapted to the arrangements for inclusion as a whole. External support that is focussed specifically on public participation or on levelling the playing field for particular groups, for example, may make important contributions to that extent but risks detracting from the effectiveness of the process as a whole. This arguably occurred in Nepal, where external support to very diverse groups within the first Constituent Assembly is said to have been a factor in the failure of the process, as deliberation moved outside the

Assembly to informal leaders' meetings that effectively imposed their decisions on the Assembly as a whole.¹⁹⁶

Secondly, the logistics of external support, through institutional arrangements or internal organisational procedures, can impact on timelines and flexibility, with implications for the quality of support for many aspects of inclusion, the timing of which can be unpredictable. Notwithstanding the difficulties, the quality of external support is enhanced where the timelines to which it responds make sense in the local context and where it is flexible enough to adapt to changing circumstances and needs. Linear processes identifying specific deliverables for the purposes of evaluation and accountability to supporting states, other donors, and organisations can have an impact on quality that needs to be understood, with a view to exploring how the realities of constitution building can be better accommodated in the ways in which support is provided.

6.3.5 Reception and weight

Reception of external support for inclusive constitution building purposes is significantly enhanced where it is welcomed by local leaders who share a similar vision of inclusion with those providing the support and appreciate assistance in realising it. Positive reception may be influenced by the value that external support adds to the process and the quality of the support, in the senses discussed earlier. It is likely to be influenced by other considerations as well, including the reputation of the organiser and provider, the collaborative nature of their relationship with the local context, the linkages between the constitution building state and those offering external support, and sources of effective leverage.

¹⁹⁶ Monalisa Adhikari, "Formal Adoption – Informal Subversion": Limits of International Constitutional Assistance' [2023] *Journal of Intervention and Statebuilding* 1.

The reception of external support for inclusive constitution building processes can come under pressure in two familiar situations. In the first, even where key stakeholders have been generally open to external support, disagreement may emerge between provider and recipient over, for example, the extent of inclusion or the priority accorded to it vis-à-vis other considerations. In the second, key stakeholders are hostile towards external support, whether overtly or not.¹⁹⁷ This latter situation may be more likely to arise where constitution building takes place in the context of conflict, which we consider more closely later in this chapter.

In dealing with either of these situations, often complex considerations arising from the need for national ownership come into play. External support for inclusion seeks to enhance national ownership in the thick sense. There are limits to which it can do so by pressing for particular forms of inclusion without impinging on national, in the sense of local, ownership. There are practical limits as well on the extent to which external actors can urge their views on those purporting to speak for a constitution building state, however compromised their local legitimacy may appear to be.

If those providing external support for inclusion are confident about their conclusions but appear to have reached an impasse with local stakeholders, several courses of action potentially are available. One is to turn to diplomacy, which is more likely to be able to engage at higher levels of leadership and has other mechanisms for persuasion at its disposal. To this end, there may be a case for greater collaboration between those parts of the administration of donor or otherwise supporting states that deal respectively with diplomacy and development assistance. Instead, or in addition, depending on the circumstances, external support conducive to inclusion might be provided to civil society groups or others not directly connected to the leadership. Such support might, for example, be designed to

¹⁹⁷ Dennis Friess and Nina Katharina Herff, 'The Doctors of Democracy: Self-Image and Democratic Values of Participatory Practitioners' (2023) 19 *Journal of Deliberative Democracy*.

enhance understanding of constitutional processes and the possibilities of public participation and other forms of inclusion on the part of women's groups, youth, potential leaders, or minority groups. Realistically, this option may not achieve a more inclusive formal process that takes account of the views of the public in the short term. It has the potential, however, to sow seeds of understanding of democratic constitutional practice that could prove to be productive over time.

If all else fails, the ultimate sanction available in principle to those providing external support is to withdraw it. This is a course of last resort, with implications for relationships with donors and the reputation of provider organisations. It also abandons whatever advantage might have been gained by staying in the field, in terms of enhancing the constitution building process, however marginally, and inhibiting the spread of more authoritarian influences.¹⁹⁸ How these calculations are weighed, and with what outcomes, depends in part on the purpose and nature of organisations providing external support. Staying in the field also risks the manipulation of external support for internal political purposes, obscuring the accountability of local leaders. Participants in the Dialogues warned of these possibilities and mentioned at least one instance in which support was withdrawn to avoid them.

6.4 Peace processes and constitution building

The following sections examine the implications of external support for constitution building in the context of conflict. It deals with cases in which conflict has become violent, calling for peace processes of some kind as well as, potentially, a constitution building process.

¹⁹⁸ Sarah Sunn Bush, *The Taming of Democracy Assistance: Why Democracy Promotion Does Not Confront Dictators* (Cambridge University Press 2015); Clark C Gibson, Barak D Hoffman and Ryan S Jablonski, 'Did Aid Promote Democracy in Africa? The Role of Technical Assistance in Africa's Transitions' (2015) 68 *World Development* 323.

Peace processes feed into constitution building in a multitude of ways, examples of which are set out in Appendix 3. The aim here is to provide a better understanding of the relationship between the two processes and to suggest how it could develop to enhance the effectiveness of external support.

The current section briefly introduces peace processes and external support for them. The following section (6.5) examines the relationship between peace and constitution building processes, explaining similarities and differences, and noting features of the evolution of peace processes over recent decades that have implications for constitution building. The final part (6.6) use the four factors of national ownership, the addition of value, quality, and the reception of external support to explain what helps and what hinders external support in these particularly challenging contexts.

The generic term ‘peace processes’ used here covers both mediation and peacebuilding. Mediation is defined by the United Nations as ‘a process whereby a third party assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them to develop mutually acceptable agreements’.¹⁹⁹ Peacebuilding covers all activities and actors that ‘seek to address the underlying causes of conflict, helping people to resolve their differences peacefully and lay the foundations to prevent future violence’.²⁰⁰ In 2016, the UN Security Council and General Assembly committed UN agencies, funds and programmes to working for the even more inclusive goal of ‘sustaining peace’.²⁰¹

¹⁹⁹ ‘United Nations Guidance for Effective Mediation’ (Annex to the Report of the Secretary-General on Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution A/66/811, 25 June 2012).

²⁰⁰ Conciliation Resources, ‘What is peacebuilding?’ <https://www.c-r.org/who-we-are/why-peacebuilding/what-peacebuilding#>. The term was used by Boutros-Ghali in the ‘Agenda for Peace’.

²⁰¹ ‘Resolution 2282 (2016) Adopted by the Security Council at Its 7680th Meeting, on 27 April 2016’ (United Nations Security Council 2016) S/RES/2282

As with constitution building, the number, size, and range of those providing external support for peace processes of some kind have expanded since the 1990s. Those involved come from both governmental, intergovernmental, and regional organisations and international non-governmental organisations. The communities of providers are diversifying, in line with geopolitical shifts in the global distribution of influence and power. As one indicator, the involvement of Western states as third-party signatories has been decreasing and neighbouring states and other powers are playing increasingly important roles as peace brokers.²⁰² As with constitution building, peace process initiatives by multiple organisations sometimes take place at the same time, without necessarily having cumulative or collective impact.²⁰³

Increasing emphasis on gender equity as a key international value also is reflected in peace processes and the external support provided for them. Women's participation at the negotiating table for peace agreements and the need for gender sensitivity in mediation are now widely recognised as goals in international policy and amongst providers.²⁰⁴ This in turn has shaped mediation through the adoption of, for example, frameworks for gender sensitive conflict analysis and process design that can generate technical guidance for the implementation of policy goals. In addition to UN Women, formally established in 2010, there has been a growth in the number and capabilities of international organisations focussing on providing support, partnership, and resources to these agendas. An important

(2016); 'Resolution Adopted by the General Assembly on 27 April 2016: Review of the United Nations Peacebuilding Architecture' (United Nations General Assembly 2016) A/RES/70/262.

²⁰² Sanja Badanjak and Mateja Peter, 'Diversification and Congestion in International Peacemaking: What the Data Says', Still Time to Talk, Accord Issue 30 (Conciliation Resources 2024).

²⁰³ United Nations, 'Delivering as One: Report of the Secretary-General's High Level Panel' (2006).

²⁰⁴ Thania Paffenholz and others, 'Making Women Count – Not Just Counting Women: Assessing Women's Inclusion and Influence on Peace Negotiations' (Inclusive Peace and Transition Initiative (The Graduate Institute of International and Development Studies) and UN Women 2016).

innovation has been the emergence of international women mediator networks connecting women mediators and peacebuilders, with consequences also for women involved in national constitution building processes.²⁰⁵

6.5 Relationship between peace and constitution building processes

The relationship between peace and constitution building processes has attracted considerable attention over the past three decades.

In countries coming out of violence and military rule, peace processes may be an integral part of constitution-building, to make peace more durable.²⁰⁶ Constitution-building in turn, may be part of the effort to find a political solution to conflict.²⁰⁷ Though the two processes are interlinked in many cases, external providers of mediation, peacebuilding and constitution building support typically come from different epistemic communities working with different skills to different goals.²⁰⁸

Greater consciousness of the interrelationship between the two sets of processes has encouraged reflection about how the several communities of those providing external support might better

²⁰⁵ Eg. Network of African Women in Conflict Prevention and Mediation (FemWise-Africa); Mediterranean Women Mediators Network; Nordic Women Mediators; Women Mediators across the Commonwealth; Arab Women Mediators Network; ASEAN Women for Peace Registry; Global Alliance of Regional Women Mediators Networks.

²⁰⁶ Fiedler (n 5).

²⁰⁷ Berghof Foundation and United Nations Department of Political and Peacebuilding Affairs, 'Constitutions and Peace Processes: A Primer' (Berghof Foundation 2020) 73; Jamal Benomar, 'Constitution-Making After Conflict: Lessons for Iraq' (2004) 15 *Journal of Democracy* 81.

²⁰⁸ Mir Mubashir, Julian Klauke and Luxshi Vimalarajah, 'The Nexus of Peace Mediation and Constitution Making: The Case for Stronger Interaction and Collaboration' in Catherine Turner and Martin Wählisch (eds), *Rethinking Peace Mediation: Challenges of Contemporary Peacemaking Practice* (Policy Press 2021).

support each other, in the interests of more effective outcomes.²⁰⁹ Some organisations have begun to take positive steps in that direction, but it is plain from discussions in the Dialogues that there is more to be done.²¹⁰ The answer lies somewhere between the extremes of separation of peace and constitution building processes and their amalgamation, neither of which is possible nor, in these contexts, desirable. At the very least, there is a strong case to make that those providing external support to an aspect of a peace process need access to constitution building competence of a kind that is relevant to the immediate context and those providing external support for constitution building need access to relevant skills associated with peace building, again, for the context in which they are presently engaged. To achieve this requires mutual appreciation of the contributions that the different communities make.

There are complementarities, synergies, contrasts, and differences between the two sets of processes that are imperfectly understood. They help to explain the current relationship and need accommodation in its future development.²¹¹

Complementarities and synergies include the following. External support for both peace and constitution building processes contributes to the resolution of the same problems of a state community in crisis. Peace and constitution building may proceed in parallel or in ways that complement each other. In both cases, process is considered important, in its significance for outcomes and in its own right. In both, the process lays stress on inclusion. In both, the effective inclusion of women is a priority that enhances

²⁰⁹ Berghof Foundation and United Nations Department of Political and Peacebuilding Affairs (n 208).

²¹⁰ Dialogue, 'Lessons Learned from Support to Constitution Building Processes', November 2023.

²¹¹ Kirsti Samuels, 'Post-Conflict Peace-Building and Constitution-Making' (2006) 6 *Chicago Journal of International Law*; Jennifer Widner, 'Constitution Writing in Post-Conflict Settings: An Overview' (2008) 49 *William and Mary Law Review* 1513.

outcomes and offers new perspectives.²¹² In both, some gains have been made in this regard,²¹³ although there is more to be done. External support to both processes faces similar methodological challenges, including the need for a deep understanding of context and insights from effective local partnerships.

The contrasts and differences also are significant. Organisations providing constitutional support set out to assist in developing a stable constitutional democracy supported by a rule of law. International peacebuilding organisations may broadly frame their goals as contributing to efforts that transform conflicts, helping to build more constructive relations across divides, and to find areas of agreement.²¹⁴ Both sets of actors bring different knowledge and skills, with different ways of working. One emphasises the importance of ‘constitutional moments’ and the other moments when conflicts are ‘ripe for resolution’. These moments may or may not be contemporaneous.

The catalogue of differences can be continued. Peace processes and constitution building operate within different legal, theoretical, cultural, and practical frameworks. The former draw more extensively on international law and rely on soft power and persuasion. Constitution building works within the framework of domestic and comparative constitutional law and theory, which expects certain legal and political processes to be followed before constitutional change is achieved. Mediation and peacebuilding may take place at the local level, as required, including where secession or sovereignty claims are involved. Constitution building typically takes

²¹² Catherine Turner, “‘Soft Ways of Doing Hard Things’: Women Mediators and the Question of Gender in Mediation” (2020) 8 *Peacebuilding* 383.

²¹³ Silvia Suteu and Christine Bell, ‘Women, Constitution-Making and Peace Processes’ (UN Women 2018).

²¹⁴ Berghof Foundation and United Nations Department of Political and Peacebuilding Affairs (n 208); Nicholas Haysom and Sean Kane, *Understanding the Transition: A Challenge and Opportunity for Mediators* (Center on International Cooperation 2013); Jean Arnault, ‘Good Agreement? Bad Agreement? An Implementation Perspective’ *UN Peacemaker* (15 December 2019).

place at the level of the central state and is concerned with establishing institutions that can govern the whole state and can enter arrangements with other states. The different epistemic communities by which external support is provided have developed exponentially and separately over recent decades. These bring different bodies of knowledge and skills to their respective tasks and are accountable through different institutional frameworks.

The usual challenges that confront constitution building processes, examined earlier in the report, present in even more difficult ways in states affected by violent conflict where mediation and peace building also are required.²¹⁵ Some of these difficulties emerge in context later in the chapter, including the likely character of the leadership of states emerging from armed conflict or authoritarian or military rule, the often drawn-out and transitional nature of processes that combine both peace and constitution building, and the impact of geopolitical factors when dealing with the possibility of threats to international peace and security. Another difficulty includes the context in which such processes typically take place. Communities in states in which there is or has been violent conflict are likely to be affected by poverty and underdevelopment, to have suffered sometimes extreme trauma, to be divided and suspicious of each other, to have had their homes and livelihoods disrupted or destroyed, or to have been displaced. The state itself is likely to be weak and institutions weak or non-existent. Armed conflict may be ongoing or threatened, weapons and militia may be prevalent, and parts of the state territory may not be under effective control. Neighbouring states may be involved, positively or negatively.

Over the past three decades, there have been trends in peace processes that are relevant to an understanding of their present relationship with constitution building.

²¹⁵ Andy Carl, 'Constitution Making in Contexts of Conflict: Paying Attention to Process' (Berghof Foundation 2019); Paul R Williams, *Lawyerling Peace* (Cambridge University Press 2021) ch. 5.

In processes following the end of the cold war, peace talks sought not only to bring a permanent end to the fighting but to find a lasting political resolution involving the structure and operation of the state. With hindsight, this now is seen as an era of comprehensive peace agreements, at least in ambition.²¹⁶ These agreements ‘operated partly as contracts between the parties, partly as road maps for social change, and partly as pre-constitutional agreements that would lay the foundation for turning an elite political-military bargain into a social contract’.²¹⁷ It suggested the possibility of a linear process for peace and constitution building, although this was at least partly misleading.

In reality, most of these agreements proved less comprehensive than their framers had hoped, with the Comprehensive Peace Accord in Nepal a case in point.²¹⁸ Increasingly, there was movement towards ‘framework’ agreements, which consolidated ceasefire agreements, leaving unfinished business to a sequenced process in a road map during which the conflict theoretically would be suspended, and a broader “post conflict” political settlement established step by step. Most framework agreements follow the same pattern of a ceasefire, some form of dividing and allocating power to jointly manage the state and its resources during a transition period, and constitutional reform and elections, not necessarily in that order. Experience has shown that finding a political solution to protracted conflicts with all the political deliberation, compromise and accommodation that is needed rarely progresses in a linear fashion culminating in a stable constitutional democracy. Long transitional processes often stall and are as likely to move backwards as forwards.

²¹⁶ Christopher Thornton, ‘Eyes on the Long Term: Reconceptualising the Negotiation of Political Settlements’, *Still Time to Talk*, Accord Issue 30 (Conciliation Resources 2024).

²¹⁷ Badanjak and Peter (n 203).

²¹⁸ Comprehensive Peace Accord signed between Nepal Government and the Communist Party of Nepal (Maoist), 22 November 2006.

Often there are many distinct negotiations and agreements in what is generally referred to as single peace process.²¹⁹ In the best cases, these processes are iterative, in the sense of learning from and building on past, interdependent, processes. Sometimes crisis is encountered, and backsliding occurs.²²⁰

In current conditions, at least, the successful transformation of any protracted conflict is challenging. The difficulties have been augmented over time by the diminished political influence of the UN and some of its Western member states in consequence of ‘wars on terror’ and related events. They are further exacerbated by the drawn-out and episodic nature of the processes now typically followed. Once power and resources are shared out in an initial agreement between the leaders of the parties in conflict and organised violence is paused, it is difficult for international actors to influence the behaviour of the power-holders to maintain their commitments to inclusive negotiations and compromise-based politics, so as to move through the phases of the process that remain.²²¹

These aspects of current practice have been characterised as leading to ‘formalised political unsettlements’,²²² which are said to have two primary features. The first is that constitutions and the institutions they create “contain” as much as they “resolve” conflict. The second is the continuation of a transitional or exceptional state, relying on a mix of local and global, including multi-polar sources of

²¹⁹ See PA-X Peace Agreements Database at the University of Edinburgh holds more than 2,000 agreements from the last three decades. For example, there have been a total of 35 agreements (including the Good Friday Agreement) in the resolution of the conflict in Northern Ireland; 139 involving South Sudan; 129 in Mindanao in the Philippines; and 46 in the Democratic Republic of Congo.

²²⁰ Berghof Foundation and United Nations Department of Political and Peacebuilding Affairs (n 208) 73.

²²¹ Sharath Srinivasan, *When Peace Kills Politics: International Intervention and Unending Wars in the Sudans* (Hurst & Company 2021).

²²² Christine Bell and Jan Pospisil, ‘Navigating Inclusion in Transitions from Conflict: The Formalised Political Unsettling’ (2017) 29 *Journal of International Development* 576.

claimed legitimacy and assisted by transnational institutions. This discouraging assessment further highlights the core challenge of moving towards peace and stability in some of the most difficult cases of transition from conflict and authoritarian rule.

6.6 Help and hinder for external support in conflict contexts

In applying the factors elaborated earlier in the report to gauge the effectiveness of external support in the context of conflict, this section focusses on the distinctive characteristics of constitution building when peace processes also are, or have been, in train. The same measure of effectiveness applies: the extent to which external support makes a positive difference to an aspect of a constitution building process that is apt to lead to a more stable constitutional system in the relevant context. In the context of conflict, however, the complexity and difficulty of both peace and constitution building make determinations of what is ‘apt’ precarious, requiring latitude. To an even greater degree than in other contexts, it may mean that tangible movement towards constitutional stability is unsteady and slow.

6.6.1 National ownership and leadership

National ownership and leadership, in both the thick and thin senses, are recognised as requirements for peace as well as constitution building processes. It is not just a matter of principle; there are sound practical reasons for national ownership and leadership in both sets of processes in order to secure sustainable peace and a workable and working constitution that offers the possibility of stability in the longer term.²²³

²²³ Dialogue, ‘Lessons Learned from Support to Constitution Building Processes’, November 2023.

Securing national ownership in either sense, however, is made more complex by constitution building in the context of conflict and peacebuilding, in ways that effective external support must navigate as best it can.

Mediation necessarily deals with parties to a conflict, whatever steps are taken to involve others in some way. Typically, such parties are leaders of armed groups, almost invariably men. They may not be suited to leading a constitution building process or recognised as having the legitimacy to do so, even within the state. This presents a challenge to mediators, seeking agreement between the parties on terms that can end the conflict, without intruding unnecessarily, or too far, into decisions about constitutional substance or even constitution making process, which ideally should be made by other means. This is one of many areas in which closer collaboration between those supporting peace and constitution building processes respectively could be useful, although it may not entirely resolve the legitimacy problem.

Leaders of armed groups or authoritarian or military governments also are unaccustomed to working within a constitutional framework and potentially resistant to it. They may be opposed to limitations on their power, including during a negotiated transition process, and to inclusion of either their opponents or the community at large. In these circumstances, external support needs to steer a delicate path between the two poles of national ownership. One is effective capture by one or more leaders of the militarised elite, thus favouring national ownership in the thin sense (at best) in the interests of peace and stability. The other is broadening the process to approach the thick understanding of national ownership at the risk of losing even this veneer of local ownership and, with it, the incumbent leadership on which peace and security depends.

How this path is negotiated will be heavily dependent on context and so on the understanding of context by those providing external support, through local partnerships and in other ways. In each case,

effectiveness lies in finding ways to encourage local actors without getting in their way, and offering the right support in ways that are welcomed and conflict sensitive, with cumulative effect.

A few constants deserve consideration, however. First, there may be deep differences of view within the community at large, which may be particularly marked between rural and urban communities, about the nature of a political and constitutional settlement. These need to be respected and accommodated, including by adapting processes to local traditions and culture.²²⁴ Doing so will be complicated for external actors by a social and economic context characterised by poverty, illiteracy, and the many destructive effects of long-standing conflict.

Secondly, there is much to be gained in terms of national ownership and the benefits it potentially brings from providing for and strengthening the substantive roles of women and civil society in the constitution building process. This may best be achieved by ensuring the involvement of women in at least the mediation and early peace building processes, and by facilitating the involvement of civil society in ways that can feed into constitution building processes, as far as it is possible to do so. As one participant noted in the Dialogues for this project, external support was too often about ‘accommodating the elites, rather than pursuing what the people wanted’. Engagement of civil society, including civic-minded potential leaders, also offers a resource to defend the constitutional settlement in the future.

The task of securing national ownership can be further complicated when action taken by external providers is affected by organisational, national, or geopolitical considerations. This may cause external actors to favour political incumbents dealing with what are seen to be rebel groups. Where this occurs, it further reinforces the link between external actors and state institutions, who rely on the state

²²⁴ Dialogue, ‘Lessons Learned from Support to Constitution Building Processes’, November 2023.

for their continued presence in any event, and as the conduit through which external funds are channelled. Despite these realities, there is much to be lost in terms of the benefits derived from national ownership if external support succumbs to the views of those holding power that are self-serving, seeking to prolong the transition and fend off the surrender of political and economic power.

Strategic considerations or, in some cases, international law and practice, can inhibit those providing external support from dealing with key parties to the conflict, thus compromising outcomes. The Taliban in Afghanistan, the Maoists in Nepal and Houthis in Yemen are examples. In some cases, of which Nepal is an example, potential harm may be moderated by the choice of an external provider or by involvement of states that are not so inhibited.²²⁵ Where this does not occur, the issue has the potential to undermine and destabilise already fragile settlements as, with hindsight, experience in Afghanistan shows.

6.6.2 Added value

This section identifies additional, distinctive, ways in which external support can add value to constitution building processes in the context of conflict and some of the issues encountered that can enhance or detract from its effectiveness.

Some examples are obvious and flow from the context. External support offers expertise in peace processes that includes skills in mediation, negotiation, and peace building. These can be critical in laying the foundations for peace and in building trust. They may also assist to resolve disagreements in the constitution building process. In addition to resources for constitution building generally, external support can provide security in kind at some of the most sensitive

²²⁵ Carl (n 216); Alex de Waal and others, 'South Sudan: The Politics of Delay'; Katrin Seidel, 'State Formation through Constitution Making in Emerging South Sudan: Unveiling the Technicity of the Rule of Law' (2016) 18 *Law in Africa* 3; Srinivasan (n 222).

moments in a difficult constitution building process including (but not only) during and after elections or referendums. It can provide or restore infrastructure to assist constitution building processes and offer administrative or executive services, in the absence of capabilities in the constitution building state.

External support can also offer comparative knowledge and experience of constitution building and the implementation of international values in the context of conflict. Knowledge that may be particularly relevant includes the design and management of transition periods, options for power-sharing, mechanisms for building trust in a constitution building process between parties previously in conflict, the development and uses of interim constitutions and the challenges of implementation of new constitutional arrangements in states with little or no experience of constitutional government.

State communities needing a way out of internal conflict are highly vulnerable and dependent on external support and goodwill. It is easy in these circumstances to overlook local initiatives, guidance and solutions that could be critical for peace or constitution building, or to underrate the capability of local institutions on which the state may need to rely in the future. In processes of this kind, even more urgently than others, solutions lie in deep local knowledge and understanding, effective local partnerships, mutual respect, and open minds.

Further reflections on how external support can more effectively add value are prompted by the significant number of recent cases that have ended in stalemate or backsliding.

The first is that processes aimed at making a new constitution can enable but cannot replace negotiations aimed at finding a political agreement to end a conflict, including its underlying causes. Without agreement, such processes risk facilitating a victor's peace that requires less compromise from the stronger party, or a settlement driven, guaranteed, and under-written by foreign powers, neither of

which is likely to be stable. The problem is illustrated by attempts in recent years to agree on a new or revised constitution without a foundational peace settlement, leaving armed belligerents outside and hostile to a political resolution while violent conflicts continue. Somalia, Yemen, Afghanistan, Syria, and Libya are all cases in point.²²⁶ With hindsight, drawing in constitutional expertise in these cases without more progress in improving relations between the parties to the conflict may have yielded some short-term gains but was not conducive to stable constitutional outcomes.

Secondly, even where negotiated peace agreements are in place constitution-making processes can fail to reach satisfactory outcomes unless they find ways of resolving issues on which disagreement remains. The risk is that, while the state nominally has moved to a post-war context, there are outstanding issues that undercut stability, with no satisfactory means of resolving them. The post-Constitution tension over federalism in Nepal is an example.

There are no easy answers to these challenges. In some cases, external support could be enhanced by making skills in dialogue, negotiation and problem-solving available during the constitution building phase. In others, it may be that constitution making should be indefinitely delayed or, perhaps, avoided entirely by relying on interim or earlier constitutional arrangements. There is more work to be done on better understanding these options and when and how they can usefully be put into effect.

6.6.3 Quality

Both the degree of difficulty of providing external support that meets the standards of quality, and the risks of shortfall, are heightened in the context of constitution building during conflict.

²²⁶ Eg. in Somalia: Ahmed Abbas Ahmed and Ruben Zamora, 'Puntland Constitutional Review Process', *Whose peace is it anyway? Connecting Somali and international peacemaking*, Accord Issue 21 (Conciliation Resources 2010).

So, for example, the difficulty of acquiring the levels of local knowledge and understanding that make external support useful, which is encountered in other contexts, is augmented in cases of this kind by the likely complexity and range of the causes underlying the conflict, the implications of conflict for the adaptation of experience elsewhere and the problems of access to many communities. Adequate understanding is complicated also by the iterative nature, of the process and by the disjunction between the roles played by those providing external support to peace and constitution building processes respectively, when these impinge on each other.

Similarly, as in many processes, constitution building in the context of conflict is likely to encounter tension between international norms and standards that reflect the values of liberalism and the more communitarian values that prevail in many communities.²²⁷ This tension may manifest itself initially in the design of constitution building process, as a key influence on the substance of the constitution that emerges from it. Resolving it in any context requires deep understanding of local context and culture and strong negotiation skills. It is more difficult still where constitution building is affected by violent conflict, security is a priority, and external support is not necessarily viewed as impartial.

In another example along the same lines, the programmatic nature of the funding and delivery of external support can be even more problematic in the typically drawn-out processes that require both peace and constitution making. Where this occurs, those providing external support need to ensure that the contribution they make preserves the continuity of the process as a whole and to avoid setting timetables that do not suit conditions on the ground.

The quality of external support also can be enhanced by closer attention to the relationship between peace and constitution building processes and the opportunities it offers. More effective

²²⁷ Anthony Billingsley, *Political Succession in the Arab World: Constitutions, Family Loyalties and Islam* (Routledge 2010).

collaboration, in an appropriate form, would be helpful both to overcome situations where the external support offered by one creates problems for another and to maximise the benefits of drawing on both sets of knowledge and skills.

An example of the former was mentioned in the Dialogues. There is an obvious problem if commitments about constitution building processes or substance are made during peace negotiations that are not desirable or achievable from the perspective of constitution building. This is a risk that is well understood but hard to avoid in some cases. Its effects can be lessened by greater mutual awareness, and collaboration as required. Similar problems from disjunction may occur if other functions are distributed thematically between international actors, hindering the coherence of the process and the effectiveness of outcomes. The division of responsibilities in Afghanistan for security sector reform, countering illicit trade, constitution building, and disarmament was cited to us as an example.²²⁸

An example of how the relationship might be developed to deal more effectively with shared problems concerns the often-vexed issue of management of moments of transition in a peace and constitution building process. Such moments may arise after an election that has implications for power-sharing, in the handover from a consultative or expert process to a decision-making body, if conflict interrupts the process or at other points. The process may stall in these periods, with consequences that can be fatal. Pooling the skills and insights of those in the peace and constitution building communities could help to better understand the dynamics of such transitional moments and to anticipate and respond to them more effectively.²²⁹

²²⁸ Dialogue, 'Lessons Learned from Support to Constitution Building Processes', November 2023.

²²⁹ The point is illustrated at several stages in South Sudan following the peace agreement that set up the architecture for constitution building, after the Akolda Commission in 2012 and after the National Dialogue of 2016–2020.

Pooling skills and capabilities might enhance the quality of support for dealing with other familiar problems as well, including territorial disputes involving claims for local autonomy, or even sovereignty. By way of example, external support for peace processes may engage with pro-independence movements and their constituencies, including as de facto guarantor or observer in talks.²³⁰ External support for constitution building may be inhibited in dealing with such issues by dependence on state leaders and central institutions; perhaps also by a preference for building a strong centre.²³¹ There is more work to be done on how to take advantage of these potential synergies between peace and constitution building processes to better understand how constitution building support also can be applied to assist such transitions.

6.6.4 Reception and weight

External support is assisted where it is welcomed by local stakeholders and the two can work in tandem towards broadly shared goals. Reception may be enhanced by various factors that affect influence, including links through common languages, religions, legal systems and histories and opportunities for leverage that can appropriately be applied. The growing significance of regional institutions for both peace and constitution building is attributable to these considerations as well.

Where constitution building takes place in the context of conflict leaders may be less likely to welcome external support that is geared to encouraging constitution building processes. Other features of such cases also can militate against the influence of external support, including the length and multi-phased character of the process; the incremental character of progress; interference from neighbours pursuing their own interests; and the availability of other sources of

²³⁰ The International Contact Group on the Bangsamoro process in the Philippines, involving both diplomats and INGOs, is such a case.

²³¹ Dialogue, 'Lessons Learned from Support to Constitution Building Processes', November 2023.

external support that are not conditioned on inclusive processes.²³² Objections by those in positions of state leadership also may inhibit external support from seeking to make a difference by engaging with civil society, as an alternative to state institutions. These realities should be understood in gauging the effectiveness of external support in terms of the weight accorded to it by local stakeholders.

In such cases, alternative strategies are needed. Whether and how they are adopted depend also on how states contributing to external support weigh security, economic and other considerations against peace and constitution building in the case at hand. Nevertheless, interstate conflict with the potential for spillover affecting regional and global peace and security triggers options that may not be available in other contexts. These include greater reliance on leverage, supported by diplomacy at the highest levels, to bring key parties to the table, secure sufficient consensus about workable process, and press for the process to be carried through. Forms of leverage may also be useful for dealing with individual leaders blocking progress toward peace and constitutional stability, albeit with all the usual caveats.

These are the most difficult conditions faced by external support; a form of end game in which those providing support steer a difficult path between extremes. On the one hand, it is necessary to avoid the presence of external support from lending a veneer of respectability to a process that, in fact, is deeply flawed, thus also obscuring the responsibility of local actors. On the other hand, those providing external support generally seek to avoid rejection by those speaking on behalf of the state, in order to maintain a modicum of influence. The ultimate sanction available to external support is to withdraw altogether, possibly diverting support to other purposes. We were told of at least one instance where this has happened, as a last resort. It may be useful for more work to be done on the conditions that justify an action of this kind and what is required in institutional and organisational terms.

²³² Elizabeth Economy, 'China's Alternative Order and What America Should Learn from It' *Foreign Affairs* (23 April 2024).

7 Conclusions and recommendations

7.1 Conclusions

Over the past 30+ years, external support for constitution building processes has contributed to the global spread of constitutional democracy in the wake of the end of the cold war. It has helped to consolidate acceptance of inclusive constitution building processes as a foundation for stable democracy, and to disseminate understanding of what such processes involve. In doing so, it has assisted to advance gender equality, in constitution building processes and generally. In many cases, processes supported by external actors have also played a role in securing and maintaining peace.

The forms and practices of external support have evolved significantly over this time. The pool of those contributing to support has grown exponentially, bringing together a variety of disciplinary and professional skills. Much external support continues to emanate from developed democracies, including Sweden, which provides an instructive example in this report. There is, however, now considerable competence in the field across all regions of the world, including in states that have been or presently are engaged in constitution building. Much has been learned over this period about the distinctive challenges faced by outsiders in making a positive difference to constitution building processes without overstepping the bounds of support. The learning process continues. One burning current issue, canvassed in this report, is the need to maximise the synergies between external support for peace and constitution building processes in the interests of the effectiveness of both.

In the third decade of the 21st century both progress and the appearance of progress with constitutional democratisation appears to have stalled, making it timely to take stock of the effectiveness of

external support. A succession of constitutional processes has failed. Even when new constitutions are made, they do not necessarily lead to stability or to a better quality of life for people. Democratic backsliding is widespread, and some constitutions have been overturned. It is becoming increasingly difficult to reach political settlements in divided communities and peace-making negotiations stall and freeze, sometimes for decades.

These outcomes should be placed in perspective. Constitution making is inherently a difficult exercise, especially in contexts emerging from devastating armed conflicts and underdevelopment. Democratic culture takes a long while to develop and small seeds may grow unexpectedly. Constitutional change often is slow to bed down. Some of the most intractable current cases are those in which peoples are deeply divided, the state is weak, and there has been little if any experience of constitutionalism of the kind external support seeks to advance. The magnitude of these challenges makes the need for effective external support greater than ever.

Responsibility for final decisions about both process and constitutional substance ultimately, and properly, lies within the constitution building state. Poor constitution building outcomes are not necessarily attributable to external support. Even so, the research undertaken for this project suggests that there are ways in which external support for constitution building processes could be (and perhaps could always have been) more effective. This requires confidence in the broad values that external support seeks to promote, sensitivity in the forms in which external support is offered, and strategic use of the advantages at the disposal of those providing external support. It also requires respect for difference, a commitment to genuine partnership, openness to unfamiliar ideas, and modesty of expectations.

The geopolitical context in which external support is provided also has changed over the past three decades and is continuing to do so. This context helps to explain the advance and decline of constitutional democracy over time and needs to be considered in

the design and delivery of external support in the future. In the 2020s and for the foreseeable future, it means that the international community does not speak with one voice, that there is competition between different approaches to the governance of states, and that there are multiple avenues of external support for peace making and constitution building. To complicate the picture further, these changes come at a time of heightened interest in the implications of the distinctive constitutional experiences of countries in the ‘global south’, and of growing concern about the performance of at least some established democracies in the global north.

Most positively, there is potential for continuing innovation and experimentation with both constitution building processes and external support for them. Examples that we have noted in the report include new applications of digital technology, the adaptation of the emerging genre of ‘mini-publics’ to serve constitution building purposes in different contexts, and the development of inclusive processes to better deflect significant forms of democratic backsliding over time. In this way, constitution building processes will continue to evolve, and there remains much to be learned from the experiences of others.

7.2 Recommendations

In this report, we have organised our insights into effective external support for constitution building around four factors: contribution to national ownership and leadership, the addition of value, quality, and influence or weight. In relation to each of them we have teased out approaches that are conducive to effectiveness and those that hinder it.

The diversity of contexts in which external support is provided suggests a need for caution in making detailed recommendations and we commend the analysis and application of the factors to interested readers in their entirety. To make the report as accessible as possible, however, we make some particular recommendations below, some

of which are general and some for the attention of states that play a significant role in funding and otherwise assisting external support, and of those involved in providing external support. Some of the recommendations cover familiar territory. Difficulties encountered by external support to constitution building processes often lie in the application of principles in practice, rather than in identifying the principles themselves.

We have not formulated recommendations for stakeholders in constitution building states that engage with external support, which would have been beyond the scope of the project. We note, however, that they also might draw insights from the report into how to maximise the advantages that external support offers while maintaining ownership of constitution building processes and taking responsibility for the decisions that are made.

7.2.1 General

1. Work creatively to ensure national ownership of a Constitution, including the processes by which it is made, in the sense of both local and broadly inclusive ownership. External support is particularly effective when providers use skills and influence to ensure that national decision-makers take the views of people seriously and do what they can to encourage the democratic choice of representatives.
2. Accept that constitution building is a political exercise that requires political as well as technical skills.
3. Temper expectations of what can be achieved through a constitution building process including the extent of compliance with international norms. No constitution or constitution making process is perfect and some progress may be better than none. Sometimes, movement towards constitutional stability will not necessarily require formal constitutional change, and external support may be better directed to supporting implementation of the existing constitution.

4. Be flexible about timeframes: constitution building processes can be unpredictable.
5. Accept that constitution building, peacebuilding and sustainable development are co-dependent; one cannot be successful without the others. This requires a shared long-term vision, mutual understanding and collaboration where possible.
6. Give thought to how different external actors providing support to a constitution building process may co-ordinate, with each other and with actors in the constitution building state, in the pursuit of cumulative impact. Better alignment may be achieved through formal co-ordinating mechanisms as well as relationship building and knowledge sharing.
7. Consciously adapt assumptions, attitudes, and practices to an increasingly less liberal democratic and more overtly competitive global context. This includes attention to the potential for constitutional democracies to be undermined or overthrown, with attention to supporting local stakeholders who seek to defend democracy.

7.2.2 States providing external support

1. Take every opportunity to co-ordinate assistance, identify synergies, and facilitate co-operation between state functions, including between support for peace and constitution building processes and associated activities.
2. Ensure support for constitution building is part of a multi-faceted long-term approach that includes measures to implement and embed the constitution and assist actors in the constitution building state to realise its political, social and economic promises.
3. Use leverage decisively, with other states, IGOs and regional organisations.

4. Ensure funding is based on a thorough understanding of the constitution building context and is spread across political and social groupings, so as not to negatively distort the political sphere.
5. Be prepared to direct funding to either or both formal constitution building processes or local civil society organisations working on peace and constitution building or in defence against constitutional backsliding.
6. Fund projects directly or through organisations most likely to provide effective support, prioritising multi-year partnerships with such bodies.
7. Keep the demands of grant management as low as feasible, consistently with an adequate level of accountability that is flexible enough to respond to context.
8. Accept that even modest steps may make progress towards constitutional stability over time, as long as they make sense in the overall context.
9. Understand that both detailed outcomes and timelines for a constitution building process are difficult to predict at the outset and be flexible enough to accommodate reasonable adjustments over time.

7.2.3 Organisations and individuals providing external support

1. Be conscious of and responsive to your own strengths and weaknesses in any particular constitution building context.
2. Invest in deeply understanding relevant aspects of a constitution building context, learning from it, and responding effectively to it.
3. Work with internal expertise where possible, to support local and national capacities and provide opportunities for learning by doing.

4. Be prepared to listen to and learn from a wide range of stakeholders about the hopes and expectations from constitutional change.
5. Develop the skills and culture required to work in effective partnerships with local stakeholders, based on mutual respect, shared accountability, and trust.
6. Be realistic about the timing of outcomes. Be flexible enough to adapt to changing circumstances and to correct errors in the provision of support if things go wrong.
7. Pay attention to the opportunities and threats presented by movement between the different phases in a constitution building process, particularly between public consultation and formal deliberative processes and between peace making and constitution making.
8. Avoid overreach of the bounds of external 'support' by setting the agenda, driving the process, or constraining the decision-making of local actors. Avoid 'overclaiming' credit for successful constitutional outcomes, which properly should be nationally owned.
9. Consider strategies for dealing with potential hostility or resistance from local stakeholders to democratic constitution building processes. If leaders prove intractable, be open to working with civic minded groups (where that is possible) and engaging diplomatic channels.
10. Take care not to obscure the accountability of local leaders for decisions that are taken, by allowing them to conceal their own agency behind the shield of external support.

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Appendix 1. Concept note for Dialogues

This concept note provides the framework for a series of dialogues to identify the lessons that can be drawn from practical experience for how external support is most effectively provided to constitution building processes and the challenges to be avoided. The dialogues will involve both participants who have provided external support and those who have been stakeholders and recipients of support. We are grateful to all who are willing to give their time to participate in this way.

The dialogues are the third phase of a project conducted for the Swedish government's Expert Group for Aid Studies (EBA) by a team comprising Cheryl Saunders, Andy Carl, Anna Dziedzic and Samantha Smith under the auspices of Kantar Public. Earlier phases of the project involved an extensive literature review, discussions with individual stakeholders, some mapping of the field of external support, and the development of four case studies in depth, on Georgia, Nepal, South Sudan, and Tunisia. The concept note draws on this accumulated knowledge and reflects some of the tentative conclusions emerging from it.

The overarching questions to which the dialogues are directed are drawn from the terms of reference for the project:

- What is known about the function, form, and purpose of support to constitution building processes?
- What factors and approaches contribute to, or hinder, more stable constitutional systems?
- What insights can be drawn from experience for citizen participation in constitution-building?
- What insights can be drawn from experience for inclusion in constitution making bodies?

- What insights can be drawn from experience for the role of constitution building in conflict mediation?
- What are the relevant gender dimensions in each of these areas?
- What lessons can be learnt from experience for future support to constitution building processes?

More than 2/3 of the countries of the world have made or significantly changed their constitutions over the past 30 years, often in the wake of conflict. External support has been provided to many of them, in a variety of forms, from a wide variety of international, national and other sources, with mixed success. There is now an extraordinary body of experience on which to draw. This project is designed to collate and analyse this experience with a view to informing future efforts. The aims of the project are important for stable responsive government around the world and for the reduction of global conflict. The project also is timely, in view of recent evidence of democratic decline in countries in many parts of the world and geopolitical shifts that may have implications for world order.

Organisation

Each dialogue will be organised around the following six sessions, each examining a key theme for the project.

1. Are there adjustments to the way in which we frame the scope and goals of the project that could make it more productive?
2. What have been the goals of external support to constitution building processes?
3. How has external support provided? How might the modalities be improved?
4. What factors contribute to effective external support for public participation in constitution building, including its gender dimensions? What factors detract from effective support?

5. What factors contribute to effective external support for inclusion in constitution making bodies, including its gender dimensions? What factors detract from effective support?
6. What factors contribute to effective external support for constitution building in the context of conflict mediation? What factors detract from effective support?

Methodology and logistics

The dialogues will be held online, at times tailored to accommodate global time differences. We aim for 16–20 participants in each. Around 40 minutes will be allocated to each session, with a total commitment of 4 hours in all. Three participants in each session of each dialogue will be asked in advance to introduce the discussion for that session by speaking on selected aspects of it, for a maximum of five minutes. The remainder of the session will involve discussion of the theme as developed in the concept note, facilitated by one of the team members. The format is designed to prompt reflection on the issues and to encourage the free and frank exchange of ideas. The insights will inform the draft report on the project. No views will be attributed to particular people or particular organisations without permission.

Outline of the sessions

Session 1: Framing the project

The terms of reference for the project ask for insights into factors that help or hinder effective support to constitution building, with particular reference to participation, inclusion, gender and conflict mediation. Our interpretation of these terms of reference frame the project in ways that are the subject of this first session and on which views are welcome.

Key points include the following.

Support. We treat this term as referring to external support, whether direct, in terms of funding to in-country projects or other forms of hands-on assistance, such as advice or training, or indirect, by way of funding to other external institutions. There is now a wide range of at least 50 or so institutions that provide hands-on support, with financial contributions from other, usually state or state-related sources. Most of these providers are based in Europe or North America. We acknowledge that support is provided in other ways as well, including from neighbouring states (for example, India to Nepal), which is less readily identified but may be influential. We also acknowledge that the ambit of external support relevant to this project does not have definitive boundaries. While we will focus on the most common practices, external support potentially includes other relatively unusual, context-specific examples such as the international members of the Committee of Experts in Kenya. Query whether it might also extend to the issue economic support for fragile democracies during a transition or other practical measures.

Constitution building. We understand constitution building broadly, running from the earliest intimations of constitutional change (including in the context of negotiations to end and move on from conflicts that agree on future governance arrangements) to the implementation of a new constitutional settlement. There is a sense in which constitution building is always a continuing work in progress and there are plenty of examples, including Nepal and Tunisia, which show that the challenges of implementation may extend well for some time. These realities will be acknowledged in the analysis in the report on the project and also are relevant to the concept of effectiveness or success, considered below.

Process vs substance. The focus of the project is the effectiveness of external support to the processes of constitution building, rather than to external support in relation to the substance (or content) of new constitutional arrangements. External support is common in

relation to both process and substance. While this project is related to process, we note that many of the same issues potentially arise in relation to both, in terms of local ownership and contextual fit and the relevance of claimed international standards.

Effectiveness. In order to consider when external support is more or less effective it is necessary to have a concept of what amounts to achievement (or success). For some providers, it may be measured by reference to the quality of the support provided; for others it may depend on the outcomes of a constitution building process in terms of, for example, stable government, to which local actors are key. Consideration of effectiveness also needs to accept that progress may not be linear, that new constitutional arrangements are likely to take some time to become established, and that the contexts in which much constitutional building occurs mean that outcomes are likely to differ from those in the established constitutional systems from which much external support comes. It may also be argued that, depending on the context, any improvement on the status quo, or prevention of deterioration, or diminution of conflict is an achievement, even if temporary. While reasonably substantive outcomes offer a more obvious guide to what works and what doesn't, for the purposes of this project we accept that achievement will often be relative and will evaluate measures in context.

Effectiveness of support v effectiveness of process. The project seeks to identify what helps and hinders external support to constitution building processes. It thus requires consideration of the effectiveness of both the modalities of support and particular constitution building processes. These two levels of the inquiry may raise different considerations. For example, the choice between funding an international or regional organisation for the purposes of a constitution building project goes primarily to the modalities of support, whereas the extent of public participation in formulating proposals for change concerns the process of constitution building itself. Both sets of issues are taken up later in the dialogue (sessions 2 and 4 respectively) but the multi-layered nature of the investigation should at least be noted here.

Questions on which we would welcome reactions include:

- Would it be useful for the project to extend beyond the familiar forms of direct and indirect constitution building support presently covered?
- There is a sense in which constitution building is an indefinite process. Over what period should the effectiveness of external support be considered, in order to meet the goals of this project?
- What kinds of outcomes in constitution building are adequate, in order to assess when support for a process works more or less effectively? Can this question be determined in the abstract?
- Are there other aspects of the ways in which we have interpreted the terms of reference that need attention or alteration?

Session 2: The goals of external support to constitution building processes

The goals of external support are relevant to evaluating its effectiveness. They may also affect the types of support provided and the choice of institution to provide direct support.

The principal goal of support usually assumed or asserted is to assist internal stakeholders in the course of transition to a new form of constitutional democracy including, where relevant, to deal with unresolved issues of intrastate conflict. In a variation, in some cases, support is provided to states that are not in transition but seek to improve the quality of constitutional democracy. We understand this implicitly to accept democratisation as an intrinsic good in its own right, with potential benefits for a state and its people in terms of stable and responsive government. To this end, in principle, the form of constitutional government that is built, through process and in choices made about substance, should be nationally owned, should fit the context in which it will operate, and should lend itself to a constitutional ‘story’ that sustains its acceptance over time. The

constitutional system that emerges from such a process may differ from those in developed western democracies in some respects. This understanding of the goal of external support is consistent with the narrative in our terms of reference. On the other hand, at least three other perspectives that emerge from the literature are not entirely consistent with it and we would welcome reactions to them. They are prompted by considerations of geopolitics and of the different preoccupations of providers of constitution building support.

First, some perspectives on constitution building suggest that the model for democratisation, in both process and substance, is more homogenised, along lines provided by traditional western democracies, than is consistent with the need to seek local ownership and fit. This perspective is bolstered by an emphasis on the need to comply with international standards, in both process and substance, and/or the need for consistency with economic liberalisation. It derives further strength from some strands of theory about ‘global constitutionalism’ in international law and from the growing geo-political competition between democracies and authoritarian systems.

Secondly, it may be that the goals of external support vary to a degree depending on the provider. A (probably over) simple classification of providers between the United Nations, inter-governmental organisations, states, national institutions and NGOs, suggests the potential for this to be correct. All have their own priorities, within their own institutional frameworks and operate within their own accountability regimes. They may also be in competition with each other, to a greater or lesser extent.

Thirdly, the goals of external support may be affected by characteristics of the state in which constitution building is taking place, to which external support is provided. Key variables that could influence the priorities of external support include whether the constitution building state is in the neighbourhood of the provider or is a strategic ally, whether it has a significant role in managing and suppressing international terrorism or crime and whether it has natural resources on which other states depend.

Questions on which we would welcome reactions include:

- Is the goal of external support adequately captured by the ideas of assisting democratisation in context and the resolution and prevention of conflict?
- Are there cases where external support is neutral on whether to explicitly support democratisation?
- To what extent, if at all, should compliance with international standards about constitution making processes be factored into the goals of external support? What weight should they have? Is this an issue of ethics, or effectiveness (or other)?
- Do the goals, interests and motives of external support vary between providers in ways that might be relevant to assessing what works and what doesn't for the purposes of this project?
- Do the goals of external support relevantly vary between recipient states or partners within states? Are there examples?
- How do the goals of external support relate to those of recipient states or partners within states?
- Are there any other aspects of our treatment of this issue that deserves attention?

Session 3: How is support provided? How might its modalities be improved?

This session considers the factors that might have a bearing on the effectiveness of external support to constitution building generally. To assist understanding, it groups them into five categories, dealing with the character of the provider, the character of the in-country partner, the type of support, logistical aspects of support, and comparative aspects of support.

Character of the provider considers whether there are characteristics that make some providers of direct or indirect support more or less appropriate or effective in particular constitution building cases or at particular stages of constitution building. Possibilities include:

- Some providers might be seen as more legitimate, or more neutral, or less self-interested, generally or in particular cases.
- Expertise or experience as a service provider may be factors, generally or for particular purposes (eg. drafting, conducting elections for a constituent assembly).
- Some providers may be regarded as having more leverage over, or closer linkages with, a recipient state or dominant party, in ways that make effective outcomes more likely (eg. the Venice Commission, particularly in relation to potential EU candidates).
- Some providers may have trusted relationships with representatives of an underrepresented minority group or democracy and rights activists in-country.

Character of the in-country partner asks whether there are factors concerning the in-country partner for external support to constitution building that might have a bearing on constructive outcomes. Possibilities include:

- A genuinely felt need for assistance on the part of the recipient state/key decision-makers/partner.
- A relevantly influential partner.
- The goals of the state or partner.
- Political aspirations, such as EU membership.
- The in-country partner's commitment to democratisation and/or regional or international norms and standards.

Type of support might be categorised in a variety of ways. One that seems relevant to this project concerns the extent to which the support adds value and is perceived by in-country stakeholders to

add value to a significant aspect of constitution building process. External support that offers something that is necessary for constitution building but cannot otherwise be achieved in-country may be more valued and more likely to lead to productive outcomes than support that duplicates in-country capabilities. Impartiality in mediation, as a foundation for building trust and confidence, is one example. Information about comparative experience may, in some circumstances, be another. Procedural aspects of support include a range of factors affecting the ways in which support is provided in practice, including:

- The timetable for aspects of constitution building process (elections, duration of Assembly, etc), including the need for timing to be determined by contextual considerations, rather than provider interests and established ways of working.
- The duration and continuity of connection between provider and recipient, facilitating trust, understanding and the effective interchange of knowledge.
- Co-operation between multiple providers, to reduce confusion and minimise complexity. Comparative aspects of support comprise factors that might make external support more suitable and more acceptable in context, including:
 - A commitment to adequately understanding local context and the capacities to do so.
 - Familiarity with local language(s) and constitutional/legal heritage.
 - A willingness to forgo credit for providing external support in the interests of the perception, as well as the reality, of local ownership.
 - Effective local capacity building as an alternative to ongoing external support.
 - Approach(es) to partnership.

Questions on which we would welcome reactions include:

- Is the nature of the provider relevant to the effectiveness of external support, in these or other ways? Are we correct to assume that the choice of appropriate provider varies with context and circumstance? Examples?
- Are we correct to assume that it makes a difference to the effectiveness of external support if the recipient state considers itself to be genuinely in need of external support and/or the in-country partner is an influential decision-maker? How commonly are these criteria satisfied?
- Is support likely to be more productive and effective where it adds agreed value to a constitution building process? Does the provision of comparative knowledge always/often/sometimes fall into this category?
- Are we correct in assuming the practical aspects of support that make a difference to its effectiveness? Are there others that should be included here?
- Are we correct in the emphasis we place on comparative aspects of support? Are there others that should be included here?
- Does an invitation matter? How do trust and legitimacy interact with the effectiveness of external support?
- Are there other factors relevant to the strengths and weaknesses of external support to constitution building that we should consider?

Session 4: Effective external support for participation, including its gender dimension

This session deals with the effectiveness of external support to public participation, including the gender dimension of public participation, as the first of the three constitution building processes

specified in our terms of reference. Public participation has been a common feature of constitution building for at least the past three decades and frequently attracts external support. This session is designed to explore the insights that might be derived from this extensive experience for both the practices of public participation and the effectiveness of external support for it. For the purposes of this session, we treat public participation as comprising any direct engagement of the public in groups or at large, at any point in a constitution building process, and in any way that meets desired goals, from the time when constitutional change is mooted to its implementation over time. We include in this definition a referendum at the beginning or end of a process, on the basis that that this creates a need for public education and understanding that is shared with other aspects of participation and may attract external support. We acknowledge that referendums also raise distinct issues for constitution building of their own, which we will not pursue here.

Despite its prevalence, and a now extensive literature, there is a host of uncertainties about the purposes and modalities of public participation that can usefully be grouped as: Why? When? How? Who? These may have a bearing on the effectiveness of external support. They also prompt some additional questions about the modalities of external support itself, which are identified separately below.

Issues for public participation

- Why? The reasons for public participation in constitution building are diverse and may not be clearly articulated. Nevertheless, they are relevant to the way in which participation is conducted and to any evaluation of the outcomes. On one view, public participation is largely symbolic or performative, underpinning the conception of the constitution as drawing its authority from the people. On another view, public participation has practical purposes, including supporting transition to democratic practice and the equality and deliberation associated with it, preparing the public to hold representatives to account and/or influencing the substance of the Constitution.

- When? Public participation may be targeted at particular points in a constitution building process, ranging from early phases, when ideas are beginning to form, to intermediate phases, when committees are developing concrete proposals, to later phases, when there is a draft to react to. The choice will be influenced by the perceived goals of public participation and will, in turn, influence how it is conducted.
- How? The principal, practical challenge of public participation is to encourage people to take an interest and to assist them to understand what it is all about. This may require some form of public ‘education’, which risks eroding trust by being perceived as manipulative. Participation may be enhanced by engaging with local culture (music, dance, ceremony, story, other) to assist understanding. It may be designed for particular groups to encourage take-up: women, youth, communities organised territorially or by reference to other social factors (religion, ethnicity). Feedback to encourage acceptance that participation is worthwhile also may be relevant; the ultimate indication of relevance is impact on the ideas and text that emerge from the constitution-building process.
- Another important question is the subject-matter of the consultation, which may range from problems the community would like resolved to the concept of a constitution and the details of potential constitutional arrangements. The need to keep a balance between public outreach and accommodation of the views of political leaders is taken up in the next session on inclusion.
- Who? Whatever the goal of public participation, in principle it should be available and as accessible as possible to the public at large including women, youth, minorities and other marginalised groups. In reality, however, particularly in states with high levels of illiteracy and little understanding of constitutional government, public participation is likely to have only limited reach, engaging groups in civil society that have mobilised to

participate in the constitution building process. The significance of this, and ways to minimise its impact, need consideration in context.

Issues for external support for public participation

- Why? External support for public participation may be motivated by factors additional to the rationales mentioned above. External support for process avoids some of the concerns about legitimacy potentially raised by external involvement in more substantive constitutional content. Participation in constitution making is sometimes claimed as an evolving right in international law or, at least, as an international standard of some kind.
- How? There are questions about the aspects of public participation that might best benefit from external support, bearing in mind the added value that external support potentially offers in terms of resources, comparative knowledge, skills and understandings of constitutionalism (although developed in other contexts) and a commitment to international standards, including in relation to gender. External support may be least useful for aspects of public participation that require knowledge of local custom and context, including the design of public participation itself.
- Who? The variety of ways in which external actors might support public participation broadens the potential range of local partners. There are questions about the types of partners that might produce the most effective outcomes, at different stages of a constitution building process. To the extent that NGOs representing marginalised groups are potential partners, it would be useful to understand how well this has worked in practice.

Questions on which we would welcome reactions include:

- Is it useful to articulate the goals of public participation, and of external support for it, in advance of a constitution building project? What should they be?
- Are we right in identifying the added values that external support potentially offers public participation? Are there others? What does this mean for the ways in which external actors can best support public participation? In what ways is external support least useful?
- Are we right in assuming that public participation only has limited reach, at best? Has experience identified ways of maximising the effects of public participation?
- What principles and practices have been found to be most useful in selecting in-country partners for external support in public participation? Are there examples of what clearly has not worked?
- Are we right in assuming that there needs to be flexibility in the timing, sequencing and mechanisms for public participation, in order to deal with contingencies that may arise? If so, how should this affect current practice?
- What does experience suggest about the design of public participation in states with where there are deep divisions in the population?
- Are there any other points that might assist to enhance the effectiveness of external support for public participation?

Session 5: Effective external support for inclusion

This session deals with the effectiveness of external support to inclusion in constitution building processes, including the gender dimension of inclusion, as the second of the three aspects of process

specified in our terms of reference. Like participation, with which it has some affinity, inclusion has been a common feature of constitution building in recent decades and frequently attracts external support.

This session is designed to explore the insights that might be derived from experience for inclusion, its gender dimension, and the effectiveness of external support for it. For the purposes of this session, we treat inclusion as referring to the systemic involvement of all relevant groups or interests in the institutional arrangements for constitution building, as part of the decision-making process.

Significantly, at least some of those included may previously have been excluded from civic, economic and social life in ways that have contributed to the case for constitutional change. On this basis, the potential rationales for inclusion resonate with those for public participation but are more focussed. Thus, it might be claimed that inclusion reinforces the concept of a constitution by facilitating broad-based support; that it lays foundations for democratic practice over time; that it is nation-building; that it gives all groups a sense of ownership of the state and the system of government through which it functions; that it diminishes the incentives for ‘spoilers’; and that it assists to break down authoritarianism and other concentrations of power that characterised earlier regimes.

The design of effective arrangements for inclusion will depend on the rationales that are most important in context. Inclusion may be critical to a constitution building project, but it is not an unqualified good. It needs to take its place in an overall constitution building process that is tailored to achieve a successful outcome, in context. Such a process needs to accommodate not only inclusion but also the perspectives of those needed to play a leading role in the implementation of new arrangements in the short and medium terms. It also needs to take account of the likely reactions of decision-makers at later stages in the process including, for example, ratification through referendum or enactment by a parliamentary body.

Views about where to strike the right balance range from the pragmatic choice of including at least all groups with the potential to spoil the process to the more conceptual calculation of what will be accepted as leading to a constitution 'by and for the people'.

Issues for inclusion in a constitution building process, which may be relevant to the effectiveness of support, include the following.

- Who should be included; and who decides? Some groups are obvious: women as well as men; significant minorities and marginalised groups; adequate geographical representation; different generations. Others require more careful decision in context and by reference to the rationales for inclusion: the military, the diaspora, rebels, groups of which key internal stakeholders or powerful members of the international community disapprove.
- When is inclusion relevant? Broad inclusion is always likely to be relevant in the principal deliberative body in which a constitution is made, including its committees, and in a National Conference or other consultation process, if any, designed to build consensus at the outset of a constitution making process (or, sometimes, later). Even in these cases, however, caution may be needed in the advice given and options supported: a Constituent Assembly that doubles as a national legislature may need to be less inclusive than an Assembly directed solely to the task of constitution making. Other, more challenging contexts in which consideration should be given to at least some degree of inclusion are at the outset of a constitution making process, when the framework of principle and process is being negotiated and for the purposes of making an interim constitution.
- How should inclusion operate? Inclusion may require attention not just to participation in institutions but to their decision-making rules, to ensure a sufficiently broad consensus. Inclusion also directs attention to form versus substance. Many of the potential goals of inclusion will not be achieved if participation is purely formal and does not involve real engagement.

Additional issues for external support for inclusion include the following.

- What should receive external support? At least one determining factor concerns the ways in which external support can add value to or detract from appropriate levels of inclusion, in principle and in context. Issues for consideration include the provision of resources to local partners, comparative knowledge adapted to context; training adapted to context; and draft rules for the operation of constituent assemblies elsewhere.
- How should support be provided? This issue encompasses the choice of local partner with a view to maximising, rather than detracting from effectiveness, and the manner in which external actors work with the local partner. Questions of continuity, familiarity, local understanding and trust are relevant here.

Questions on which we would welcome reactions include:

- In what ways is external support for inclusion most useful? In what ways is it least useful?
- Are any insights emerging to assist with decisions about where the balance is most effectively struck between the accommodation of leadership and inclusion in constitution building processes?
- What does experience suggest about ensuring the substantive inclusion of women in constitution building in states where cultural, including religious, practice is to the contrary? What helps, and what hinders? How can external support best assist?
- What principles and practices have been found to be most useful in selecting in-country partners for external support with processes of inclusion. Are there examples of what clearly has not worked?

- How are decisions best handled about the inclusion of groups of which the external supporters disapprove?
- How can external providers support the interests of excluded groups when the government and dominant parties are not interested? What has been learned from these experiences?
- What does experience suggest about the design of inclusion in states with territorial divisions that are engaged in constitution building?
- Are there any other points that might assist to enhance the effectiveness of external support for inclusion, including its gender dimensions?

Session 6: The relationship of mediation and peacebuilding support to processes of constitution building and support

Much constitution building takes place during, after, or in anticipation of intrastate conflict. Often, processes of mediation and peacebuilding are used to try to deal with the conflict. In these situations, both constitution building and mediation/peacebuilding may receive external support. This session explores the relationship between them, in order to better understand how the effectiveness of external support to constitution building might be enhanced in such contexts.

For present purposes, we understand mediation as a process whereby a third party assists others, with their consent, to deal with conflict by developing mutually acceptable agreements. The parties typically are the state and dominant non-state actors. Peacebuilding has a broader connotation and involves engagement with civil society and others, covering all moves to deal with the underlying causes of conflict, to help people to resolve their differences and to lay foundations to prevent violence and to sustain peace. Understood in these ways, there are both synergies and significant

differences between mediation and peacebuilding on the one hand, and constitution building on the other. These affect the relationship between them and the ways in which the relationship might be used to further the effectiveness of outcomes through external support.

Synergies on which the relationship might build include the following:

- Both mediation/peacebuilding and constitution building have a broad commonality of purpose in promoting peaceful co-existence.
- Both may be prompted by actual or latent conflict on the ground.
- Both may need to use similar tools of negotiation and trust building.
- Both peacebuilding and constitution building assume the value of public participation and inclusion, tailored to context.
- Both mediation/peacebuilding and constitution building receive support from a variety of external actors, who face common challenges in accessing local understanding, ensuring local ownership, and managing external interests and priorities.
- Mediation/peacebuilding and constitution building often take place contemporaneously, particularly when both state building and nation building are required.
- Mediation/peacebuilding and constitution building are often interdependent. The former may rely on a constitution to give agreements greater security and to build trust between the parties. Both the process and substance of constitution building may have been predetermined to a degree by agreements in a peace process. These are two communities of practice that may overlap in terms of people and organisations.

There are important differences between these processes as well, however, which need to be understood and taken into account in supporting them both productively.

- Their specific goals differ in ways that also affect an assessment of the outcomes. Mediation/peacebuilding seeks a reduction in conflict, a change in relations, and agreement on ways to move towards positive peace. Constitution building seeks a constitutional framework with particular characteristics that include electoral democracy and protection of human rights.
- Key aspects of their procedures differ. Mediation involves key, often elite parties and may require confidentiality, informality and discretion. Constitution building also tends to involve elite parties but can ultimately be more inclusive, consultative and transparent, in order to secure legitimacy of the constitution that emerges from the process.
- Constitution building may disrupt mediation/peacebuilding by, for example, heightening tensions through requiring an election. Mediation support to peace processes may put undue and unreasonable pressures on constitution building by being too prescriptive or too pre-emptive of the process design and its outcome.
- Mediation/peacebuilding and constitution building operate within different legal, theoretical, cultural and practical frameworks. The former draws more extensively on international law, relies on soft power (and occasionally hard power) and engages the executive branch of government. Constitution building works within the framework of domestic constitutional law and theory, which requires certain legal and political processes to be followed, before constitutional change is achieved.
- Mediation/peacebuilding may take place at the local level, as required, including where secession or 'sovereignty conflicts' are involved. Constitution building typically (although not invariably) takes place at the level of the central state and is concerned with building institutions that govern the whole state and can enter into arrangements with other states.

- While both receive external support, external actors for mediation/peacebuilding and constitutional building come from different epistemic communities (with some overlapping practitioners), bring different knowledge and skills to the task and may be provided by and accountable to different sections of international, intergovernmental and national institutions.

Consideration of these synergies and differences suggest steps that might be taken to enhance the effectiveness of external support to constitution building processes in the context of conflict. To some extent these are underway.

- Each of the two sets of communities might develop greater awareness of the modalities and parameters with which the other works, generally and in particular cases.
- A more holistic approach might be taken to a constitution building project where there is underlying and ongoing conflict.
- The mediation/peacebuilding and constitution building communities might learn from each other in productive ways. Constitution building might make greater use of techniques of negotiation, for example. Mediation/peacebuilding might take place with an awareness, drawn from experience, of the potential consequences of agreements that cannot be constitutionally realised or, if realised, are not regarded locally as legitimate.
- The two communities might usefully share insights into local knowledge, local partners, and the preferences of local communities in particular cases.
- Constitution building might pay more attention to the development of agreement at the local level, in cases where this is relevant, and to how this might be used to support agreement across the state as a whole.
- Constitution building might be undertaken with greater awareness of the potential of the need to avoid taking steps that

might exacerbate conflict or destabilise fragile peace. Questions on which we would welcome reactions include:

- Is our assessment of the synergies and differences between mediation/peacebuilding and constitution building accurate? How significant are the tensions to which the differences give rise?
- To what extent and in what ways could these two communities learn from each other in enhancing the effectiveness of external support?
- Could current practices be usefully enhanced by greater collaboration between the two sets of communities in the ways suggested here – and in other ways? Alternatively, should they remain distinct, but informed by better mutual understanding?
- Are there particularly good examples of where the relationship between mediation/peacebuilding and constitution building has worked effectively? Are there examples of where the relationship clearly has been a source of tension and created problems? Do these provide more general lessons or were they context specific?
- What insights can be drawn from experience for managing and mitigating external interests and priorities in supporting constitution building in the context of conflict?
- How can the potential for constitution building to further peacebuilding, dialogue and negotiation be enhanced?
- Are there other ways in which to maximise the potential of the relationship between mediation/peacebuilding and constitution building and to minimise the challenges of it?

Appendix 2. Overview of four cases

The criteria for selecting these cases and their roles in the research and analysis are set out in chapter 2.4.

Georgia

Georgia's constitution was made in the early 1990s in the wake of the dissolution of the USSR. After a referendum vote in favour of independence in 1991, the governing military council declared that the 1921 Constitution of Georgia was restored. This Constitution did not take effect, however, and the parliament adopted an interim 'small' constitution in November 1992. The following year the parliament created a State Constitutional Commission of 118 members drawn from the members of parliament, lawyers, economists and scholars, to draft a new constitution.

Georgia was receptive to external support during this period. It is believed that President Edvard Shevardnadze personally requested assistance from George Soros, given the experience of his Institute (now known as the Open Society Foundation) in assisting the transition to democracy in eastern and central European countries.²³³ The State Constitutional Commission also received assistance from a range of sources including the Venice Commission, the OSCE and the National Democratic Institute.²³⁴ Activities included seminars and training delivered in Georgia by experts from the United States, Canada, France, Hungary, Poland and Switzerland.²³⁵ Members of the Commission also visited the Central European University in Budapest and ODIHR in Warsaw for information on human rights provisions.²³⁶ Ten members of the Commission attended a drafting

²³³ Interview 38.

²³⁴ Interviews 21, 32 and 38.

²³⁵ Wolfgang Gaul, *Drafting and Adoption of Constitution of Georgia* (Wissenschafts-Verlag 2001).

²³⁶ Interview 32.

conference hosted by the University of Chicago.²³⁷ It was thought that meeting abroad would provide a private environment conducive to negotiating a draft text, but the absence of the Minister of Justice from the conference was later used to justify changes to this draft in favour of a stronger presidential system.²³⁸ The Venice Commission provided comments on draft texts.²³⁹

Interviews with those involved in coordinating these processes suggest that external support provided access to comparative experience that offered different constitutional options and contributed international legitimacy to Georgia's newly won independence and Euro-Atlantic ambitions.²⁴⁰ Similarly, the approval of the Venice Commission was seen to be important for cooperation with the European Union and the accession process.

Constitutional reform processes in 2004, 2010 and 2017–18 also attracted external support. In contrast to the relatively closed process for making the 1995 Constitution, State Constitutional Commissions have become more inclusive and their procedures more transparent to the public, although shortcomings remain, regarding inclusion of women and ethnic, religious and cultural minority groups.²⁴¹ These efforts in constitutional reform attracted support from the European Commission and foreign development agencies, especially from Germany and the United States. The Venice Commission has continued to provide advice and review constitutional drafts.

²³⁷ Catherine Behan, 'Center Helps Eastern European Countries Shape Constitutions' The University of Chicago Chronicle (7 December 1995) <<https://chronicle.uchicago.edu/951207/georgia.shtml>>

²³⁸ Interview 21.

²³⁹ Interview 20. Opinions of the Venice Commission relating to Georgia are available at

https://www.venice.coe.int/WebForms/documents/by_opinion.aspx?lang=EN

²⁴⁰ Interviews 32, 38. See also Wolfgang Babeck, Steven Fish and Zeno Reichenbecher (eds), *Rewriting a Constitution: Georgia's Shift towards Europe* (Nomos Publishers 2012).

²⁴¹ Giorgi Meladze and Karlo Godoladze, 'Constitution for "All" or for "Chosen Few": Problems of Constitution-Making in Georgia' (2015) VIII Constitutional Law Review 23.

Less direct forms of external support have been provided through scholarship programs to support the legal education of Georgian citizens in Germany;²⁴² funding from philanthropic organisations and donor states (including Sweden) for NGOs and civil society groups engaged in constitution building;²⁴³ and support to peacebuilding NGOs in the disputed regions.²⁴⁴

Nepal

The Comprehensive Peace Accord of 2006 marked the end of ten years of internal armed conflict in Nepal and is a convenient starting point for an account of the Constitution building process. The peace agreement called for an Interim Constitution, which was drafted by a committee of seven lawyers, later expanded to include some women and persons from ethnic minority groups.²⁴⁵ The peace agreement and interim constitution set out a process for making a permanent constitution through an elected Constituent Assembly, which would also function as a legislature. Both were amended as the process got underway. The first, highly inclusive Constituent Assembly failed to produce a draft constitution and was dissolved in 2012.²⁴⁶ A second, somewhat less inclusive Constituent Assembly was elected in 2013 and a new Constitution promulgated in September 2015.

Nepal was receptive to external support from the outset: the peace agreement specifically urged ‘all the friendly countries and the United Nations, as well as the International Community to extend support’

²⁴² Babeck, Fish and Reichenbecher (n 241).

²⁴³ Eg. ‘Georgian Young Lawyers’ Association: Chronicling Its Struggle for Democracy’ (International Bridges to Justice 2010) <<https://www.ibj.org/2010/07/georgian-young-lawyers-association-its-struggle-for-democracy/>>

²⁴⁴ Interviews 4, 15 and 34.

²⁴⁵ Jill Cottrell and others (eds), *The Interim Constitution of Nepal, 2063* (2007) (UNDP 2008) 8.

²⁴⁶ Surendra Bhandari, ‘The Politics of Constitutions Making in Nepal’ in Bipin Adhikari (ed), *A Treatise on the Constitution of Nepal 2015* (Kathmandu University School of Law 2020).

to Nepal to establish democracy and peace.²⁴⁷ Nepal attracted extensive support, particularly during the first Constituent Assembly, although levels of support declined when this was dissolved without finalising a constitution. A wide range of donors provided funding, through contributions to constitution building organisations or through pooled funds. Notable funding initiatives included the Nepal Peace Trust Fund established in 2007 to implement the Peace Agreement;²⁴⁸ the United Nations Peace Fund for Nepal established to complement the Peace Trust Fund; the Rights, Democracy and Inclusion Fund; and a donor consortium established under UNDP auspices to co-ordinate the provision of external support with the consent of the Government of Nepal. Embassies and development arms of many states actively provided support to the constitution building process.²⁴⁹ Other organisations significantly involved included UNDP, International IDEA, the Asia Foundation, and the Carter Center. Most external support was provided in partnership with Nepali institutions and actors, such as the Electoral Commission. Support was also provided to political parties, cantonments, local peace committees and civil society, including women and Indigenous peoples. Activities included the provision of infrastructure for elections, civic awareness and voter education, training for electoral staff, study tours, papers and workshops for members of the Constituent Assemblies.

Aspects of external support in Nepal have been criticised, partly for lack of co-ordination. The 2008 Constituent Assembly election is an exception in this regard; the donors, external support providers, law enforcement agencies, including those on the Indian side of the border, and the Nepalese Election Commission worked in a coordinated fashion towards the common goal of making the

²⁴⁷ Comprehensive Peace Accord signed between Nepal Government and the Communist Party of Nepal (Maoist), 22 November 2006, cl 10.8.

²⁴⁸ Managed by Nepal, which also contributed 60%.

²⁴⁹ Including Canada (CIDA), Denmark, EU, Finland, Germany, Japan, Norway, Switzerland, the United Kingdom (DfID), and the United States (USAID).

election a success.²⁵⁰ External support to the Constituent Assembly attracted more criticism.²⁵¹ Providers offered divergent perspectives on substantive aspects of the Constitution, some advice was perceived to be unhelpful, contradictory or driven by external interests and external engagement with particular groups of Assembly members was perceived to have diverted their attention from the work of the Assembly as whole, leaving the field to political leaders.²⁵² Some steps were taken towards co-ordination of aspects of external support. For example, several agencies jointly established the Constitutional Information Center to organize training sessions for the assembly members on various aspects of conducting elections and drafting a constitution.²⁵³

South Sudan

Constitution building in South Sudan has taken a complex path, beginning in 2005 with a peace agreement to end civil war in Sudan, the referendum in 2010 in favour of the separation of South Sudan from Sudan, and efforts since 2011 to make a permanent constitution for the new state.

There is a long history of external assistance to constitution building in South Sudan. The United Nations together with the African Union, the Intergovernmental Authority on Development (a regional organisation of eight Eastern African states) and the governments of Italy, Norway, the United Kingdom and the United States helped broker the Comprehensive Peace Agreement which ended

²⁵⁰ Fiedler and others (n 107) 70; Carter Center, 'Observing the 2008 Nepal Constituent Assembly Election' (2008); Asian Network for Free Elections (ANFREL), 'Nepal: The Constituent Assembly Election 2008' (2008).

²⁵¹ Grävingholt and others (n 80) 30–31, 52–4.

²⁵² Timilsina (n 88).

²⁵³ 'Nepal's Constitution-Building Process, 2006–2015' (n 157) 37.

two decades of civil war in Sudan.²⁵⁴ International actors have also brokered ceasefires and peace deals during the civil war that erupted in South Sudan in 2013.²⁵⁵

Following the referendum, the government of Southern Sudan formed an ad hoc Committee which produced the Transitional Constitution of the Republic of South Sudan. This transitional constitution is widely seen as the product of the ruling party, the Sudan People's Liberation Movement.²⁵⁶ A National Constitutional Review Commission was established in 2012. Its members were appointed by Presidential Decree, which also named three international actors – the International Development Law Organization, the Public International Law Policy Group, and the UN Mission in South Sudan – as partner organisations from which the Commission could seek 'technical support'. The Commission's work was affected by lack of financial resources and the outbreak of conflict in December 2013.²⁵⁷

In 2017, international actors intervened again, facilitating a peace process led by the Intergovernmental Authority on Development. This resulted in a new constitution making process, again with express provision for international assistance.²⁵⁸ It was agreed that the Max Planck Foundation would provide support, with funding from the European Union. A law made in 2022 sets out the details for the process, including a Constitutional Drafting Committee, which is to include three 'non-South Sudanese nationals'; a reconstituted National Constitution Review Commission; and an

²⁵⁴ Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army, 9 January 2005. See Al-Ali and Dann (n 17) 442–9.

²⁵⁵ Armi Beatriz E Bayot, 'Internationalised Constitution-Making in Deeply Divided States: A Note on South Sudan' (ICONnect, 9 June 2021) <<https://www.iconnectblog.com/internationalised-constitution-making-in-deeply-divided-states-a-note-on-south-sudan/>>

²⁵⁶ Srinivasan (n 222).

²⁵⁷ 'South Sudan Peace Agreement and Peacemaking' (Zambakari Advisory 2019).

²⁵⁸ Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS), 12 September 2018.

‘inclusive, deliberative representative’ National Constitutional Conference to approve the constitutional text.²⁵⁹ These actions are to be coordinated with ‘assistance and donations from regional and international partners and friends of South Sudan’,²⁶⁰ provided by the UN Mission to South Sudan, regional partners and western donors. No action had been taken, by the first half of 2024.

There have been several critiques of the way in which external support to constitution building has been provided in South Sudan. The focus of international engagements on belligerent elite groups and individuals in the name of stability sidelined wider engagement with other stakeholders; and the various different interests and ‘ends’ of external peace-building and constitution-building providers were odds with civil politics.²⁶¹ There is a concern that external assistance for constitution building was used by elites to their own political ends,²⁶² leaving little space for external support for local actors and local knowledge to inform the kind of state and political community that is best for South Sudan.²⁶³

Tunisia

Tunisia’s 2014 constitution was the outcome of a four-year revolutionary process, driven by widespread protests. A National Constituent Assembly was elected in October 2011 to serve as the legislature and to draft a new constitution. Initially, most of the work was carried out through six committees of the Assembly. As a result, the first draft constitution, released on 8 August 2012, was said to

²⁵⁹ The Constitution Making Process Act 2022 (South Sudan).

²⁶⁰ Ibid s 35(2).

²⁶¹ Srinivasan (n 222); Joseph Geng Akech, ‘Re-Thinking Approaches to the International Constitutional Assistance in South Sudan’ (The Sudd Institute Policy Brief 2022).

²⁶² Seidel, ‘The Promotion of Rule of Law in Translation’ (n 104).

²⁶³ Katrin Seidel and Timm Sureau, ‘Introduction: Peace and Constitution Making in Emerging South Sudan on and beyond the Negotiation Tables’ (2015) 9 *Journal of Eastern African Studies* 612.

have ‘six faces’.²⁶⁴ Subsequent phases of the Assembly’s work including consultations with civil society and representatives from each governorate, political differences led to a stalemate in mid-2013. Four civil society organisations created a parallel National Dialogue, which engaged over 5000 people and put the process back on track.²⁶⁵ The text of the constitution was passed by a large majority of the National Constituent Assembly on 27 January 2014. This Constitution lasted for only a short period of time before it was overturned and replaced by a new, more authoritarian Constitution in 2022.

Some external actors were present in Tunisia before the constitution building process. For example, several German organizations, such as Friedrich Naumann Stiftung, Friedrich Ebert Stiftung, Konrad Adenauer Stiftung, and Hans Seidel Stiftung, had earlier provided support trade unions, civil society organizations and political parties; after 2011, they significantly expanded their engagement with a focus on democratic assistance and constitution-building work.²⁶⁶ Similarly the UNDP, present in Tunisia since 1987, shifted its focus from development to projects supporting democratic transition, including elections and transitional justice.²⁶⁷

The post-revolution Tunisian government and the National Constituent Assembly were receptive to external assistance. Several international NGOs, including Democracy Reporting International, National Democracy International and the Carter Center, opened offices in late 2011 and early 2012. The National Constituent Assembly also received hundreds of representations from domestic and international organizations. Over 290 international bodies were

²⁶⁴ Adel Bsili, ‘Beginning and Organization of the Work of the Constituent Committees’, *Constitution of Tunisia: Part 2 – The Process of the Constitution* (UNDP 2020).

²⁶⁵ Maboudi (n 176) 777; Pastor y Camarasa (n 39) 68–9.

²⁶⁶ Pietro Marzo, ‘Supporting Political Debate While Building Patterns of Trust: The Role of the German Political Foundations in Tunisia (1989–2017)’ (2019) 55 *Middle Eastern Studies* 621.

²⁶⁷ Pastor y Camarasa (n 39) 74.

invited, and over 60 gave presentations to the Assembly.²⁶⁸ Members of the Assembly also made visits to institutions of state in several European countries and participated in international conferences in Sri Lanka, Cairo, and Qatar.²⁶⁹

The UNDP launched its 'Project of Support to Constitution-building, Parliamentary Development and National Dialogue in Tunisia' to provide the National Constituent Assembly with support, including methods for tracking electronic votes.²⁷⁰ Other assistance from a variety of external organisations included study trips and training for members of the Assembly, facilitating dialogues between opposing camps, organizing information sessions, public consultations and the national dialogue, sponsoring research work and publications on constitutional drafts. Tunisia became a full member of the Venice Commission in 2010, and the Venice Commission provided an opinion on the draft constitution in 2013.²⁷¹

²⁶⁸ Riddhi Dasgupta and George Bangham (eds), *Proposed Constitutional Framework for the Republic of Tunisia* (Wilberforce Society 2012) 32.

²⁶⁹ Carter Center, 'The Constitution-Making Process in Tunisia' (2011) 76; Maartje De Visser, 'A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform' (2015) 63 *The American Journal of Comparative Law* 963, 979–80.

²⁷⁰ Pastor y Camarasa (n 39) 77–8.

²⁷¹ Francesco Duranti, 'Constitution of Tunisia, Venice Commission and International Constitutionalism' in Loretta Dell-Aguzzo and Emidio Diodato (eds), *The 'state' of pivot states in south-eastern Mediterranean: Turkey, Egypt, Israel, and Tunisia after the Arab Spring* (Perugia Stranieri University Press 2016) 126; Visser (n 270) 963.

Appendix 3. Examples of peacebuilding support roles in constitution building processes

Types of Support	Providers	Country	Details
Local and non-office Political Mediation & Facilitation	Quaker Peace and Social Witness (Int'l)	UK/Northern Ireland/Ireland (1987–91)	Quakers deployed independent political mediators from many countries to live and work in conflict contexts. In this example Sue and Steve Williams were deployed in the decade prior to the signing of the Good Friday Agreement and played what they called “balanced partiality” mediation roles meeting with conflict parties, passing verbal message, teaching, facilitating and training. Similar roles were played in Sri Lanka, Uganda and the occupied Palestinian Territories.

Types of Support	Providers	Country	Details
Partnership and funding	Asia Foundation (USA)	Thailand 1997	The Foundation is a charter member of the Women's Network on the Constitution, representing over 40 leading women's NGOs in Thailand. The Foundation support proves influential in developing Thailand's 1997 constitution, later heralded as a model of citizen participation and gender equity. Through the Network's efforts, 6,744 provincial candidates to the Constitution Drafting Assembly (CDA) are women. In CDA national elections, six women win seats, one a vice-presidential chair.

Types of Support	Providers	Country	Details
Funding, strategic advice, Programme support and comparative learning	The Euro-Burma Office	Myanmar (1997–present)	Euro-Burma Office (EBO) was established in 1997 with Sida Funding directly and through the Olof Palme International Center with the aim of helping the Burmese democracy movement prepare for a transition to democracy. They worked closely the National League for Democracy and the state’s National Reconciliation Programme before the government was deposed by the Tatmadaw in 2021. The EBO very actively supported both the state constitution drafting processes and the federal constitution process, including the government’s Constitution Drafting Committees including in the Shan State and Chin States.

Types of Support	Providers	Country	Details
A civil society consultative forum	Swiss Peace Foundation, Bern & the Institute for International and Security Affairs, Berlin (in cooperation with the UN)	Afghanistan (Nov–Dec 2001)	80 representatives of Afghan civil society groups produced recommendations for the peace process in the fields of security, education, women's participation, economy, rehabilitation, reconstruction, legitimate governance, human rights and constitution building. The recommendations were handed to the Special Representative of the Secretary General on Afghanistan, Lakhdar Brahimi and fed into and influenced the Bonn Agreement (on 4 December 2001) which set out an interim power sharing arrangement, the creation of a new constitution, and elections in 2004.

Types of Support	Providers	Country	Details
Supported debates and provision of advice and process advocacy on principles that could guide the drafting of a transitional constitution	ACCORD (South Africa)	Sudan 2000–2002	As part of the “Constitutionalism in Africa Project,” ACCORD (along with the governments of South Africa and Switzerland) ran a Sudan Expert Reference Group was to critically interrogate the ongoing Sudan peace process and formulate principles that could guide the drafting of a transitional constitution in that country.
Public awareness & media training and support	Search for Common Ground (USA)	Sierra Leone & Liberia (2002–)	Conflict and violent constitutional change plagued Liberia and Sierra Leone in the 1990s and early 2000s, with children often used as soldiers. In the aftermath, Search for Common Ground established Talking Drum Studios to foster healing, democracy, and peace, producing radio programming and training journalists.

Types of Support	Providers	Country	Details
Mediation – (non-state)	CMI – Finland	Indonesia – Aceh (2005)	CMI and its Chairman Martti Ahtisaari were asked to facilitate talks between the Government of Indonesia and the Free Aceh Movement (GAM). The first round of talks took place in January 2005 in Helsinki. The agreement was signed on 15 August 2005. It brought a peaceful end to almost three decades of conflict between the Government of Indonesia and the Free Aceh Movement (GAM).
Provided raining and technical assistance, advice, facilitation services, position papers, and issue mapping	Peace Appeal and the Academy for Education Development.	Nepal (2005–2013)	The Nepal Transition to Peace Initiative was established to create space for informal dialogue where the seven major political parties and civil society representatives could discuss their differences before making formal decisions. It played a behind-the-scenes role in supporting and hosting informal dialogues among Nepalese stakeholders and international advisers.

Types of Support	Providers	Country	Details
			<p>They contributed to seven key peace agreements, including Nepal's Comprehensive Peace Accord (2006), and the breakthrough agreement on the management of arms in the Maoist cantonments in 2008 and the setting up of peace structures including the Local Peace Committees. Over its first four years, NTTP invested in the creation of over a dozen committees and commission for political dialogue on critical issues. It then worked with the Ministry of Peace and Reconstruction. It also supported the creation of the Women Peace Building Network which played an important role in ensuring that a third of the seats in the CA would be reserved for women.</p>

Types of Support	Providers	Country	Details
Advice, Partnership, Participatory Action Research ("Peace Mapping"), and, Public education (Radio), and facilitated community dialogues	Interpeace Switzerland (w/funding from Sida) Working with the Puntland Development Research Center	Puntland, Somalia 2007–2009	Working with the government of Puntland (a federated state, notionally forming part of a federal state of Somalia), Interpeace helped to set up a 14-member Constitutional Review Committee. The Committee conducted a systematic revision of the provisional constitution, and, with the help of an advisory team, drafted a revised constitution in November 2008. Interpeace, PDRC and the State government then conducted consultations with wider society and disseminated a draft and they assisted in the dissemination of a radio education programme.

Types of Support	Providers	Country	Details
Teaching and participatory action research	The McConnell Foundation	Nepal (2007–2017)	One of America’s leading peacebuilder, John Paul Lederach worked in Nepal for the McConnell Foundation for a decade with “user member groups” and local organisations and Parliamentarians, supporting and accompanying them to realise their potentials to be active in the peace and Constitution-making process.
Capacity-building, process advice, thematic expertise on facilitation, dialogue formats, mappings, thematic options	Berghof Foundation (Berlin) with the Office of the Special Envoy of the UN Secretary-General for Yemen (OESGY)	National Dialogue Conference – Yemen (2011)	The Yemeni national dialogue was crafted in a way that the outcomes obtained in the dialogue were transferred to the Constitutional Drafting Commission. After the Commission produced their draft, it was then transferred back to a “national body” composed of members of the national dialogue, to make sure that the national dialogue outcomes were incorporated into this draft.

Types of Support	Providers	Country	Details
International Monitoring, Human rights advocacy & Public Education	The Carter Center (USA)	Tunisia (2011–14)	The Center was present during Tunisia’s constitution building process from 2011–2014 and offered recommendations in its public statements to encourage actors in the process to respect the country’s international obligations for political and human rights. This work culminated in an in-depth public report documenting the process.

Types of Support	Providers	Country	Details
Partnership, programme management assistance for a process of National Education and Consultation	Conciliation Resources (CR) (UK) with the Citizen's Constitutional Forum (CCF) (Fiji)	Fiji (2012)	CR and the CCF set up the secretariat for the 2012 Constitutional Review Process led by Prof Yash Ghai. This provided the administrative base for the Commission as it sought to consult with all Fijians across the island. It managed 90 public consultations including an active social media campaign, a website and SMS messaging. Over 7,000 formal submissions were received and these were carefully coded and studied by the commissioners. CR & the CCF produced and distributed a cartoon illustrated short version of the draft Constitution.

Types of Support	Providers	Country	Details
Designed and operated a website, accompanying and informing the UN-sponsored National Conference	Centre for Humanitarian Dialogue (Switzerland)	Libya (2018)	Along with UNSMIL The Swiss Centre for Humanitarian Dialogue (HD) designed and operated a website (in Arabic) to accompany and inform the UN-sponsored 'National Conference' and to enable Libyans living in areas considered too dangerous to organise consultations to contribute to the process online with the aim of making the preparatory process more transparent, inclusive and legitimate. Questionnaires completed made up 30% of the overall contributions to the consultative phase of the Conference.

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Den auktoritära vågen väcker frågor om hur rättsstaten kan försvaras och samhällskontrakt byggas upp och upprätthållas. Det internationella stödet till nationellt författningsbyggande har länge varit omfattande. Senaste årens bakslag kräver dock reflektion och lärande. Den här rapporten sammanfattar och reflekterar över trettio års lärdomar.