

# CONSTITUTIONS AND PEACE PROCESSES **A PRIMER**



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Preventing Conflict **Sustaining Peace**

  
**Berghof Foundation**

Berghof Foundation and the United Nations Department of Political and Peacebuilding Affairs. *Constitutions and Peace Processes: A Primer*. Berlin: Berghof Foundation, 2020.  
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November 2020  
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Disclaimer: The views expressed in this publication are those of the drafting/editing team and do not necessarily reflect the views and opinions of the Berghof Foundation or the United Nations Department of Political and Peacebuilding Affairs.

Acknowledgement: This publication was made possible by the generous support and funding from the German Federal Foreign Office.

# CONSTITUTIONS AND PEACE PROCESSES

## A PRIMER

Berghof Foundation and the United Nations Department of  
Political and Peacebuilding Affairs

# About this Primer

Peace processes often confront conflict issues that have deep constitutional relevance, and yet the obvious link to “constitution making” and the need for constitutional expertise are seldom acknowledged. The role of constitution making in peace processes is understudied and there is little practical guidance for individuals involved in peace processes, especially the mediators, negotiators and other actors who support them, on how to engage with constitutional elements in peace processes.

This dearth of information has practical implications: those involved in mediation may fail to recognize when constitutional expertise would strengthen a peace process, and constitution makers and their advisers may be less able to navigate the political and legal complexities that arise when constitution making is an element of a peace process.

To address this gap and provide some initial reflections, the Berghof Foundation and the Mediation Support Unit in the Policy and Mediation Division of the United Nations Department of Political and Peacebuilding Affairs, with the generous support of the German Federal Foreign Office, undertook a collaborative project entitled “Towards Sustaining Peace: The Nexus of Peacemaking and Constitution Building”.

The project identified the challenges and opportunities at the nexus of peace processes and constitutions and constitution making, including lessons learned, policy options and their implications for sustaining peace.

It was informed and shaped by:

- *Expert exchanges* between practitioners from both fields at an international roundtable at the beginning of the project and a conference midway through the project.
- Advice from a seven-member *advisory group* of senior experts engaged in mediation and constitution making.
- *Semi-structured interviews* with several leading mediators and mediation support actors.
- Three *thematic studies*: applying shared principles in different contexts; process considerations; and, constitutionalizing peace agreements.
- Three *in-depth case studies*, on Burundi, Guatemala and the Republic of North Macedonia, undertaken by local analysts and researchers to examine whether and how mediators in peace processes engage with constitutional issues, and what lessons could be drawn to improve collaboration between mediators and constitutional experts.
- Several desk studies.

This Primer is a consolidation of the insights from the project work. Its goal is to raise awareness and understanding among practitioners, policymakers and scholars of the ways in which constitution making relates to peace processes.

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# Executive summary

Constitutional issues lie at the heart of many intra-state conflicts. In widely differing circumstances, constitutional issues played a dominant role in peace processes in Bosnia and Herzegovina, Burundi, the Central African Republic, El Salvador, Guatemala, Nepal and South Africa, among many other parts of the world.

When a peace process raises significant constitutional issues, decisions on them are not necessarily reserved for a dedicated constitution-making process; some constitutional decisions with long-term implications, such as those concerning access to power and resources and the structure of transitional political arrangements, may be made in the early stages of a process, outside a formal constitution-making process. Mediation and constitutional issues continue to be intertwined when a process for long-term constitutional change is part of a peace process. The close links between constitution making and other aspects of a peace process, from elections to security sector reform, mean that the outcomes of constitution making will have direct implications for the process overall.

This Primer is the outcome of a collaborative project between the Berghof Foundation and the Mediation Support Unit in the Policy and Mediation Division of the United Nations Department of Political and Peacebuilding Affairs, with the support of the German Federal Foreign Office. Its primary objectives are to explore the many ways in which constitutional issues arise in peace processes and to suggest key considerations for conflict parties, mediators and constitution makers as they address them.

To these ends, the Primer:

- Explores the relationship of constitutional change – and particularly processes to amend or replace a constitution – to the broader peace process, including the legal status of peace agreements and why parties may seek constitutional change.
- Introduces ways in which constitutional issues may arise at different stages of a peace process.
- Discusses transitional political arrangements, including why they may be adopted, what they may be and how their relationship with any existing constitution may be managed.
- Outlines questions that arise when constitutional change for the long term is undertaken in a peace process, including those regarding its timing, its progression, its scale and, if a large-scale process of constitutional change is to be launched, its design.

- Explains the importance of securing inclusivity in peace processes, including within any constitution-making processes that are part of them; provides examples and outlines common challenges of inclusive approaches; and discusses elections and referendums in the context of inclusive peace processes.
- Concludes with a list of key considerations designed to assist conflict parties, mediators and constitution makers, among others, address constitutional issues in peace processes.

## Constitutional issues in peace processes

Constitutional issues encompass the way in which power is exercised and resources are shared, the relationship between individuals and the state and its institutions, and changes to these arrangements. They often lie at the core of conflicts related to territorial cleavage, marginalization of minorities, disputed distribution of wealth, access to or abuse of power, and infringement of human rights.

It is not possible, however, to divide issues into those that are categorically constitutional and those that are not. Political entities determine what should be given constitutional status, and what is deemed constitutional varies from country to country and is subject to political bargaining. In conflict-affected contexts, the outcome of such bargaining is directly related to each party's political and military weight. A party may demand that a matter that has not previously been considered of constitutional significance be treated as such to reinforce its legal and political standing. Conversely, other parties, particularly incumbent governments, may resist such calls, especially in asymmetric conflicts, because accepting constitutional change might be perceived as political validation of their opponents' demands.

Accordingly, in this Primer, the term "constitutional issues" is used broadly to cover any issues that may have implications for a country's constitutional arrangements, including the process of constitutional change.

Addressing constitutional issues requires swift recognition of their constitutional relevance and the development of a process that facilitates their resolution in a manner that can contribute to securing lasting peace. It also requires that parties pay attention to how constitutional agreements incorporated in a peace agreement – which are unlikely to have domestic legal force – can be given binding constitutional status.



## Constitutional change as part of a peace process

Constitutions are never made in a single formal process. They are built over time, through many decisions, in informal, semi-formal and formal settings. Mediators and other peacemakers may engage with constitutional issues throughout a peace process, often beginning earlier than anticipated, to:

- Get the process started, as opposition parties may refuse to engage unless constitutional change is on the table.
- Build agreement on transitional political arrangements or on principles for future constitutional arrangements.
- Assist the parties in designing a constitution-making process.
- Help identify ways to secure the agreements reached earlier in the peace process in a new or amended constitution.

How the many constitutional issues that arise at different stages of a peace process can be resolved depends largely on the context. The following questions usually arise:

- Whether agreements about future constitutional arrangements should be made in the peace agreement or delayed until a constitution-making process begins.
- Whether transitional political arrangements – such as power-sharing – are necessary. These may involve adjustments to, or the replacement of, procedures and structures of government established in the existing constitution.
- When a constitution-making process should take place, particularly in relation to the security situation.
- How soon elections are needed and whether they should take place before or after agreement is reached on a new constitution for the long term.
- Whether the scope of a process of constitutional change should be “large-scale” – involving broad participation and full deliberation on a wide range of constitutional matters – or relatively “light”.

Including a constitution-making process in a peace process:  
when and how

### **Transitional arrangements**

Shifting from violent conflict to peace may require transitional political arrangements that depart from existing constitutional arrangements. While transitional arrangements can contribute in many ways to a peace process, they also present

challenges. One particular challenge concerns the legal status of the transitional arrangements and their relationships to the existing constitution. Ideally, the new arrangements will have legal status. This may be secured through constitutional change or, if that is not possible, another mechanism.

## Constitution making for the long term

Peace processes that involve constitutional change for the long term usually include a distinct constitution-making process. The process may be newly established or follow procedures set out in the existing constitution. A process of constitutional change typically differs from other parts of a peace process in that it has clear formal procedural arrangements with special decision-making rules, as well as requirements for a number of stages and a degree of transparency.

The timing of a constitution-making process raises particularly difficult questions, including whether it can be undertaken while violence continues, and when elections should be held. The readiness of the parties is a further consideration. Parties are likely to confront new questions and be required to engage with different constituencies in constitution making; if they have not had time to prepare, the process may be divisive.

As constitution making is undertaken in a wide range of contexts, the shape and content of these processes vary markedly. Key decisions in such a process may relate to:

- The option of pursuing constitutional amendments or developing and adopting an entirely new constitution.
- The selection of a body or bodies to be entrusted with constitution making – such as a new representative body (elected or unelected), a commission, a legislature or a combination of these.
- The scope of matters to be discussed. Is the entire constitution open to discussion, are only certain issues to be discussed or is the discussion to be constrained by earlier decisions in the peace process?
- The degree of inclusivity of the process. It may be inclusive, with many sectors represented on decision-making bodies and a robust mechanism for broad public participation; alternatively, it may be “light”, with limited inclusion or public debate.

The Primer notes that, on all these matters, decisions need to be made by the parties concerned and that those supporting them need to have a sound understanding of the political and legal context that is likely to inform such decisions. For example, the choice between amending and replacing a constitution is likely to be driven by a set of interrelated political and legal factors, including whether continuity or a break with the past is desired and the country’s legal requirements concerning the process of constitutional change. Similarly, political and legal concerns tend to inform the decision whether to engage in a large-scale process for changing the constitution,

broad in scope and inclusive, or a “light” one. Related political considerations may focus on the best means to sustain and strengthen the peace process, not only to generate greater support for its procedures and outcomes, but also to accommodate public expectations. Additional legal considerations are whether desired changes can be secured through a light process and whether any previously reached agreements can be protected in a large-scale process.

## Inclusion

Inclusive processes generally to enjoy greater legitimacy, credibility and constituencies of support, as well as more sustainable outcomes. Since parties to a conflict usually do not represent the full spectrum of groups and interests in a society, securing inclusivity is a recurring issue in mediation and constitution making.

Opportunities for greater inclusion vary across processes and over different stages of a process. Consequently, to secure the appropriate inclusion of social, cultural, religious and other minorities, as well as women, youth, civil society groups and professional organizations, mediators need to be both flexible and creative. Participation arrangements during initial negotiations to end the violence may, for instance, differ significantly from arrangements for talks over a future political dispensation. Greater inclusion is usually easier to secure in large-scale constitution-making; if efforts at inclusion have had limited success in other parts of a peace process, inclusive constitution making can help to address the deficit.

## Considerations for mediators, constitution makers and other peace practitioners

When constitutional issues are on the agenda, integrating them fully into the larger peace process strengthens the overall process and increases the likelihood of an enduring settlement. Constitutional change may provide an opportunity for conflict parties and the wider community to engage in a deliberative process through which they can address the root causes of the conflict, accommodate diversity and difference, and seek a common vision for the state. Expectations of what can be achieved through constitutional change, however, are often high and difficult to meet. Unrealistic expectations and the consequent failure to implement constitutional commitments can easily lead to polarization, hostility and a recurrence of conflict. The Primer encourages stronger collaboration between mediators and constitution experts from the outset of a peace process to increase the chances of sustainable peace.



# 1 Introduction

Most modern armed conflicts are intra-state and many concern access to public power and resources or issues of identity and autonomy, or both. Resolving such conflicts may require a renegotiation of the relationship between individuals and the state; constitutions enshrine that relationship, regulate access to political power and resources, and establish the legal framework for government. As a result, negotiating constitutional change becomes part of the peace process.

The role of constitutional issues and constitutional change in peace processes is obvious in many peace agreements and constitutions. The Dayton Peace Accords (1995), for example, included a full constitution for the newly reconfigured state of Bosnia and Herzegovina. Although a constitution is usually not as conspicuous a part of a peace agreement as it was in that case, in Colombia (1991), El Salvador (1991), South Africa (1993), the former Yugoslav Republic of Macedonia (2001), Sudan (2002), Nepal (2006) and the Central African Republic (2015), for example, agreeing on new or revised constitutions was a significant part of the peace process.<sup>1</sup> In addition to decisions about new constitutional arrangements for the long term, many peace processes also include agreements on transitional political arrangements that have direct or indirect constitutional implications. Such was the case, for example, in Angola (1994, 2002), Tajikistan (1997), Côte d'Ivoire (2003), Chad (2007), Kenya (2008), Zimbabwe (2008), Madagascar (2009), Kyrgyzstan (2010), Yemen (2011) and South Sudan (2015, 2020).

Constitutional change is often negotiated towards the end of a peace process. There are no set patterns, however, and agreements to amend constitutional arrangements may be reached relatively early in the course of a peace process but implemented considerably later, when new constitutional arrangements are formally deliberated upon and adopted. These early decisions can have a long-lasting impact on political arrangements, access to decision-making, and sharing of political and economic power in the future state.

Drawing on examples, the Primer examines the ways in which constitutional issues arise and may be addressed in peace processes. It is based on the recognition that constitutional issues are discussed in many parts of peace processes – not only when a constitution-making or amendment process is established. Sometimes they are clearly framed as “constitutional”, sometimes not.

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1 Estimates of the incidence of constitutional change linked to conflict prevention or peacemaking vary, but all suggest that constitutional reform is a significant peacemaking tool. See, for example, Laurie Nathan, *The Imperative of Constitutionalizing Peace Agreements* (Berlin, Berghof Foundation, 2019); Charlotte Fiedler, *Why Writing a New Constitution after Conflict Can Contribute to Peace* (Bonn, German Development Institute, 2019). During the period 1975–2003, “nearly 200 new constitutions were drawn up in countries at risk of conflict, as part of peace processes and the adoption of multiparty political systems” (Jennifer Widner, “Constitution writing and conflict resolution”, *The Round Table: The Commonwealth Journal of International Affairs*, vol. 94 (2005), p. 503).

The Primer also recognizes that peace processes are multifaceted. It stresses the importance of viewing any constitution-making process in a conflict-affected setting not as separate, but as one of many elements in a broader peace process that may also comprise components such as ceasefire negotiations, elections, security sector reform and transitional justice. It is premised on the idea that when constitutional change is an element of a peace process, the constitution-making process itself is part of the peace process.

The Primer focuses on constitutional change as an element of a mediated peace process and aims to give mediators and other peace practitioners a better understanding of how constitutional matters arise in these processes. It also considers the role of constitutional reform in cases of popular upheaval, although negotiations and decision-making may take a somewhat different form in these processes than in ones that involve violent conflict. In addition, the Primer includes examples of processes that lacked formal mediation.

## **Box 1**

### **Constitutional issues**

The Primer uses the term “constitutional issues” broadly to describe issues that may have implications for a country’s constitutional arrangements, including the process of constitutional change. Since what is “constitutional” varies from country to country, it is not possible to define constitutional issues categorically.

Usually, constitutional issues concern the way in which power is exercised, the relationship between individuals and the state, and changes to these arrangements. Nonetheless, parties to a conflict may demand that a matter that has not previously been considered of constitutional significance be treated as constitutional and included in the constitution. They may do so because the matter goes to the heart of their demands and conferring constitutional status on an agreement makes them feel more secure (see section 3.1).

Conflicts most obviously raise constitutional issues when the constitution itself is seen to suppress democracy or marginalize particular groups, prevent government from being held to account, favour a particular group while marginalizing others, distribute wealth unfairly or permit rights abuses. Effectively addressing such matters would usually require changes in a country’s political architecture and, accordingly, the peace process would need to engage with constitutional issues.

Constitutional issues are discussed at many stages of peace processes. They are not confined to distinct constitution-making processes. For example, a conflict party

may, at the outset, demand a commitment to greater autonomy for its community, perhaps as a prerequisite to engaging in peace talks. Moreover, although changing the composition of the executive or distributing government positions more broadly (as in a power-sharing arrangement) to bring conflict parties into positions of authority may not involve any formal constitutional change, demands for change in the formal powers of the executive almost inevitably have constitutional implications.

The Primer demonstrates that peace processes are likely to be stronger and their outcomes more durable if mediators, conflict parties, other stakeholders and the broader public understand the role of constitutional issues and constitutional decision-making in them. It also recognizes the distinctive nature and requirements of constitution-making processes, including the following:

- A constitution-making process should be inclusive and participatory, directly engaging the general public, if possible. Experience increasingly suggests that more inclusive peace processes, particularly with respect to women's participation, may be more durable. In practice, elite deals are often used (and needed) as stepping stones to building peace. However, a constitution intended for the long term but agreed to by a few is unlikely to command the public support needed to provide a stable and durable framework for government or to be properly implemented (see sections 2 and 7).
- A constitution is intended to establish the overriding law of a country. To do this in an effective and durable way, it requires authority. Constitutional authority may develop over time but, in conflict-affected contexts, the constitution's immediate authority is crucial. The usual source of immediate constitutional authority is the people. Since such immediate "popular authority" is typically secured through the constitution-making process, both the design of the process and its transparency are important.
- Constitution making usually follows a formal path. In general, the starting expectation is that procedures set in an existing constitution will be followed. Even if the existing procedures are discarded, agreement on some kind of formal process for deliberation and adoption of a new constitution or constitutional amendments is likely to be needed.
- Constitution making potentially involves the whole gamut of a constitutional system, some of which may not be directly relevant to the resolution of the conflict. Any and all issues that arise in a constitution-making process need to be resolved. Accordingly, the process should be designed in a way that enables decision-makers to draw on sound constitutional advice.

Against this background, the Primer discusses the opportunities, challenges and dilemmas that parties, as well as mediators and other third parties that support them, may face when constitutional issues arise. It encourages stronger collaboration between mediators and those involved in constitution making throughout peace processes.

The Primer recognizes that peace processes that include constitutional change vary widely and are informed by factors such as conflict history and intensity; whether the conflict is internationalized, with foreign states supporting conflict parties; and the level of international involvement in the peace process. It aims to strengthen the ability of parties, mediators and other peace practitioners, including those involved in constitution making, to respond to these contextual factors. A solid understanding of the role of constitution making in peace processes can:

- Clarify the possibilities and limitations of constitution making as an element of a peace process.
- Expose the risks of treating constitution making in conflict-affected contexts as a separate, more technical process.
- Reveal both opportunities and risks of pre-commitment on constitutional issues.
- Help avoid legal challenges to peace agreements.
- Help avoid failure to implement peace agreements.
- Assist parties and practitioners in designing constitution-making processes that are –
  - appropriate to the context of the peace process more broadly;
  - consistent with expectations (such as public involvement); and
  - flexible enough to respond to the changing circumstances of a society emerging from violent conflict.
- Enable those involved in constitutional change to be sensitive to the political dynamics that informed the peace agreement when they work on constitutional reform.

The Primer is not comprehensive. Although it draws attention to the danger of “overpromising” in a constitution, it does not explore the critical issue of translating constitutional changes into changed practices that respect new constitutional commitments. Nor does it exhaustively cover all matters that may be at the heart of constitutional reform in a peace process, such as transitional justice and the role of international actors (both foreign states and international organizations).



Similarly, it is beyond the scope of the Primer to provide comprehensive guidance on the design of constitution-making processes or the substantive decisions that are made both in peacemaking and in constitution making that is an element of a peace process. The emerging literature for practitioners on these matters is rich.<sup>2</sup>

## Structure of the Primer

Section 2 provides a backdrop for the Primer by introducing the principles and goals of peacemaking generally and processes to amend or replace a constitution more specifically. Section 3 elaborates on the place and role of constitutions in peace processes. It sets out how and when constitutional issues may arise in peace processes and why parties may seek to translate aspects of peace agreements into constitutional form. It concludes with a technical matter that frequently causes confusion: the legal status of peace agreements.

Sections 4, 5 and 6 focus on the different ways in which constitutional issues arise and constitutional decisions are made in peace processes, as well as specific challenges that may emerge in these varying contexts. Section 4 considers the early phase of peace processes, when decisions may be needed on whether to include the possibility of constitutional change in negotiations (4.1) and introduces the kinds of constitutional decisions that may be made in the early stages of a peace process as well as their possible longer-term implications (4.2). The section concludes with a discussion of reasons for setting a time frame for constitution-making processes and considerations to take into account when doing so (4.3). Section 5 covers transitional constitutional arrangements, why they are made (5.1), considerations regarding their design (5.2) and time frames for transitions (5.3). It includes a short introduction to power-sharing arrangements. Section 6 concentrates on making or amending a constitution for the long term.

Section 7 considers matters related to inclusion and legitimacy in constitution-making processes, reflecting on inclusion in decision-making and through broader public participation and voting in elections or referendums.

Section 8 sets out the main conclusions of the Primer with a list of key considerations for conflict parties, mediators and others who support peace processes.

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2 Michele Brandt and others, *Constitution-making and Reform: Options for the Process* (Geneva, Interpeace, 2011) is a key publication on the design of constitution-making processes.

## 2 Shared principles, distinct demands and common goals

In some circumstances peacemaking and constitution making are considered completely separate endeavours, with different goals. This may be the case even when constitutional change is essential to securing peace and constitution making is an outcome of a peace process. A common justification for making a sharp distinction between the two is the idea that peace processes are focussed on the shorter-term goal of ending violent conflict while constitution making has the long-term objective of building enduring political arrangements.<sup>3</sup> This distinction, however, oversimplifies the goals of both peace processes and any constitution making that is part of them. It also understates the extent to which the work of mediators and constitution makers is underpinned by the concept of sustaining peace, which the United Nations defines as:

“a goal and a process to build a common vision of a society, ensuring that the needs of all segments of the population are taken into account, which encompasses activities aimed at preventing the outbreak, escalation, continuation and recurrence of conflict, addressing root causes, assisting parties to conflict to end hostilities, ensuring national reconciliation, and moving towards recovery, reconstruction and development.”<sup>4</sup>

In practice, mediators and constitution makers often encounter tension between securing the end of violent conflict and reaching agreements aimed at sustaining peace over the longer term. If violence is to be brought to an end, attention must be paid to the existing power map. To hold, elite pacts and peace agreements need to reflect the underlying distribution of power. Both mediators and constitution makers should thus be aware that accommodations to end violence in the short term may stand in the way of addressing longer-term drivers of conflict, including gender inequality, and meeting the needs of a broader set of stakeholders.

In the complicated environment of any peace process, collaboration is needed. Collaboration can be bolstered by recognising the significant overlap between the principles that guide peacemaking and those that govern constitutional development – national ownership, inclusivity, trust building and the promotion of international norms – as well as differences in how they might be applied.

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3 In pursuing sustainable peace, however, constitution makers do not always have long-term or altruistic goals. On the contrary, like all decision-makers in peace processes, constitution makers are also concerned about the immediate impact of constitutional decisions.

4 United Nations Security Council resolution 2282 (2016) and United Nations General Assembly resolution 70/262 (2016).

## Box 2

### Shared principles, distinct demands<sup>5</sup>

#### National ownership

Legitimacy is fundamental in both peacemaking and constitution making. A sense of “national ownership,” achieved through locally owned and led processes, can contribute to legitimacy.

In ideal cases, mediators and other third-party peacemakers assist national actors in generating ideas and processes to resolve conflicts. In accordance with the principle of national ownership, they refrain from imposing solutions, although individual mediation actors have different interests and exert varying degrees of leverage and influence. National ownership also requires mediation processes to be adapted to local contexts and cultures and for mediators to be creative in facilitating ways of extending ownership beyond the conflict parties.

Constitution making is widely recognized to be an exercise of the sovereignty of the state and its people. The process is most effective when it is possible to engage a broad range of political actors, all ethnic, religious and minority groups, civil society, including women’s groups, and the general public. The sovereign nature of constitution making also demands that external actors are especially sensitive about national ownership. If they are perceived to be controlling or unduly influencing decision-making in constitution making, the legitimacy of new constitutional arrangements may be weakened and it may not be possible to implement the constitution effectively.

#### Inclusion and participation

Nowadays, a high level of participation is often expected in constitution making, largely because a constitution provides the foundation of a state and enshrines the rights of its population. Accordingly, the adoption of a constitution is understood to be an act of sovereignty in which the people have a role. Moreover, inclusion and participation contribute not only to the legitimacy of a constitution-making process and any constitutional changes, but also to the attainment of national ownership.

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5 Box 2 draws on widely agreed constitution-making principles set out in United Nations, *Guidance Note of the Secretary-General on United Nations Constitutional Assistance* (New York, 2020) and mediation fundamentals captured in *United Nations Guidance for Effective Mediation* (New York, 2012).

Securing inclusion may be more challenging in other parts of a peace process, as power dynamics and the need to cultivate and maintain consent for a mediation process means that conflict parties, rather than mediators, “largely determine who, how and when different actors are included in negotiations”.<sup>6</sup> Although experience varies, conflict parties generally do not represent the full spectrum of society and are often reluctant to open the space to more actors. Women and youth, for example, are often grossly underrepresented in elite peacemaking processes. The principles of inclusion and participation require mediators and other peacemakers to be imaginative in promoting broader inclusion in decision-making and greater participation more generally through consultation and other forms of engagement.<sup>7</sup>

Security Council resolution 1325 (2000) on Women, Peace and Security and its successors, such as resolution 2493 (2019), articulate this point clearly in the context of including women in peace negotiations. Resolution 2493 “urges Member States supporting peace processes to facilitate women’s full, equal and meaningful inclusion and participation in peace talks from the outset, both in negotiating parties’ delegations and in the mechanisms set up to implement and monitor agreements”.

See section 7.1 for a discussion on inclusivity in peace processes and constitution making.

### Trust building and impartiality

In the peacemaking context, building trust among the main conflict parties is critical for reaching compromises and forging potential post-conflict partnerships. Mediators promote confidence-building measures and often emphasize the need for confidentiality in the process. They may focus on building relationships among conflict parties as much as on the substance of the issues under dispute.

In constitution making, building trust among parties and people who are likely to be the main decision-makers is similarly important, but significant emphasis is also placed on creating institutions (including constitution-making bodies) and democratic processes that generate trust and confidence among the general public. Such measures can contribute to bridging divides and securing the legitimacy of the new constitution.

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<sup>6</sup> United Nations Department of Political Affairs, *Guidance on Gender and Inclusive Mediation Strategies* (New York, 2017), p. 20.

<sup>7</sup> United Nations, *United Nations Guidance for Effective Mediation* (see footnote 5).

By maintaining impartiality, mediators and other external actors (other than those involved specifically to advise and support a particular party) can build trust and confidence in their roles and ensure they are perceived as honest brokers in a fair process. In constitution making, non-partisan external actors often emphasize the “objective” or “technical” nature of their advice and take pains to elaborate on the possible implications of different options for different groups.

### International norms and standards

International support for peace processes, which may include constitution making, is underpinned by international norms and standards. In both peacemaking and constitution making, democratic and inclusive processes and outcomes, including the effective participation of women and the promotion of gender equality, are increasingly recognized as enhancing stability and reducing the prospects of conflict.

With respect to peacemaking, including mediation support, normative and legal frameworks are found in international humanitarian and human rights law, as well as in Security Council resolutions, such as resolution 1325 (2000) and associated resolutions on women, peace and security. For example, the UN “cannot endorse peace agreements that provide for amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights, including sexual and gender-based violence”.<sup>8</sup>

In constitution making, the most relevant international norms and standards concern human rights, the rule of law, transitional justice and inclusion. In countries emerging from conflict, key international norms relate to people who have suffered discrimination or marginalization, including women, minorities, displaced persons and persons with disabilities. For example, article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women requires signatories “to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle”.

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8 Ibid, p. 17.

### 3 Constitutional issues in peace processes

As section 1 notes, the drivers of violent conflict frequently include deep dissatisfaction with the nature and structures of the state. Repressive government, unfair distribution of wealth, perceived or actual exclusion or marginalization of minorities, and other abuses of rights trigger conflict. In such cases, changes to the constitution may be necessary but they are not sufficient, as constitutional practices need to change and a culture of respect for the constitution needs to be embedded in society. This is a long-term process (see box 4).

When constitutional arrangements for ensuring access to political office, sharing resources among all the people, managing diversity or securing equality are absent or considered ineffective, for example, movements that challenge the status quo may frame aspects of their political struggles in constitutional terms and demand constitutional change; the Revolutionary Armed Forces of Colombia (FARC) in Colombia and the Taliban in Afghanistan are cases in point, however different their demands. Calls for the rule of law, regional autonomy, federalism or self-determination, and equality all can have constitutional implications. Conversely, constitutional changes themselves, such as amendments to provisions on age or term limits for executive office, occasionally provoke or fuel violent conflict.

When constitutional issues are part of a peace process, decisions on them may be made outside any process of constitution making or amendment. In conflict-affected settings, constitutional reform for the long term – for a constitution that is intended to be permanent – usually takes place only once significant progress has been made in peace negotiations. Nonetheless, as discussed in section 4.2, significant constitutional decisions may be made at early stages in peace processes. In addition, agreements on transitional political arrangements are usually constitutional in nature, as are decisions about the form a constitution-making process is to take.

The following list sketches different ways in which decisions on constitutional issues may be part of a peace process. It provides a general framing; there is no standard approach or set sequence, and options may overlap.

- **Agreement on allowing negotiations on constitutional change:** Intense negotiations may occur when one or more parties demand constitutional change and others resist it. See section 4.1.
- **Decisions on substantive constitutional issues in peace negotiations:** Agreements that include commitments to change the constitution in substantial ways in the future may be made before any formal process of constitutional change is established. Constitutional decisions in such agreements may be detailed or take the form of “guiding principles”. See section 4.2.

- **Agenda or roadmap:** The agenda or roadmap for a peace process is itself an agreement. It may include provisions on a process for making a constitution for the long term, including details about what institutions are to be used, the membership of the institutions, how decisions will be made, processes for ensuring broad participation and other goals. See section 4.2.
- **Transitional constitutional arrangements:** A peace process may provide for transitional (or interim) constitutional arrangements that are intended to operate for a limited period only. See section 5.
- **New or revised constitution:** A new or revised constitution intended for the long term may be adopted in a peace process, perhaps during a transitional period. Constitutional reforms may also be adopted incrementally, as a peace process unfolds and agreements are implemented. More exceptionally, a process to revise a constitution may be initiated to bring parties into negotiations. See section 6.

### 3.1 Why parties to a peace agreement seek constitutional change<sup>9</sup>

Translating aspects of peace agreements into constitutional form may serve a number of purposes, including:

#### **Securing long-term legitimacy and legal enforceability of a change in the status quo:**

Parties that engaged in conflict specifically to change the political status quo generally aim to secure such changes in constitutional form because a constitution institutionalizes the agreement and can be changed only through the usually rigorous procedures for constitutional amendment.

**Generating credible assurances:** Given that negotiations are characterized by high levels of mistrust, parties are likely to seek credible assurances that other parties will abide by their commitments. Transforming parts of a peace agreement, including transitional arrangements, into constitutional form enhances the prospects of implementation and the remedies for non-implementation.

**Implementing an agreement:** Some provisions of a peace agreement cannot come into effect unless they are incorporated in the constitution. This may be the case, for example, with territorial devolution of power; changes to the electoral system; reform of the judiciary, security services, administration and other institutions; and respect for human rights and the rule of law.

**Building on and deepening an agreement:** Giving aspects of a peace agreement constitutional status through a participatory and transparent process can transform

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9 This section draws heavily on Laurie Nathan, *The Imperative of Constitutionalizing Peace Agreements* (see footnote 1).

it into a more widely shared national commitment and contribute to securing its political and social legitimacy. The substantive provisions of a constitution may also secure the principles of the negotiated settlement more firmly or elaborate on them. For instance, the 1991 Bicesse Accords in Angola provided for multiparty democracy in the first post-agreement elections only; the 1992 Angolan Constitution entrenched it for the long term. Similarly, the 1996 Constitution of South Africa supplemented political agreements that sought to reassure minorities with further detail on minority rights, while also expanding the commitment to address the situation of the previously disenfranchised majority.

**Nation-building:** Constitutional change may be a symbolic act, signalling to the population that the old political order has been decisively replaced by a new one and confirming a new civic identity. For example, participatory processes, particularly in large-scale constitution making, can contribute to building a nationally shared identity. After violent conflict, such processes may have reconciliatory effects, especially if competition over resources and power gives way to the development of a shared vision of the state.

### 3.2 Twilight zone: the legal status of peace agreements between governments and non-state conflict parties<sup>10</sup>

There is no straightforward answer to the question of whether peace agreements are legally binding. Ultimately, their implementation depends on power dynamics and the political context, including the degree of international and domestic support that they command. Their legality can be an important factor, however, especially in countries with a functioning judicial system.

**Domestic legal status:** The domestic legal status of a peace agreement may matter to parties for rhetorical reasons, as being able to assert that it is legally binding may accord an agreement greater status in the eyes of the people. More practical considerations may include whether there are any legal remedies if the agreement is breached (including when a new government is less supportive of it) and its legal status if it conflicts with an existing law. From a constitutional point of view, a key question is: Can provisions setting up a new transitional or permanent political system override any existing arrangements entrenched in an existing constitution? The practical politics of a given situation may mean that the peace agreement does override existing constitutional arrangements, but from a legal perspective the answer is almost always that it does not. Indeed, from that point of view, a peace agreement supersedes existing constitutional arrangements only if it actually takes

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<sup>10</sup> The heading and parts of this section were inspired by Cindy Wittke, *Law in the Twilight: International Courts and Tribunals, the Security Council and the Internationalisation of Peace Agreements between State and Non-state Parties* (Cambridge, Cambridge University Press, 2018).



## Box 3

### Constitutions

A constitution is a country's supreme law.<sup>11</sup> All laws enacted by the legislature and actions of the executive are therefore meant to be consistent with the constitution. Since constitutions are generally intended to be long-lasting and to shield certain norms, institutions and practices from the vagaries of everyday politics, they are more difficult to change than other laws.

All constitutions set out the system of government of a country and, in so doing, provide for the exercise of public power as well as constraints on its exercise. Which other matters are included in a constitution and how they are articulated depends on a country's history, its constitutional and legal tradition, and the context in which the document is drafted. At their most effective, constitutions are living documents that provide a framework for ongoing, day-to-day political negotiations, are responsive to changing political and social contexts, and are flexible enough to retain relevance over time.

A constitution generally fulfils three main functions:

- It establishes the powers and responsibilities of the organs of government and their relationship to each other. The main organs of government are the legislature, the executive and the judiciary. Some constitutions also establish multi-level systems of government, such as federalism or other decentralized political arrangements, which may contribute to resolving conflict by giving certain groups more autonomy over their own affairs.
- It protects people and institutions from the arbitrary use of power by the political branches of government (the legislature and executive). The cornerstone is entrenching the rule of law, including provisions that ensure the independence of the judiciary to insulate it from political interference. Nowadays, most constitutions also include a bill of rights that secures the rights of individuals, entrenches fundamental values of the society and sets standards for decision-making by the state, thereby prohibiting arbitrary action. While older bills of rights tend to focus on political and civil rights, more recent ones generally also protect social, economic and cultural rights. In addition, many constitutions emphasize that all parts of the state, including the security forces, must act in accordance with the law.<sup>12</sup>

<sup>11</sup> Not every country has a written constitution. For example, Eritrea, Israel, New Zealand, Saudi Arabia and the United Kingdom do not. Each of these countries has various laws and practices that are considered constitutional.

<sup>12</sup> See also United Nations, *Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance* (New York, 2008).

- It may express norms, values or principles that are important for the country. These may be general, such as the rule of law, democracy or accountability, or more specific, such as the German constitutional commitment to social democracy and Ecuador’s commitment to being an intercultural and multinational state. A state religion, secularism or requirements for respect for the identity of specific or all groups in society may also be set out as fundamental norms or principles.

When a constitution is made in a peace process, matters that tend to be taken for granted in stable circumstances may need more attention. “Peace constitutions” have therefore been described as both forward- and backward-looking, charting a way forward and conscious of the past that they are expected to change.<sup>13</sup>

In addition, certain conflict-affected contexts may give rise to “transformative constitutions”, which contain aspirational elements that are expected to drive state action to build a fairer and more equal society. Early examples include the German and Indian constitutions; more recent constitutions with transformative elements are those of Colombia, Kenya and South Africa.

### Transitional (or interim) constitutional arrangements

A constitution is usually intended to establish a stable and enduring set of arrangements under which a state or region can be governed effectively. In countries or regions that emerge from conflict, however, parties may introduce temporary political arrangements to provide a bridge from a situation of conflict to peace (see section 5). When such arrangements affect the way in which power is exercised, they are constitutional in nature; their temporary nature does not detract from their constitutional status, although the process through which they were agreed and adopted and the political arrangements that they establish may limit their legitimacy.

Transitional constitutional arrangements may be adopted through amendments to the existing constitution or as a new constitution, or they may be put in place by a peace agreement. Such arrangements can go by many different names. For example, South Africa (1993) and Nepal (2007) called their transitional documents “Interim Constitutions”; Libya promulgated a Constitutional Declaration (2011); Iraq used the Transitional Administrative Law (TAL) (2004); Tunisia operated under a decree law and, later, a document called the “Small Constitution” (2011); and Sudan issued a Constitutional Charter (2019). Despite the variety of names, all these constitutional documents are temporary in nature and intended to provide a space for change.

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<sup>13</sup> Ruti Teitel, “Transitional jurisprudence: the role of law in political transformation”, *Yale Law Journal*, vol. 106 (1997), pp. 2009–2080. Teitel argues that although all constitutions reflect their past, constitutions for political transitions that are intended to build peace are more conscious about the past.

constitutional form – which is extremely rare – or if it is an international treaty that has been approved domestically in a legally recognized way.

Usually, then, a peace agreement cannot in and of itself establish legally binding political arrangements. This means, for example, that transitional arrangements established under a peace agreement alone may be vulnerable to challenge in the courts. To ensure that arrangements have legal status, the existing constitution needs to be replaced or amended to conform with them. Even if old institutions have collapsed, existing authorities usually need to formalize the new arrangements through a declaration, at a minimum by issuing a statement to confirm that the peace agreement contains new rules for government (see section 5.3).

**Domestic courts and peace agreements:** Legally, the law, including the constitution, takes priority over a peace agreement. When a court is required to interpret ambiguous constitutional provisions that have their origins in a peace agreement, however, it has an opportunity to adopt an interpretation that is consistent with the agreement. The record of courts in this regard is varied. For example, in the United Kingdom, the 1998 Northern Ireland Act, which is characterized as a constitution adopted to implement the Belfast Agreement, was interpreted in the light of the Agreement; in Italy courts have expressly supported interpretations of laws that are consistent with peace agreements relating to Tyrol (1946); and, in South Africa, the Constitutional Court has asserted the importance of interpreting the Constitution in the light of the peace negotiations that preceded it in the early 1990s.<sup>14</sup>

Courts, however, cannot be relied on to rule in ways that are consistent with prior peace agreements. A case in point involves the Constitutional Court of Burundi. Although the Constitution of Burundi is based on the 2000 Arusha Peace and Reconciliation Agreement, in 2015 the Court interpreted ambiguous constitutional provisions relating to presidential term limits in a way that contradicted the clearer language of the Agreement.

In ideal circumstances, a peace agreement includes a mechanism for securing certain key elements in the constitutional framework of the state. Regardless of whether such elements can be achieved, a sound appreciation of the national legal context (which should be included in a conflict analysis) can enable mediators to anticipate and possibly avoid potential problems associated with the legal status of agreements.

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<sup>14</sup> For Northern Ireland, see House of Lords, *Robinson v. Secretary of State for Northern Ireland and Others* (Northern Ireland), UKHL 32, 25 July 2002; for Italy, see Constitutional Court Rulings, nos. 32/1960, 60/1961 and 261/1995; and, for South Africa, see Constitutional Court, *S. v. Makwanyane*, CCT3/94, 6 June 1995. The Italian cases concern South Tyrol and refer to the agreement that provided the foundation of its autonomy regime, the Gruber-De Gasperi Agreement of 1946.

## Box 4

### Constitution making and constitution building

Constitution making and constitution building are not always distinguished. When they are, “constitution making” is used narrowly to refer to the process by which a constitution is deliberated upon, drafted and agreed. The term suggests a finite process whose goal is to produce the text of a constitution or constitutional amendments.

In contrast, “constitution building” refers to the much broader and ongoing process of establishing and maintaining a constitutional order that can occur both before and after a constitution is adopted. The term emphasizes that adopting a “good” constitutional text does not in itself guarantee anything. Rather, it suggests that a society in which the constitution is the framework for the exercise of power and in which the values that it reflects are entrenched in political, social and economic culture needs to be built. In addition, the term “constitution building” draws attention to the often-lengthy processes that may take place before drafting a constitution for the long term formally starts.

### 3.3 Securing constitutional aspects of a peace agreement in a constitution

If the intention is to secure aspects of a peace agreement in the constitution, attention needs to be paid to how that will be done. Some peace agreements set the mandate of a future constitution-making body. However, peacemakers cannot take for granted that constitutional changes that are set out in a peace agreement or that are necessary to implement the agreement will make their way into a constitutional text, as the experience of Guatemala illustrates. The country’s 1996 Agreement on Constitutional Reforms and the Electoral Regime required significant constitutional change. In 1999, a package of amendments, including those required to implement the Agreement and other, unrelated constitutional reforms, were put to a public referendum but failed to secure the necessary majority. A number of factors contributed to this outcome; a decisive one was a boycott campaign by the Guatemalan business sector, another was the lack of an organized counterweight to the boycott. The failure of Mali to adopt constitutional changes required by the 2015 Algiers Agreement for Peace and Reconciliation is another example. In Mali,

opposition from parties that were not involved in the peace process contributed to the failure.<sup>15</sup>

Careful political groundwork, including building and maintaining consensus among elites and the broader public and designing a constitution-making process with the overall peace process in mind, can help increase the likelihood that aspects of a peace agreement will be reflected in the constitution.

## **Box 5**

### **Holding constitution makers to a peace agreement**

Setting out the details of future constitutional change in a peace agreement may not satisfy parties, especially when the change depends on actors who have not been part of the peace negotiations or when the parties foresee a change in the balance of power. To minimize the risk that later constitution makers might undermine the negotiated deal, South Africa required constitutional change to be endorsed by a court.

In South Africa in the 1990s, the Interim Constitution operated both as a transitional constitution that established transitional political arrangements and as a mechanism to secure key elements of the 1993 political deal. The seemingly unresolvable challenge facing the main parties, the incumbent National Party Government and the liberation movement that represented a majority of South Africans, the African National Congress (ANC), was how to reconcile the Government's demand that a constitution be settled by the parties to the negotiations and the ANC's view that only a democratically elected body could adopt a constitution. The disagreement was not merely rhetorical. Underlying the Government's demand was a search for an assurance that, despite the country's racist past, South Africa in the future would be a multiparty democracy, with independent courts and with rights upheld for all, including members of the white minority. South Africa is now famous for the two-stage constitution-making process that resolved this near deadlock.

In the first stage, the (unelected) negotiating forum drafted the Interim Constitution that was to come into effect immediately after the first democratic elections. Like many transitional arrangements, the Interim Constitution included a process for adopting a new constitution, with rules on participation and decision-making.

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15 Sidi M. Diawara, "Mali: peace process, constitutional reform, and an uncertain political future", ConstitutionNet, 20 July 2017.

It also enshrined 34 “Constitutional Principles”, which captured the negotiated deal relating to the future governance of South Africa, required them to be honoured in the constitution that was to be drafted after the election, in the second stage, and put a procedure in place for ensuring that the Principles would be respected.

The incorporation of the Principles in the constitution was secured by the requirement that a new constitution could not come into force until the Constitutional Court had certified that it complied with the Principles. The process set out in the Interim Constitution was followed meticulously. The first constitution that the Constitutional Assembly submitted to the Court failed the test. Some months later the Court approved a revised version, which then replaced the Interim Constitution.

This approach demands that all sides trust a court to do its job with impartiality and integrity. In most conflict-affected contexts, there are no mutually trusted domestic institutions that can perform an “endorsement” role. There may be other options, however; an international body, such as a regional court, may be considered.

## 4 Framing constitutional change in a peace process

This section and sections 5 and 6 are premised on the idea, introduced in section 1, that when constitutional change is an element of a peace process, the constitution-making process itself is part of the peace process. A constitution-making process is more likely to contribute to securing sustainable peace if it is designed with a full understanding of both the broader peace process of which it is a part and the distinct challenges that face constitution making.

This section discusses decisions that may frame the way in which constitutional issues are addressed in a peace process.

- Section 4.1 considers situations in which the very question of whether constitutional change should be on the agenda is a controversial issue in peace talks.
- Section 4.2 looks at constitutional issues decided relatively early in a peace process, be it with reference to the content of the constitution, the process of constitutional reform or both.
- Section 4.3 explores the challenges of determining time frames for constitution making in peace processes.

Building on this discussion, section 5 addresses constitutional arrangements during transitions, why they are adopted, their purposes and how they can be formalized. Section 6 focuses on adopting a new constitution or reforming an existing one for the long term.

### 4.1 Agreeing to put constitutional change on the agenda

In a peace process, reaching agreement among the conflict parties on whether constitutional change is to be an aspect of negotiations may itself be difficult. Parties that seek a change in the status quo may demand that constitutional issues be included in the peacemaking agenda. In contrast, governments and other established elites may resist such moves because conceding that constitutional change is a possibility may be perceived as a political validation of opponents' claims – and an acknowledgement that demands to change the system may be warranted. Governments may also fear that conceding the possibility of constitutional change could have a “contagion effect”, meaning that other groups might be encouraged to make similar demands. In asymmetrical conflicts in which the government is the stronger actor, opposition groups are relatively unlikely to succeed with these demands.

More generally, governments in particular may resist putting constitutional change on the agenda because of the risk that a process of constitutional change may open up a wide variety of matters that are unrelated to the conflict. Although the decision does not lie in their hands, mediators may similarly be concerned that extraneous issues and interests could be raised and the process disrupted if constitutional change were added to the agenda. They may also be apprehensive about the complexity that constitutional change adds to a process and argue that it is preferable to resolve the issues in other ways whenever possible.

Reluctance to contemplate constitutional change was a factor during negotiations between the Government of the Philippines and the Moro Islamic Liberation Front (MILF) in 2016–2019. Although both sides had agreed on relatively substantive changes in political arrangements for the Bangsamoro region, the Government resisted any constitutional change. Among other things, it was concerned that putting constitutional change on the agenda would inevitably draw in a broad range of national constitutional matters that had long been the subject of political debate in the Philippines. The process would also require a national referendum. As the MILF was principally concerned with self-determination for the people of the Bangsamoro region, it was satisfied with the Bangsamoro Organic Law, which settled the matter through a limited regional plebiscite without recourse to a constitutional amendment or national referendum.

Similarly, during the peace talks between the Government of Colombia and the FARC in 2012–2016, the FARC initially argued for convening a national constituent assembly and enshrining the peace accord in a new constitution, while the Government favoured a public referendum. After many months of discussion, the parties agreed that the aim of the peace talks was to end the armed conflict rather than to resolve all the country's problems. This important distinction allowed the parties to build an agenda for peace talks composed of topics strictly necessary to end the conflict.<sup>16</sup>

As discussed in section 4.2, other peace negotiations could not proceed without agreement on and, sometimes, implementation of constitutional change.

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<sup>16</sup> Dag Nylander, Rita Sandberg, and Idun Tvedt, *Designing Peace: The Colombian Peace Process* (Oslo, Norwegian Centre for Conflict Resolution (NOREF), 2018).



## 4.2 Decisions on constitutional issues during peace negotiations: substance and process

Many decisions concerning a future constitution-making process or the content of a future constitution may be taken during inter-party negotiations in a peace process.

Generally, agreements regarding permanent constitutional arrangements or the process by which a constitution is to be replaced or amended are not reached at the very outset of peace negotiations, but somewhat later, when parties have built a level of shared understanding of what a future constitutional arrangement could encompass. Delaying these decisions may have the benefit of providing more opportunity to weigh their long-term political and legal implications with some care.

In some cases, however, constitutional decisions are made very early, perhaps even before a formal peace process starts. For instance, a clear commitment to a constitution-making process or particular constitutional changes may be required to bring conflict parties to the table. Rather unusually, in Mozambique in 2019, securing autonomy was a core demand of opposition groups, which would not enter formal talks at all until the constitution was actually changed to that effect. Some parties require constitutional change after initial talks, but before they are prepared to enter a further stage of negotiations, or they require agreement on future constitutional change, sometimes with specific changes identified and agreed.

For example, the 1991 Mexico Agreement between the Government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional included an undertaking by the Government that certain constitutional amendments would be adopted. The Constitution was duly amended in late 1991, providing a vital stepping stone towards the conclusion of the negotiations. These and further constitutional changes were constituent elements of the 1992 final peace agreement. In South Africa, the disenfranchisement of black South Africans was the fundamental issue in the democratic transition and, although the Constitution itself was not changed, a basic initial agreement that a new constitutional arrangement would give all citizens the vote was a necessary prerequisite for talks. Similarly, in 2002, at the commencement of the Sudanese negotiations that led to the 2005 Comprehensive Peace Agreement, the parties agreed that certain fundamental constitutional changes would be introduced; the detail of other protocols was subsequently negotiated on that basis.

In addition, a “roadmap” for a negotiation process, adopted to build confidence in the process and allow progress to be measured, may include arrangements for making a constitution for the long term. Box 6 provides examples of early agreements on constitutional substance and process.

In peace negotiations decisions on constitutional issues take many forms.

Examples are:

- Guiding principles to provide a general framework for a constitution-making process or future constitutional arrangements.<sup>17</sup>
- Relatively detailed provisions for a future constitution-making process, including time frames, institutions, participation, decision-making rules and adoption of the constitution, or provisions concerning the content of a future constitution, with specific instructions to future constitution-making bodies.
- A requirement for laws to be adopted so that negotiated decisions on the form of a future constitution-making process become legally binding or so that elements of the agreement can be implemented immediately, perhaps as a confidence-building measure.
- A request to international bodies to play a role to increase confidence that agreed constitutional principles will be honoured. While such requests are rare, the United Nations Security Council, for example, helped to verify that the principles agreed for the Namibian constitution were respected. In this case, the Security Council asked the Secretary-General to report to it on how the draft constitution incorporated the agreed procedural and substantive provisions.

Early consideration of constitutional issues may benefit a peace process by:

- Providing credible assurance to parties that their key political goals and interests will be protected through constitutional changes. Parties are more likely to commit fully to negotiations on other matters, including a ceasefire, if they have such reassurances. The challenge may then be whether these commitments can be met. In this context, everyone involved in a peace process has a responsibility to consider the credibility of constitutional promises (can the constitution – promises on paper – be translated into practice?) and to contemplate how constitutional agreements reached early in a process can be fulfilled.
- Identifying key constitutional commitments sufficiently early to allow the ongoing negotiations to be conducted in alignment with these commitments. For example, early agreements on constitutional matters, such as a commitment to respect human rights, may require further, more detailed commitments to independent courts, minority rights or a particular electoral system to enhance inclusion.

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<sup>17</sup> On guiding principles, see Brandt and others, *Constitution-making and Reform* (see footnote 2).

- Providing reassurance to the broader population about the direction the process is taking, for instance through an early agreement that a region will be given greater autonomy, that multiparty democracy will be protected or that term limits will be adopted.

Since early constitutional decisions normally exclude wider or deeper deliberations, conflict parties contemplating such choices and the mediators who support them face the following questions:

- How well do the conflict parties and mediation teams understand the constitutional issues?
- Could decisions made in the peace process threaten longer-term peacebuilding and constitutionalism, either because they reflect the interests of a small number of conflict parties or because they entrench short-term personal or party interests or interests that are blind to critical issues, such as gender? For example, might prioritizing constitutional concessions to secure a ceasefire block efforts to find a better and more durable constitutional arrangement? If so, are there ways of deferring the constitution-making elements of the process to a stage at which greater inclusion and more deliberation is possible and conflict parties with narrow social bases are less dominant?
- Will these constitutional decisions be seen as unduly restrictive of the people's right to make such choices? If so, will they reduce the legitimacy of the peace agreement and the future constitution?
- Do decisions about the process of adopting constitutional changes for the long term take adequate account of the practical, legal and deeper political and social implications of the constitution-making process? Decisions about the process of constitution making may have profound constitutional implications. For instance, decisions on how constitutional changes will be made and how the constitution will be adopted may define "the people" both symbolically, such as when an inclusive process is implemented, and practically, such as when eligibility to vote in a referendum is determined.<sup>18</sup>
- Can constitutional pre-commitments proposed in a peace agreement be effectively implemented and can they command broader support? Is there a danger of parties "over-promising"?

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<sup>18</sup> Cheryl Saunders, *Constitutional Design: Options for Decentralizing Power*, Policy Paper No. 2 (Melbourne, Constitution Transformation Network, 2018).

## Box 6

# Examples of agreement on constitutional process and substance in peacemaking

PROCESS

**Colombia:** Presidential Decree 1926 of 1990 set out the framework for a constitutional assembly, which prompted some guerrilla groups to enter into peace agreements with the Government in return for participation in the assembly.

**Afghanistan:** The 2001 Bonn Agreement sketched a constitution-making process. Article 1(6) stated: “A Constitutional Loya Jirga shall be convened within eighteen months of the establishment of the Transitional Authority, in order to adopt a new constitution for Afghanistan.... The Transitional Administration shall, within two months of its commencement ... establish a Constitutional Commission.”

**Yemen:** The 2011 Agreement on the Implementation Mechanism for the Transition Process set out a constitution-making process, including a national dialogue, constitution-drafting commission and referendum.

**El Salvador:** In negotiations with the Government from 1990, the armed opposition was concerned that a change of government would undermine their agreements. Accordingly, in the 1991 Mexico Agreement, the Government agreed to immediate constitutional reform concerning the security services and the judiciary, as well as the establishment of an electoral tribunal. The 1991 constitutional amendments provided a basis for significant parts of the final agreement – the Chapultepec Accords – in early 1992.

**Bosnia and Herzegovina:** The 1992 Statement of Principles required that the political settlement for Bosnia and Herzegovina recognize the rights of people belonging to all communities.

**South Sudan:** Building on an agreement to revisit the division of the country into states, the 2018 Revitalized Agreement on Resolving the Conflict requires certain laws of a constitutional nature (for example, relating to the boundaries of the states within South Sudan) to be adopted before the constitution-making body foreseen in the peace agreement can be established and before the agreed power-sharing arrangement for the transition can be implemented.

SUBSTANCE

PROCESS AND  
SUBSTANCE

**Cambodia:** The 1991 Agreement on a Comprehensive Political Settlement of the Cambodia Conflict (Paris Agreement) included an outline of the constitution-making process with details on how a constituent assembly was to be elected and a set of principles for a new constitution.

**South Africa:** The 1991 Declaration of Intent adopted by the Convention for a Democratic South Africa included a set of basic constitutional principles; South Africans subsequently agreed to more detailed constitutional principles, including commitments to certain institutional structures in a future constitution.

**Democratic Republic of the Congo:** The 2001 Declaration of Fundamental Principles of the Inter-Congolese Political Negotiations set out principles for the political settlement as well as certain aspects of the procedure.

### 4.3 Timeframes for constitution making: a recurrent issue

Like all other elements of a peace process, setting the time frame of a constitution-making process involves not only consideration of the goals of the process, but also a difficult calculation of likely challenges and the way constitution making may interact with other elements of the process. As box 7 illustrates, time frames are seldom met, which may have negative consequences for the overall process. This section introduces the main reasons for setting a time frame for constitution making and considerations that might inform the decision. Section 5.4 discusses time frames for transitional periods.

#### 4.3.1 Why set a time frame for constitution making?

A time frame is usually set for constitution-making processes because, among other things:

- Setting a realistic time frame makes it easier to manage political expectations of conflict parties and constituencies with key constitutional demands and may provide incentives for reaching agreement.
- An indication of a time frame allows better choices to be made about transitional governance arrangements, which often have significant political implications. For instance, if a longer process is anticipated, a sound architecture for sustaining the peace process and managing potential delays is required. The case of Tunisia is instructive: a year was set for constitution making, but it took longer and the extended period put considerable strain on government arrangements intended for a short period only.
- When a large-scale constitution-making process is envisaged (see section 6.2), a time frame may help make costs calculable and curb the tendency to drag out the process and increase its expense.

#### 4.3.2 What considerations might inform the time frame?

Longer constitution making may:

- Be beneficial for peace because it enables a more deliberative and inclusive process and provides opportunities to build trust and to reach more robust compromises. Recent research suggests that in conflict-affected contexts, writing a new constitution in a longer process reduces the risk of conflict recurrence.<sup>19</sup>

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19 Fiedler, *Why Writing a New Constitution after Conflict Can Contribute to Peace* (see footnote 1).

- Support greater inclusion of actors that are often excluded from peace negotiations and constitution making, including women, notably through measures to increase representation in formal delegations and bodies.
- Allow many sectors of society to be engaged through public consultation and education on peace, democracy and constitutionalism. Such engagement also tends to provide opportunities to strengthen the ability of civil society, including women's organizations and marginalized groups, to participate.
- Address substantive issues more effectively.

Yet, a longer time frame has drawbacks:

- As long as the permanent constitutional arrangements are unsettled, the political uncertainty created by potential constitutional change persists.
- Over a longer period, the “constitutional moment” – the energy for and commitment to either compromise or constitutional change or both – may be lost.
- Constitution making requires decision-making by senior leaders and can distract their attention from other urgent needs of a post-conflict period.

## Box 7

### Examples of unrealistic time frames

Some mediators and other peace practitioners, as well as some members of the international community, believe that constitutional reform is a technical matter that can be concluded quickly or that tight timelines lead to faster constitution writing. When constitution making is to take place during a transitional period, both conflict parties and third-party actors may be concerned about how long the transitional arrangements can retain legitimacy. As a result, they too may press for speedy constitution making. However, demands for a quick process often overlook how political most elements of a constitution are and the importance of building constitutional legitimacy. The history of constitution making is littered with both constitutions that suffer from hasty preparation and broken promises of imminent new constitutions:

**Iraq:** The 2004 Transitional Administrative Law (TAL) set a deadline for the Constitutional Drafting Committee to approve a draft of the permanent constitution. As a result of delays in establishing the Committee and then expanding its membership to include Sunni Arabs, it did not officially begin its work until five weeks before the deadline, leaving insufficient time to build the required political consensus.

**Libya:** The original roadmap, set out in the 2011 Constitutional Declaration, provided only 60 days for preparing a draft of the new constitution. As soon became obvious, this period was too short for the constitution makers to forge the political agreement necessary to establish a stable system of government.

**Kenya:** To revive a faltering constitution-making process, the new Government elected in December 2002 promised a new constitution within 100 days. However, it was only in November 2005 that a draft constitution was put to the people for approval in a referendum. It did not pass.

## 5 Transitional arrangements: moving from the old to the new

Transitions are often volatile and characterized by instability and uncertainty. Especially in the early stages, parties may adopt transitional political arrangements that are intended to replace all or part of an existing constitution for a limited period of time while they resolve other matters, such as long-term constitutional arrangements. These arrangements are often negotiated when a new or more stable political order is required but it is not yet possible to reach a long-term settlement.

The first step, reaching agreement to adopt new political arrangements for a transition, may itself be significant and difficult, in part because departing from existing constitutional rules is politically symbolic. In this context, the negotiations may serve as a proxy for debates between incumbent parties and opposition actors over the legitimacy of the current constitutional order.

If transitional constitutional arrangements can be agreed, they can provide some space to prepare for inherently competitive processes, such as elections and constitution making, and they may contribute to building trust and confidence by prioritizing inclusivity and the sharing of power. However, transitions tend to be high-risk and high-stake ventures due to the cumulative effect of the challenging security and economic conditions in which they usually operate, as well as divergent expectations, a lack of trust, resource constraints and, often, the fragmented nature of the conflict parties themselves.

The success of transitions generally, and of transitional political arrangements in particular, depends in part on the nature of the arrangements and the plans for the transition, such as the authority embodied in new office holders and institutions; the degree of clarity and consensus on how government will operate in the transitional period; the pace and duration of the transition; and the sequencing of its various aspects. Outcomes also depend on the nature of the conflict parties, their relationships with local communities and their ability to adjust to a transition.

From the standpoint of mediators who support the negotiation of transitional constitutional arrangements, the overriding focus is on how they can help secure conditions for peace while also fashioning a process that can produce a sustainable social compact.<sup>20</sup> These arrangements do not operate in a vacuum: choices on the design and sequencing of the transition have implications for the exercise of power during this period, the achievement of set goals and, often, the shape of future long-term political arrangements. Design and sequencing choices also play a significant

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20 Nicholas Haysom and Sean Kane, *Understanding the Transition: A Challenge and Opportunity for Mediators* (New York, Center on International Cooperation, 2013). See also Jean Arnault, *Good Agreement? Bad Agreement? An Implementation Perspective* (n.p., n.d.).



role in maintaining the credibility of the transition: it needs to retain the buy-in of the conflict parties and enable the people and communities to see some concrete benefits.

Paying attention to the capacity of conflict parties and the challenges they face is particularly important in this context; their organization and the ability of their leaders to disseminate information and generate internal understanding and consensus on any agreements is frequently overlooked in designing and supporting a transition. When the parties have strong internal structures and are fully committed to the new arrangements, and when their members sufficiently understand their likely social, political and legal impact, transitional arrangements and their associated political changes can provide opportunities for consolidating peace. When this commitment, understanding and support is weak or lacking, transitions may fail entirely or key processes such as elections and constitution making may become deeply polarizing. Peace processes are likely to be stronger if mediators and others who support conflict parties pay attention to these matters as well as the relationships among different parties.

Building on this brief overview, the rest of this section focuses on a number of process issues relating to constitutional arrangements in transitional periods. As background, section 5.1 identifies reasons parties may choose to adopt transitional constitutional arrangements and the challenges they are most likely to face. Section 5.2 considers some matters relating to the design of transitional institutions; section 5.3 sketches ways in which transitional arrangements that conflict with existing constitutional arrangements may be adopted and secured against legal challenges; and section 5.4 introduces the main considerations in determining the time frame of a transition that includes a constitution-making process.

## 5.1 Why conflict parties adopt transitional constitutional arrangements

Conflict parties adopt transitional constitutional arrangements for various reasons, including ones related to the conflict context and specific interests. Apart from moving a country out of conflict and providing a more stable political framework, transitional constitutional arrangements may also:

- Mark a break with the past (Afghanistan 2002; Tunisia 2011; Sudan 2019) – sometimes filling a vacuum (Afghanistan 2002; Iraq 2004) – and contribute to making the transition irreversible by signalling a move to a new political order.
- Perform a “holding function”, for instance after disputed elections, sometimes amending existing constitutional arrangements to reflect changed power balances and give conflict parties a role in government (Kenya 2008).
- Confer a level of legitimacy on those who hold power during a transition by replacing a discredited constitution (Ethiopia 1991; Democratic Republic of

the Congo 2003; Tunisia 2011). Transitional constitutional arrangements that are considered legitimate may provide greater political space and additional time to undertake institutional and legal reform prior to holding elections.

- Offer political reassurances to parties so that they remain in the process and continue to take measures that are necessary to secure peace (South Africa 1993; South Sudan 2017).
- Provide a strategic tool in negotiations by presenting an opportunity for parties to lock in certain deals (South Africa 1993).
- Be easier to negotiate than arrangements for the long term and delay the entrenchment of new power relations while keeping the peace process moving forward (Somalia 2004; Libya 2011; South Sudan 2011).<sup>21</sup>

Transitional constitutional arrangements may also entail limitations and challenges:

- If they are agreed in an exclusive process dominated by conflict parties, the arrangements may be perceived as illegitimate or may not respond to the needs of the broader public, including women, who are rarely represented in party delegations. At worst, they may contribute to conflict. For example, the 2011 Transitional Constitution of the Republic of South Sudan was adopted while one side clearly dominated the political scene, without effective formal negotiations. It over-concentrated power in the central executive. Conflicts ensued over the exercise of that power and other concerns, and the situation rapidly led to war.
- If they are not formally constitutionalized, they may be threatened by legal challenges (see section 3).
- They may create path dependency by giving more powerful conflict parties significant leverage over the future, granting parties positions of authority that may be used opportunistically to entrench their power for the longer term,<sup>22</sup> or they may lock in power, thus limiting the scope for other options.
- They may be too rigid and thus unduly limit the flexibility that is essential for a complex peace process. In the worst case, this can lead to the collapse of the process.

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21 Vicki C. Jackson, “What’s in a name: reflections on timing, naming, and constitution-making”, *William & Mary Law Review*, vol. 49 (2008), pp. 1249–1305.

22 Transitional arrangements sometimes include provisions prohibiting certain office holders from competing for future public office (Libya 2011; Sudan 2019). Such restrictions do not necessarily curb the ambitions of powerful people, however, and can be problematic if they exclude leaders who need to be in government to maintain its legitimacy, either in transition or in the longer term, if those excluded resort to undermining the process, or if restrictions prevent deserving, experienced people from contributing to the peace process over the longer term.

- They may be difficult to bring to an end. If transitional arrangements are not built on a real commitment to finding a mutually agreed final objective, or if they come to serve the economic or other interests of one or more of the parties, some parties may become complacent about reaching a final agreement, as in Nepal during its extended transitional period, which started in 2006.

## 5.2 Designing transitional arrangements

When new or adapted constitutional arrangements are to govern a transition, the main focus is usually on the distribution of executive positions among conflict parties (see box 8 on power-sharing). Yet, regardless of whether executive power-sharing is adopted, for transitional arrangements to weather the difficult conditions under which they will operate and to avoid deadlocks and disputes about competencies (who does what), attention also needs to be paid to other aspects of the governance arrangements.

Arrangements established in peace processes, including transitional arrangements, may be more resilient if, among other things:

- They are phased in so as to ensure that any relevant groundwork, such as tasks related to security, is completed in advance and that parties assuming new positions have adequate opportunity to build internal support for the arrangements.
- The division of responsibilities and authority among any new decision-making bodies (or follow-up mechanisms) is as clear as possible, and accountability and fiscal arrangements are fully agreed, to avoid struggles over primacy and access to resources during the transition phase.
- Several decision-making layers are introduced as a way of avoiding the need for all questions to move upward to senior-level decision-makers. This approach can contribute to building trust among parties at different levels and can also prevent many smaller issues that could be resolved at lower levels from becoming overly significant because of the attention they receive from senior leadership.
- Mechanisms for broader participation are adopted and, if it is practical, a degree of transparency (access to and distribution of information) is provided. Among other things, these steps can allow the public to express concerns about how the agreement is implemented and can increase the likelihood of its acceptance among the broader population, rather than just the belligerents.

### 5.3 Transitional arrangements and existing constitutional arrangements

Across cases and countries, special constitutional arrangements for a transition differ from existing constitutional arrangements to varying degrees. Since a peace agreement is unlikely to have the legal status to override the constitution (see section 3.2), the question that conflict parties and mediators face is how to bring the arrangements into force and secure them against challenges based on the constitution, with which they may conflict.

The options available depend on the political and legal context:

- If existing national mechanisms are still functioning and if they support the transition and retain sufficient backing among the political and security establishment and opposition, the transitional arrangements may be formally adopted by existing procedures for constitutional change.
  - South Africa (1993), Burundi (2001) and Sudan (2005) adopted full interim constitutions that set out transitional arrangements. In both Burundi and Sudan, significant parts of preceding peace agreements were incorporated in the interim constitutions. Burundi enlarged its legislature to accommodate all parties for the adoption process.
  - In 2008, Kenya and Zimbabwe amended their constitutions to incorporate transitional arrangements.
  - In South Sudan, the 2015 and 2018 Agreements on the Resolution of the Conflict required the existing legislature to incorporate the agreed transitional arrangements into the constitution. Although there were delays in that process, the principle was not contested.
- If existing state institutions have collapsed, have been dismantled or are perceived to lack legitimacy, a newly established authority may formally adopt transitional arrangements (for example, in the form of a declaration).
  - In Tunisia, the first transitional constitution was promulgated by a decree and the second (the “Small Constitution”) was adopted by the elected Constituent Assembly in 2011.
  - In Libya, the National Transitional Council issued a constitutional declaration in 2011.
  - In Sudan, after the President was removed from office in 2019, the new authorities issued a transitional constitution called the Constitutional Charter.
- Sometimes the peace agreement itself provides the basis for transitional government, with no legal process to formalize it.

- The 1993 Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front replaced almost half of the provisions of the 1991 Constitution and stated that the two documents “constitute indissolubly the Fundamental Law” for the transition, but that the Agreement prevailed in case of conflicting provisions.
- The 2003 Comprehensive Peace Agreement for Liberia included agreement “on the need for an extra-Constitutional arrangement that will facilitate its formation and take into account the establishment and proper functioning of the entire transitional arrangement”. Accordingly, the Agreement suspended “the provisions of the present Constitution ..., the Statutes and all other Liberian laws, which relate to the establishment, composition and powers of the Executive, the Legislative and Judicial branches of the Government”.
- The 2011 Agreement on the Implementation Mechanism for the Transition Process in Yemen established a form of power-sharing for a transition. It simply provided that it superseded “any current constitutional or legal arrangements”. The circumstances were particular: the agreement was strongly supported by the international community, and there was apparent domestic support and no institutional resistance to its contents.
- The legal basis for the transitional arrangements may rest in international law.
  - In Kosovo (1999) and Timor Leste (1999) the UN exercised legislative powers under authority conferred by the UN Security Council.

## 5.4 Time frames for transitions

After violent conflict, demands on a transitional period can be considerable. They can range from ceasefire implementation and the establishment of transitional security arrangements, through the resettlement of displaced people and rebuilding of destroyed infrastructure, to the initiation of longer-term efforts to strengthen institutions and governance and build economic resilience. Moreover, as noted above, the shift from violent conflict to political engagement under transitional arrangements usually calls for considerable adjustments from conflict parties. Among other things, the parties may face internal resistance and splits among their followers or the movements that comprise them; they need to build internal cohesion and manage such dissent.

All these factors suggest that a transition should not be rushed. Usually, however, there is also a driving concern to limit the length of a transition and move to elections in order to produce a legitimate government, meet the expectations of the international community or address the interests of international actors. Parties themselves may adopt ambitious time frames to keep up a sense of momentum and reassure the population that the temporary will not become permanent.

The challenge for parties and mediators is to balance the many competing interests, sequence processes and set a time frame that permits the political and strategic goals to be achieved without undermining confidence in the transition. Even the most careful and nuanced decisions about time can turn out to be unrealistic: time frames set for transitions, like time frames for other aspects of peace processes, are notoriously unreliable.

Constitution making during a transition adds yet another layer of demands, requiring negotiations about the shape of the future state, which are typically slow and difficult. Conflict parties, mediators and other third parties are likely to face difficult questions in this context; urging restraint and a more measured process, so that constitutional decisions can be made in more stable conditions, with higher levels of trust, is challenging. This is particularly so when, for instance, a peace agreement is fragile, a conflict party is prioritizing constitutional reform to achieve its political goals, transitional arrangements have limited legitimacy, international pressure for an end to the process is high, or constitution making is mistakenly perceived to be a rather simple legal or technical task.

Section 4.3 outlines matters related to time frames for a constitution-making process. These also require consideration when a time frame is being set for a transition that includes constitution making. Additional questions that need to be addressed include:

- What challenges do conflict parties face in moving into the transition and, particularly, in operating under the transitional arrangements? If conflict parties are not well organized, a longer transition, perhaps divided into stages, may be needed.
- What specific processes need to be undertaken during the transition period? For example, is there a need to establish new security arrangements, an electoral system, or a transitional justice process? How long will it take to secure agreement on such processes? Are they to be concluded during the transitional phase?
- Is the transition period intended as a bridging mechanism until elections can be held? If so, what preparations are required before they can be held? Is a new constitution to be adopted or are substantial revisions of the existing constitution needed first?
- If a constitution for the long term is to be agreed and adopted during the transition, what should be done before the process is started? Is time needed for conflict parties to adapt to the transitional arrangements, develop internal consensus and consolidate their political agendas? Is a new legal framework for constitution making required and, if so, how long will it take to agree? What is needed to secure broader participation in constitution making? Is a relatively long constitution-making process required or should it be curtailed?

- How secure are the transitional political arrangements? Can their legitimacy and acceptability be maintained? Is there a risk that a longer period will compromise stability? Is the transitional government likely to be able to govern effectively and start meeting the needs of the population?

## Box 8

### Power-sharing: changing constitutional arrangements to secure peace

Who is to govern during a transition is a divisive question. Power-sharing provides a potential solution because, although it is inevitably difficult, adopting a power-sharing arrangement can move conflict parties to resolve disagreements through political processes rather than violence. When parties recognize that none of them is likely to be an outright winner, they may be prepared to share power. Thus, about one third of peace agreements include some type of power-sharing. These are usually transitional arrangements (such as transitional governments of national unity) and are intended, among other things, to provide the space to negotiate long-term political arrangements that respond to the causes of the conflict.<sup>23</sup>

Power-sharing may also be a permanent strategy for building peace, as when power-sharing quotas or devolved government arrangements are included in a permanent constitution. It can be used at the national and the subnational level.

The main aim of power-sharing is to restructure power relations by providing a form of governance that gives different segments of society, and particularly conflict parties, a stake in governance and decision-making.

Power-sharing may be introduced in a peace process to:

- Provide an alternative to the violent settlement of disputes or a rush to zero-sum elections by reassuring parties that their interests will be represented in political decision-making and other aspects of government.
- Allow time for legitimate arrangements for an electoral process to be put in place or for long-term political arrangements to be agreed.
- Contribute to overcoming mistrust by providing institutional incentives to turn opponents into cooperative partners.

<sup>23</sup> Lotta Harbom, Stina Höglbladh, and Peter Wallensteen, “Armed conflict and peace agreements”, *Journal of Peace Research*, vol. 43 (2006), pp. 617–631. The number of peace agreements that include some form of power-sharing does not reflect the number of power-sharing arrangements that have been implemented. Many are not ever brought into effect or last a shorter time than originally envisaged.

- Provide an environment in which democratic governance can be built.
- Contribute to managing diversity by formally acknowledging and including diverse groups and providing a role for them in shared government. If power-sharing includes territorial arrangements, it offers opportunities for self-rule as an alternative to partition.

Power-sharing arrangements may include ethnic, ideological, regional or other groups. Afghanistan, Burundi, Nepal, Northern Ireland and South Africa are examples of places where power-sharing has been used in peace agreements.

There is no single model for power-sharing. Power-sharing arrangements are usually multifaceted and may involve government arrangements, territorial autonomy, inclusion in the public service and security services, and economic elements.<sup>24</sup> As with other aspects of peace and constitution making, a power-sharing arrangement needs to be carefully designed, with the conflict parties, mediators and those involved in constitution making working together to address the demands of the particular context. In exploring power-sharing options with the conflict parties, mediators need to consider how cohesive parties are; whether, when and how power-sharing should be institutionalized; when and how it might be ended; and how it is likely to affect stakeholders who are not involved in the negotiations.<sup>25</sup>

### Benefits and risks of power-sharing and its inclusion mechanisms

Some form of power-sharing may be the only governing arrangement that conflict parties are prepared to adopt; in practice, however, attempts to introduce and maintain power-sharing arrangements often fail. Failure may reflect parties' unwillingness to make required compromises. Conflict parties and mediators may be able to minimize potential problems by paying careful attention to the way power-sharing arrangements are designed and introduced.<sup>26</sup> Each situation is unique but keeping the following common benefits and risks of power-sharing in mind may assist in establishing more robust arrangements.

In the short term, power-sharing can help to end violent conflict by breaking with previous patterns of exclusion. Armed groups are often reluctant to give up arms

24 Caroline A. Hartzell and Matthew Hoddie, "Institutionalizing peace: power-sharing and post-civil war conflict management", *American Journal of Political Science*, vol. 47 (2003), pp. 318–332; Christine Bell, "Introduction: bargaining on constitutions – political settlements and constitutional state-building", *Global Constitutionalism*, vol. 6 (2017), pp. 13–32.

25 Alexandre W. Raffoul, *Tackling the Power-sharing Dilemma? The Role of Mediation* (Basel, swisspeace, 2019).

26 Donald Rothchild and Philip G. Roeder, "Power sharing as an impediment to peace and democracy", in *Sustainable Peace: Power and Democracy after Civil Wars*, Philip G. Roeder and Donald Rothchild, eds. (Ithaca, Cornell University Press, 2005); Chandra L. Sriram and Marie-Joëlle Zahar, "The perils of power-sharing: Africa and beyond", *Africa Spectrum*, vol. 44 (2009), pp. 11–39.



unless they are guaranteed positions in government and benefit from military security guarantees that power-sharing can offer. The principle of inclusion that underpins power-sharing may also provide opportunities for the inclusion of individuals and groups other than conflict parties, such as women and youth. However, the political and power dynamics in setting up power-sharing arrangements, particularly for a transitional period, mean that conflict parties are often unwilling to open space for other actors.

Power-sharing may also have a number of drawbacks in the short term:

- It may merely divide up positions to give conflict parties “a piece of the cake”, appeasing them in the short term without fundamentally transforming conflict dynamics.
- If one or more of the conflict parties suffer from low levels of internal cohesion, power-sharing arrangements, and particularly those that centre on granting senior government posts to armed group commanders, may fail to bring groups into the peace process or may lead them to fracture.
- It has limitations as a mechanism of inclusion and may be under-inclusive because it usually focuses on conflict parties. When it includes only the conflict parties with military power, it effectively rewards violence as a means to access power while sidelining non-violent actors (Angola 1992).
- Power-sharing runs the risk of entrenching group interests yet more deeply and may skew forms of political mobilization by taking groups as the building blocks of society, rather than seeking mechanisms that promote intergroup cooperation and the moderation of group interests.
- Government in a power-sharing arrangement is cumbersome. For instance, cooperation among departments controlled by different groups is difficult. If it includes a system of mutual veto, in which groups can block decisions on specific matters, power-sharing can lead to deadlock.

In the long term, the downsides of power-sharing may grow:

- It can be unstable and risks collapsing if underlying conflict issues remain unresolved and combatants see no tangible benefits from the arrangement.
- It risks freezing the conflict with the parties continuing to strive for political agendas linked to the conflict without transcending conflict cleavages and trying to mobilize new supporters (the 1995 Dayton Accords, which put an end to the war in Bosnia and Herzegovina, are criticized on these grounds).
- While addressing the grievances of some parties, power-sharing may simultaneously create new ones or fuel similar demands by excluded groups.

In summary, the challenge for parties and mediators is to secure the elite pact that is necessary for peace while at the same time laying the foundations for a broader social contract to eliminate the root causes of the violent conflict. In this context, both the design of the mediation process and the continued engagement of mediators in the post-agreement phase influence the performance of power-sharing.

Mediators and other third parties can contribute to a successful transition and longer-term peacebuilding by persisting with efforts to strengthen the relationships among conflict parties while also working with broader constituencies that are committed to peace.<sup>27</sup>

## **Box 9**

### **Territory and power: decentralization, devolution and federalism**

Disputes about territory and the distribution of power are frequently part of intra-state conflicts and lead to demands for some form of devolution or decentralization of power. Such arrangements have the potential to balance local or regional demands for greater autonomy and participation in decision-making with desires to preserve territorial integrity. However, a settlement that includes a form of decentralization often involves fundamental changes to the structure of the state. It usually requires rethinking government structures, authorities and competencies and a careful assessment of its political, economic, social and security implications. In addition, it inevitably raises complicated emotional questions related to the nature of the state and citizenship.

#### **Territorial arrangements: labels**

There are no agreed terms to describe different forms of decentralization. Terms such as autonomy, regionalism, federalism, devolution and self-rule are commonly used, but they do not have fixed meanings.

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<sup>27</sup> Raffoul, *Tackling the Power-sharing Dilemma?* (see footnote 25).

The terms are themselves frequently a source of conflict. In Sri Lanka, for instance, supporters of federalism accused advocates of decentralization of not being serious about effective devolution of power, while they themselves were accused of seeking secession. Moreover, agreement on a term may hide substantial disagreement. “Federalism” is particularly problematic because, although it is familiar and signals a relatively strong form of decentralization, no two federal systems are the same and different advocates of federalism may envisage very different systems.

The key is not to allow the name of a decentralized arrangement to be a distraction from the substantive issues. Agreeing that a “federal” system is to be adopted – or that the arrangement is not to be labelled “federal” – can be a critical decision, but what is most important is to reach agreement on the substance of a system and, as far as possible, a shared understanding of the depth or extent of decentralization.

### Decisions to make<sup>28</sup>

Decentralization can take a multitude of forms that vary according to many factors, including:

- **Configuration:** the number of levels of government, the number of units at each level, and the boundaries of each unit.
- **Depth:** the degree of authority granted to subnational levels of government, sometimes understood on a scale of “weaker” (less deep) to “stronger” (deeper) decentralization.
- **Division of responsibilities:** the responsibilities (often referred to as powers) assigned to each different level of government.
- **Elements of shared rule:** the principles and common interests that underpin the state, the types of shared institutions (such as a national legislature, courts, independent bodies), the methods for cooperation on national interests among different levels of government, and the mechanisms for allocating resources and managing conflict among governments.
- **Symmetrical or asymmetrical decentralization:** the degree of authority enjoyed in various parts of a country. Under asymmetrical arrangements, some parts of a country enjoy more or less governing authority than others, for example, Yukon, Canada; Aceh, Indonesia; Bougainville, Papua New Guinea; and variously in Spain.<sup>29</sup>

<sup>28</sup> Saunders, *Constitutional Design* (see footnote 18).

<sup>29</sup> Nicole Töpferwien, *Decentralization, Special Territorial Autonomy, and Peace Negotiations* (Bern, Mediation Support Project, swisspeace, 2010).

## Territory, constitutions and the law

All forms of decentralization require a legal framework. Sometimes a fairly detailed framework is included in a peace agreement (Sudan 2005) and sometimes a peace agreement leaves most details to lawmakers (Nepal 2006). In either case, the first question is often, “Should decentralization be entrenched in the constitution?” In post-conflict contexts, whether and how much of the legal framework is included in a constitution depends primarily on:

- **Assurances that parties require:** entrenchment in the constitution makes the arrangement more secure.
- **What the constitution already says about decentralizing power:** the constitution may permit decentralization, may need to be amended to permit it, or may be unclear in this respect, requiring a decision on whether to amend the constitution.
- **Practicalities of changing the constitution:** if a constitutional amendment is not possible, ordinary law may be the only mechanism available.

## 6 Making a constitution for the long term

Section 3 shows that new political arrangements with constitutional implications may be agreed at many points in a peace process. A more formal process to adopt a new constitution or amend the existing one is usually required or expected if such agreements are to secure constitutional change for the long term.

When constitutional issues are clearly at the heart of a conflict, parties may agree to a relatively ambitious constitution-making process to resolve them. However, as noted in section 1, there are no set patterns for when constitutional change might be undertaken. In some cases, as in El Salvador (1991) and Mozambique (2019), constitutions have been amended early in a process, usually to provide a stepping stone for further negotiations (see section 4.2). Constitutional change may also be incremental, with the constitution revised a number of times as the negotiations mature. Incremental constitutional reform has advantages: it can reassure conflict parties that agreements are being honoured, prevent slippage and maintain momentum. Incremental changes may also protect previously reached agreements against revision by a new government. Moreover, if many constitutional issues need revision or attention and cannot be resolved in the course of the peace talks, an incremental process may allow them to be settled over a longer period. Indeed, some issues may require considerable research and consultation. For example, truth commissions usually have an explicit mandate to look into root causes of the violence and to consider what legal or policy changes are needed to prevent further rights violations; they may recommend additional constitutional changes based on their findings, as was the case in El Salvador.

Most commonly, however, a constitution is amended or replaced towards the end of peace negotiations. Sometimes these processes of constitutional change are limited to incorporating provisions of the peace agreement in an existing constitution in a relatively “light” process, without much public debate. Alternatively, the process may take place on a larger scale; it may be more comprehensive and more participatory, so as to provide an opportunity to review constitutional arrangements in their entirety and to secure a new constitutional settlement that has national support.

Formalizing new constitutional arrangements for the long term offers opportunities, yet it also presents challenges to a peace process. Key questions for parties and mediators include:

- **When should constitution making for the long term take place?**  
At what stage of the process should a new constitution be made or the existing constitution amended? How much needs to be settled before constitution making for the long term can be constructive? (See section 6.1.)

- **What is the appropriate scope of the exercise with respect to its process and the constitutional substance it covers?** Should the process for making a constitution for the long term be expansive (large-scale) – entailing inclusive decision-making and broad participation arrangements and engaging more comprehensively with the constitution – or should it be more contained (light)? Will the entire constitutional framework be reviewed or are changes intended to be limited? (See section 6.2.)
- **Can the existing constitution be amended or should it be replaced?** What do the legal system and tradition demand? And what do the politics demand? (See section 6.3.)
- **If a large-scale process is undertaken, what should it look like?** What institutions and procedures should be used, who should be included and how should the new constitution be brought into force? (See section 6.4.)
- **How can constitution making be supported?** What support is likely to be needed and what considerations should inform decisions about providing support? (See section 6.5.)

## 6.1 When should constitution making for the long term take place?

In practice, the timing of many early constitutional decisions is driven by the most urgent interests of the parties and other actors (including external actors) and opportunities, rather than by a formal sequencing decision. By contrast, the decision on when constitution making for the long term should take place is usually one element of a set of broader sequencing decisions, informed by calculations that balance competing needs and interests as well as an assessment of what is realistic in the unfolding peace process.

There is frequently pressure to finalize constitutional arrangements for the long term quickly. Parties that have been out of power and want the system changed may press for constitution making to start as soon as possible. A population excluded from negotiations might mistrust the parties and also be unwilling to wait; instead, it may press for a participatory, large-scale constitution-making process to be established quickly. Invested in achieving stability after conflict, mediators may fear a loss of momentum and a re-establishment of the “old elites” if new constitutional arrangements are not settled swiftly. The international community may also press for settling the constitutional arrangements as soon as possible for a number of reasons, including their own vested interests.

In this context, it can be challenging to manage unrealistic expectations about the ability of a new constitution to deliver peace and many other goals. Some experts question “whether constitutions can bear the conflict resolution and

democratisation burdens being ascribed to them in political transitions”.<sup>30</sup>

Mediators raise related concerns, referring, for instance, to the readiness of the international community to embrace premature constitution making (as in Iraq in 2006) and to rely on a new constitution as the foundation of peace (as in Bosnia and Herzegovina in 1995), for instance.<sup>31</sup>

It is also common for some actors to resist settling constitutional arrangements for the long term early in a process. Conflict parties may be reluctant to do so because they have not had an opportunity to build their support base and positions. Some mediators, constitution makers and other peace practitioners may argue that a considered and inclusive constitution requires distance from the conflict, ideally with a reduction in the political dominance of conflict parties, as well as greater progress on peacebuilding measures and more agreement on contentious issues.

Two specific matters arise regularly in discussion about when to embark on constitution making for the long term in conflict-affected contexts. First, the security situation: does a certain level of security need to be achieved before constitution making can be undertaken? Second, the progress needed in peace talks: how many of the future constitutional arrangements should be agreed before a constitution-making process begins? These matters are discussed below.

### 6.1.1 Violent conflict and constitution making for the long term

Some mediators and academics have argued that constitution making for the long term should not be attempted if the security situation prevents serious engagement by all sectors of society. They stress that conflict termination and constitution making should be totally separate undertakings.<sup>32</sup>

Iraq did not involve a mediated settlement to the conflict. Nonetheless, it is a paradigmatic example of the problems of undertaking constitution drafting when violence is still prevalent and there is very limited political stability. Indeed, the 2005 Constitution of Iraq was drafted and adopted under conditions of violent conflict. One of many problems was that a major community, the Sunni Arabs, largely boycotted the elections for the body that appointed the Constitutional Drafting Committee. As a consequence, Sunni Arab input into the drafting process and political deal-making that led to the Constitution was limited.<sup>33</sup>

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30 Bell, “Introduction: bargaining on constitutions”, p. 14 (see footnote 24). See also, for example, Jon Elster, “Forces and mechanisms in the constitution-making process”, *Duke Law Journal*, vol. 45 (1995), pp. 364–396, and Hallie Ludsin, “Peacemaking and constitution-drafting: a dysfunctional marriage”, *University of Pennsylvania Journal of International Law*, vol. 33 (2011), pp. 239–311.

31 Mediators and mediation support actors interviewed as part of the project mentioned in ‘About this Primer’ on page 2.

32 Jamal Benomar, *Constitution-making and Peace Building: Lessons Learned from the Constitution-making Processes of Post-conflict Countries* (New York, United Nations Development Programme, 2003); Ludsin, “Peacemaking and constitution-drafting” (see footnote 30).

33 Feisal Amin Istrabadi, “A constitution without constitutionalism: reflections on Iraq’s failed constitutional process”, *Articles by Maurer Faculty*, Paper 2362 (2009).

Nonetheless, as section 1 notes, peace and constitution-making processes are often intertwined. Although ongoing violence may inhibit inclusiveness and deliberation in constitution making, constitutional reform has been undertaken in attempts to end violent conflict (Colombia 1991; Somalia 2002) and may be viewed as the most likely opening for serious discussions about reaching peace (Syria 2019). In countries that are experiencing several violent conflicts, a settlement might relate to only one of them and constitutional change might be necessary to reach even that partial resolution; delaying this process until all conflicts can be resolved would be unrealistic. In 1995, for example, Uganda adopted a new constitution through a participatory process even though some of its conflicts, notably with the Lord's Resistance Army and with the Allied Democratic Forces, were not resolved. In 2005 the Government of Sudan and the southern Sudan People's Liberation Movement reached an agreement that had significant constitutional implications and led to the autonomy and eventual secession of the South. The agreement was not able to stop the hostilities in Darfur or in the east of Sudan, nor did it resolve aspects of the conflict between the north and south (in Abyei, Blue Nile or South Kordofan), which may yet lead to further constitutional change.

As the case of Iraq illustrates, settling long-term constitutional arrangements in the midst of conflict is challenging. There are no simple answers; each case requires a difficult judgment about the extent to which constitution making may contribute to stabilization, taking account of the distinctive challenges of making a durable constitution for the long-term.

### **6.1.2 Should long-term political arrangements be settled in a peace agreement or through constitution making?**

There is a lively academic debate about how detailed the political settlement should be before constitution making for the long term begins. Can all or most of the political arrangements for the long term be left to be settled in a constitution-making process? Or does the context require that some aspects, or even a considerable amount of detail, be settled before a constitution-making process begins? What are the potential risks of either approach?<sup>34</sup>

In practice, the degree to which constitutional matters are resolved in a peace agreement, outside a distinct constitution-making process, depends largely on the context of the conflict and on how much certainty conflict parties need about the future before they agree to stop fighting. Moreover, despite the risks, settling some long-term constitutional issues in the less structured setting of negotiations may have advantages; in view of their focus on politics and bargaining (and sometimes pressure imposed by international actors), negotiations might lend themselves to greater creativity and elicit more willingness to agree than can be achieved in the greater formality of a constitution-making process.

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<sup>34</sup> See, among others, references in footnote 30.



## 6.2 Constitution-making processes: large-scale or light?

How elaborate should a constitution-making process be? In some countries, constitutions can be amended or replaced through a relatively light procedure, such as approval by the legislature, which is sometimes followed by a referendum. However, many peace processes include what this Primer calls large-scale constitution making, often because, for varying reasons, parties or the public may expect an inclusive process that provides the entire population with an opportunity to discuss future constitutional arrangements. Mediators may see a large-scale process as a way of expanding inclusion and strengthening national ownership of new political arrangements. Such large-scale processes for making constitutions for the long term were used in South Africa (1994), Nepal (2006), Kenya (2008), Zimbabwe (2008), The Gambia (2017) and, to a lesser extent, Burundi (2005), among other places. They may follow existing provisions for constitutional change – which can be supplemented to provide for more public participation – or adhere to newly agreed procedures, marking a break (rupture) with the past (see box 10).

By contrast, a light constitution-making process may provide for limited or no public engagement and would not usually serve as a nation-building or peacebuilding exercise. In general, the main goal of a light process would be to give relevant aspects of a preceding peace agreement constitutional form. In so doing, a light process may resolve the constitutional issues or it may shift some or all of the contestation to the formal, constitutionally regulated arena, in which the revised constitution provides a framework for ongoing peacemaking.

Constitution-making processes cannot be neatly divided into light and large-scale. They take many forms. The former Yugoslav Republic of Macedonia, for example, did not undertake a large-scale process to adopt the constitutional provisions of the Ohrid Framework Agreement (2001). To ensure that the constitutional amendments would pass, however, extensive discussions were held among international experts, the President of the Parliament and Members of Parliament from the smaller political parties, who were dissatisfied because they had not been included in the negotiation process. This process balanced the aim of adopting constitutional changes in a relatively fast and effective manner with the goal of providing space for discussion of those changes.

A decision to embark on a large-scale constitution-making process presents distinct opportunities and challenges. When the decision is made – be it early in a peace process, perhaps as a part of a road map (see section 4.2), or later – parties and mediators need to draw on constitutional expertise, especially from those who are familiar with the country's legal system, to discuss the implications of and alternatives to large-scale constitution making in an informed way. A thorough conflict analysis that includes consideration of the potential impact of a large-scale process and the challenges it may face, as well as possible substantive outcomes, is an essential resource in this context.

Parties may agree to a large-scale constitution-making process if:

- The constitution needs broader political and popular support than either peace negotiations or a light process can secure. A large-scale process can be more inclusive and transparent than peace negotiations; it can also lend legitimacy to a negotiated deal.
- The country has been fractured by the conflict and a large-scale constitution-making process is seen as a nation-building opportunity that can allow for deliberation on national values, bring diverse sectors of society together in a joint endeavour and tackle some of the underlying causes of the conflict, among other things.
- The constitutional tradition of the country requires the changes to the political system that are envisaged by the peace process to be adopted through an exercise of constituent power and a referendum is not considered sufficient or wise (see section 6.3).

Large-scale constitution making also presents challenges in a peace process:

- It may be divisive. Unless the peace process before constitution making has itself secured a broad social consensus, a large-scale constitution-making process may reopen issues and challenge any agreements. A re-evaluation may be healthy but could break down whatever trust may have been built and threaten peace.
- Securing agreement may be difficult. Decision-making in a large-scale constitution-making process may be more challenging than in a more contained one, as more interests are represented, more issues are raised and bargaining is more complex.
- Large-scale constitution making takes time, is costly and drains energy from other matters that need attention in the aftermath of violent conflict.
- The time taken to complete a large-scale process may provide opportunities for obstruction of the entire peace process by groups that are dissatisfied with the agreement. Moreover, if no mechanism has been found to secure elements of a negotiated peace agreement in the constitution for the short term or longer, a genuinely inclusive process may well produce unexpected outcomes, including some that might threaten the interests of the main conflict parties – and thus the peace.

### 6.3 Choosing to amend or replace the constitution: legal and political questions<sup>35</sup>

If it is agreed that constitutional change is needed, the question may be whether the existing constitution should be amended or replaced.<sup>36</sup> This decision is not simply a choice between minor changes and more substantial ones: Vietnam made few substantial changes when it replaced its constitution in 2013; Indonesia made major changes through constitutional amendment over a period of time (1999–2002). Rather, the decision is likely to be driven by a range of political and legal factors. If mediators are called on to advise parties on this choice, they need to consider both the political and social roles constitutional change may play in the peace process, understand the legal context of (and constraints on) constitutional change in the country concerned and draw on whatever resources are necessary to secure a sound grasp of the existing constitution and the legal system and culture.

Constitutional amendment may be chosen when:

- Proposals call for relatively discrete changes, such as name changes (North Macedonia 2019); changing official languages (Sri Lanka 1987); and granting autonomy to a specific region (Bougainville/Papua New Guinea 2001).
- The change is to set up a transitional political arrangement (Kenya 2008; Zimbabwe 2008) and other elements of the constitution are not contested, or it has been agreed that a full process of constitutional reform is to take place at a later date.
- A relatively contained process is politically desirable, with only certain issues on the agenda, or replacement is unlikely to be possible (El Salvador 1991; Guatemala 1996). When a constitution is replaced, there is a greater chance that everything is open to discussion, which may overload the process and risk it being derailed by issues unrelated to the main concerns of the peace process.
- The existing constitution is respected, parties wish to retain it to signal legal stability to their supporters, or governments wish to avoid any suggestion that the system under which the country was governed in the past was illegitimate.
- The cost and time that replacing the constitution may involve are unacceptable.

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<sup>35</sup> See Melbourne Forum on Constitution Building, *Constitutional Beginnings: Making and Amending Constitutions*, Constitutional Insights No. 1 (Melbourne, International Institute for Democracy and Electoral Assistance (International IDEA) and Constitution Transformation Network, 2018).

<sup>36</sup> All constitutions include provisions for their amendment. In many countries, these provisions are understood to cover both amendment and replacement. In some legal traditions, however, amendment provisions do not permit replacement of the entire constitution. A few constitutions, such as those of Austria, Bulgaria, Costa Rica and Spain, include provisions that specify a distinct process for replacing them.

Replacement of a constitution may be chosen when:

- The old order has collapsed and an entirely new system is envisaged.
- Constitutional amendment is not practically possible, for instance because the established process sets time frames that are too lengthy, requires a referendum that is not possible or requires the cooperation of discredited institutions.
- Substantial changes are being made to political arrangements and implementing them through amendments would face legal hurdles (see box 10) or lead to a constitutional text that is unnecessarily complicated or lacks internal coherence.
- The old constitution has limited or no legitimacy, or significant conflict parties resist the signal of continuity and the affirmation of the legitimacy of the old constitutional arrangement that merely amending the existing constitution might convey. A completely new constitutional arrangement can be an important political symbol, marking the change of the political order.
- A full process of constitutional reform is desired as a step in the peacebuilding process because it enables a broad national debate and a shift from the relatively closed process of decision-making in negotiations to a more inclusive, accountable and transparent one.

## Box 10

### Constitutional continuity or a break with the past

Constitutional continuity is maintained when a new constitution is adopted or a constitution amended according to the process set out in the existing constitution.

“Constitutional rupture” refers to a legal break with the past; the rules for constitutional change in the existing constitution are not applied and a new constitution is adopted following new rules and procedures.

The choice between constitutional continuity and rupture is not a choice between chaos and order or between minor changes and large-scale constitutional reform. It is more likely to be driven by political circumstances and history, particularly the legal tradition. Constitutional rupture may be chosen to signify a rejection of an old regime (Benin 1990; Tunisia 2011); in other cases, a country’s legal tradition may expect a complete replacement of a constitution to be an absolute break with the past and a completely fresh exercise of constituent power – that is, the power of the people to establish a new constitutional order.

**Constitutional continuity in South Africa and Kenya:** In 1993, South Africa responded to the Parliament’s lack of legitimacy while simultaneously averting the danger of legal challenges associated with constitutions that are not adopted in the legally prescribed manner. It did so by preparing its transitional constitution in negotiations and then having it formally enacted by the Parliament, thereby securing continuity. That transitional constitution set out a new procedure for adopting the permanent constitution, again securing legal continuity. In 2008, the Kenyan Constitution was amended to set out the special arrangements for the constitution-making process that had been agreed after the 2008 Accord, ensuring continuity to protect a new constitution from legal challenges.

## 6.4 Undertaking large-scale constitution making in a peace process<sup>37</sup>

Section 6.2 notes that a large-scale process may be expected or needed to make or amend a constitution for the long term. As mentioned, this Primer characterizes large-scale constitution making as a process that seeks to be inclusive and provide the entire country with an opportunity to discuss the future constitutional arrangements for the state. Such a process may include institutions especially established to develop new constitutional arrangements (such as commissions and constitutional assemblies) and may develop an extensive public participation programme.

As the Guidance Note of the Secretary-General on United Nations Constitutional Assistance states, constitution making “should be nationally owned and led”.<sup>38</sup> This principle applies with extra force when constitution making has the goal of building national unity and securing the legitimacy of new constitutional arrangements. Nonetheless, mediators and other third parties supporting negotiations may be asked to provide support on the design of the constitution-making process. In these situations, they have a particular responsibility to draw on appropriate local and comparative expertise in a way that recognizes the distinctive nature and challenges of constitution making outlined in section 1. Domestic actors are best able to judge what kind of process will work, although the rich comparative understanding of constitution making that has developed over the past few decades can expand the range of options under consideration and provide guidance on likely challenges and possible ways of managing them.

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<sup>37</sup> This section draws heavily on Brandt and others, *Constitution-making and Reform* (see footnote 2).

<sup>38</sup> United Nations, *Guidance Note of the Secretary-General* (see footnote 5).

In this context, a number of questions are likely to require attention. One is the time frame for constitution making, as discussed in section 4.3. Other questions include:

- **What institutions and procedures will be used?** Are new institutions needed or are existing institutions adequate? Who is included in making agreements on the process? What rules of procedure should apply and, in particular, what are the decision-making rules? How will a new constitution or amendments to the existing one be adopted – by the existing legislature, by a special constitution-making body or through some form of voting, such as a referendum?
- **Who should be included in constitution-making bodies and how broad should participation be?** Ideally, a constitution-making process is relatively inclusive and participatory. A key challenge is to design the process so that it secures both elite consensus and broad public support and leads to durable long-term arrangements. Methods for choosing participants (including mechanisms to ensure proper inclusion of women, youth, ethnic minorities and other actors that are traditionally excluded), decision-making rules, mechanisms for ensuring adequate links with other parts of the peace process and a strong public participation programme can contribute to meeting this challenge (see section 7.1).
- **How should a new constitution be brought into force?** Unlike many other elements of a peace process, the adoption of a new constitution or constitutional changes for the long term usually requires a formal process (see section 1).<sup>39</sup> Formal adoption by a constitution-making body (such as a legislature or constituent assembly) is sometimes enough, but often more is needed. This additional approval may be mainly symbolic, such as formal assent (in practice, a signature) by the head of state, or more substantive, such as ratification by the people in a referendum (see section 7.2.3). South Africa, discussed in box 4, was unusual in requiring endorsement by a court.

## 6.5 Supporting constitution making for the long term

Constitution making usually requires administrative infrastructure and constitutional and other specialized expertise. While national experts provide much of this support, domestic actors increasingly draw on international support for some aspects of constitution making, especially when a large-scale process is undertaken.<sup>40</sup>

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<sup>39</sup> Christopher Thornton and Felix Tusa, *To Seal the Deal: Mechanisms for the Validation of Political Settlements* (Geneva, Centre for Humanitarian Dialogue, 2017).

<sup>40</sup> Useful practical guidance on setting up administrative structures and providing expertise is available. See, especially, Brandt and others, *Constitution-making and Reform* (see footnote 2) and United Nations Development Programme, *UNDP Guidance Note on Constitution-making Support* (New York, 2014).

In terms of structure and operation, bodies that are involved in constitution making may differ significantly from those engaged in peace negotiations; nonetheless, decision-making in a constitution-making process usually involves negotiations, which require trust and compromise. South Africans were unusually frank in this regard, describing the constitution making in their Constitutional Assembly as “negotiations”. Tunisia also offers relevant insight: in 2012 insider mediators assisted the parties in overcoming a deadlock by mediating a combination of matters concerning both the existing transitional political arrangements and constitutional decision-making. In designing a process, it is thus wise to anticipate the role mediators may play as well as the political sensitivity that constitutional and other technical advisers require.

Similarly, expert support provided to a constitution-making process needs to take account of the delicate balance of political and technical skill required in drafting and reaching agreement on a constitution. A constitution or constitutional amendments must accurately reflect any political agreements and provide a coherent legal framework for government. Individuals who lead constitution making processes usually focus on the major decisions that capture overarching changes, such as those relating to the form of government and, perhaps, devolution. In ideal circumstances, those who support them are able to provide advice to ensure that these decisions are incorporated in the constitution in a way that provides a sound system of accountable and effective government. The constitutionalization of a system of devolved government is an informative example of the range and detail of decisions that may be needed. It usually requires fairly detailed decisions on how boundaries are to be drawn, what matters are devolved, arrangements for wealth sharing, and the way security services operate across internal boundaries, among other things. These decisions demand an understanding of existing arrangements and a good knowledge of public finance and public administration, as well as constitutional expertise and sensitivity to the social and political context.

**Box 11****National dialogues and constitution making**

National dialogues in political transitions vary in their form and what they intend to achieve.<sup>41</sup> In contrast to many other parts of a peace process, they are often large gatherings, intended to provide the platform for an inclusive, open discussion and exchange of ideas at the national level, with the goal of generating consensus about the shape and vision of the society, and so to contribute to building peace.

The value of large-scale national dialogues is their ability to draw many sectors of society – beyond the usual elites – into discussions about a country’s future and to have a broad agenda that provides an opportunity to explore the root causes of conflict and introduce new perspectives. In a peace process, a national dialogue can provide a clear signal that those in power are willing to have open discussions about the future and that diverse sectors of society can talk to each other in a constructive way. National dialogues cannot be conducted outside the politics of the conflict, however, and can be manipulated and stage-managed affairs, as when they are initiated by struggling governments hoping to contain disaffection or are set up by powerful parties in a conflict merely to legitimize their own power.<sup>42</sup>

National dialogues may be linked to constitution-making processes in a number of ways:

- By including constitutional issues on their agenda, as has been the case in many large-scale national dialogues. While some national dialogues make decisions on constitutional principles or propose provisions for a future constitution, national dialogues are not usually the best forum for drafting a constitution, as discussed below.
- By agreeing to a process for constitution making, including principles of participation and decision-making, usually to contribute to the legitimacy of constitution making.
- By settling basic principles that must underpin future constitutional arrangements.
- By facilitating future constitutional decision-making by demonstrating the possibility of conversations across deep political and social cleavages.

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41 For general information, see Berghof Foundation, *National Dialogue Handbook: A Guide for Practitioners* (Berlin, 2017).

42 Roxaneh Bazergan, “National dialogues in political transitions”, UN internal research paper (2019).



However, there are reasons why constitutions are not usually written in large-scale national dialogues:

- National dialogues aim to generate debate and exchange on a broad range of issues, often as stepping stones to a new social contract. They are not generally designed to address the complexity and longevity of decisions relating to constitutional matters.
- The legitimacy of a constitution often depends in part on the legal status of the process by which it is drafted. The necessary formal compliance with pre-existing legal procedures or a process that parties and the people recognize as a constitution-making process may run counter to the goals and approach of a national dialogue.
- A constitution is a law and detailed attention must be paid to its framing and how it relates to (or needs to change) existing laws and institutions. Large national dialogues are not usually designed with this kind of drafting specificity in mind.

Therefore, in a peace process, the relationship between a national dialogue and constitution making needs to be carefully considered, especially with respect to the following points:

- If constitutional issues are on the agenda of a national dialogue, it is important to ensure that later constitution makers can produce a coherent constitution. This may require some arrangement for amending proposals that emerge from the dialogue, particularly if they are contradictory or based on assumptions about the structure of the state that no longer apply. The Yemen Comprehensive National Dialogue Conference illustrates the dangers of expecting a national dialogue to yield workable agreement on constitutional matters. It was mandated to develop constitutional principles. Working groups produced different proposals, some of which were very detailed; consequently, the Constitution Drafting Commission was confronted with contradictory resolutions to implement.
- Parallel but disconnected national dialogues and constitution-making processes can increase conflict. Participants in each may compete to decide matters and the legitimacy of both processes is likely to be undermined. Ultimately, these processes need to be conceived within an overarching transition strategy.

## 7 Inclusion and legitimacy

As noted above, parties to a conflict usually do not represent the full spectrum of groups and interests in society. A growing body of evidence shows that inclusive peace processes – particularly those that include women – have stronger legitimacy, credibility and constituencies of support within societies and lead to more sustainable outcomes.<sup>43</sup> A concerted effort is therefore required to ensure that peace processes, including any constitution making that is part of them, encompass social, cultural, religious and minority groups, as well as women, youth, civil society groups and professional organizations, and are responsive to the needs and interests of different segments of society, both during the process itself and in its outcomes.

Section 7.1 discusses the many different ways in which inclusion can be secured in peace processes and points out that a combination of different approaches is usually needed to build a fully inclusive peace process. Voting, which is discussed in section 7.2, provides a very specific form of inclusion: a credible balloting process is closely linked to the legitimacy of political bodies or, in the case of a referendum, on the decision it supports.

### 7.1 Inclusion and consensus: conflict parties and the wider society

Successful peace agreements and constitutions enjoy not only the support of conflict parties and elites with the power to destabilize or undermine them, but also broader backing from the public at large. As noted in the United Nations Guidance for Effective Mediation “An inclusive process is more likely to identify and address the root causes of conflict and ensure that the needs of the affected sectors of the population are addressed”.<sup>44</sup> The 2018 joint United Nations and World Bank report, *Pathways for Peace*, makes the point succinctly: “Inclusive decision making is fundamental to sustaining peace at all levels.”<sup>45</sup>

Decisions about inclusion and participation – who is included, why and how – are thus among the most important in peace processes. They are also difficult. In practice, emphasis on broad inclusion and participation always needs to be balanced with the need for elite support of an ongoing process. In this context, some commentators refer to two different, sometimes competing, forms of inclusion.

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43 See, for example, Jana Krause, Werner Krause and Piia Bränfors, “Women’s participation in peace negotiations and the durability of peace”, *International Interactions*, vol. 44 (2018), pp. 985–1016.

44 United Nations, *United Nations Guidance for Effective Mediation*, p. 11 (see footnote 5).

45 United Nations and World Bank, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict* (Washington, D.C., 2018), p. xix.

The first is the horizontal inclusion of political elites or the main political groups that vie for power. The second is the vertical inclusion of those in power and of broader society. Without the first form of inclusion, peace is unattainable; the second form of inclusion is important for reaching sustainable outcomes grounded in the needs of the society that is emerging from conflict. Both forms are necessary for a peace process to succeed.<sup>46</sup>

Securing women’s meaningful participation in decision-making bodies and in other aspects of a peace process demands particular attention because war has distinct impacts on women and women play a distinct and critical role in peacemaking. Moreover, an approach that recognizes the importance of including women is consistent with the international normative framework for securing women’s full participation in peace, political, constitutional and electoral processes. This commitment is based on the principles of non-discrimination and equal enjoyment of political rights enshrined in the 1948 Universal Declaration of Human Rights and other key international human rights instruments; the same commitment is underlined in the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1995 Beijing Declaration and Platform for Action, and United Nations Security Council resolutions on women, peace and security, beginning with the foundational resolution 1325 (2000) (see also box 2).

### 7.1.1 Securing inclusion

How inclusion is secured in decision-making and broader participation varies across contexts and depending on the nature of the issues on the agenda:

- Conflict parties can be encouraged to be inclusive with respect to their delegations. In South Africa in 1993, women succeeded in securing the principle that they would be represented in every delegation.
- Advisory groups may support women’s participation in political processes. In 2016 the United Nations Special Envoy of the Secretary-General for Syria constituted the Syrian Women’s Advisory Board, which has consistently advocated women’s direct participation in the formal negotiations.
- Consultative platforms, including groups underrepresented in official delegations, can be invited to the negotiations. In Kenya in 2008, the African Union mediation team regularly consulted civil society groups before meeting the parties; separate meetings of representatives of women’s groups were always part of these consultations. In addition to the Women’s Advisory Board, the Special Envoy for Syria used the “Civil Society Support Room” for regular engagement with different sectors of Syrian society from 2016 onwards.

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<sup>46</sup> Christine Bell and others, *Navigating Inclusion in Peace Settlements: Human Rights and the Creation of the Common Good* (London, British Academy, 2017); Berghof Foundation, *Broadening and deepening participation in peace negotiations: a strategic framework* (Berlin, 2015).

- If inclusion is resisted in initial ceasefire negotiations, efforts can be made to strengthen inclusion when discussions turn to political arrangements and constitution making. The 2013 Yemen National Dialogue Conference, established to deliberate on a future vision for the country, was designed to be an inclusive body. Each political group was required to fill agreed quotas for women, youth and representatives from the South in their delegations; the Conference also included blocs of seats for women, youth and civil society.
- Parties that have remained outside a peace process may be given opportunities to be included later. In Burundi, the Hutu rebel movements CNDD-FDD and Palipehutu-FNL signed on to the 2000 Arusha Accords in 2003 and 2009, respectively.
- If one party's key demand is the inclusion or empowerment of a particular group, acceptance of that demand can be used to push for the inclusion of other excluded groups, such as women or youth. In Nepal in 2006, women used provisions that focused on including marginalized ethnic groups to support arguments for their own inclusion.

Constitution-making processes offer many examples of creative ways of including diverse groups and interests. Among other factors, the larger size of many constitution-making bodies provides opportunity for inclusive decision-making, special decision-making rules can ensure minorities and other relevant groups have a say, and transparency in setting agendas and deliberating provides the broader public with opportunities to engage. Active forms of broader participation, such as submissions to constitution makers and responses to drafts of a constitution, are also common.<sup>47</sup>

### 7.1.2 Challenges

As the examples above illustrate, various mechanisms can be used to broaden inclusion in peace processes. There are often barriers to doing so, however. As already noted, conflict parties may not attach importance to inclusion, or they may be opposed to the idea; they may also perceive certain groups, including civil society, to be aligned with their adversaries. A lack of trust and uncertainty about the process may also lead parties to insist on less inclusive talks.

Inclusion and broader public participation in constitution making may pose particular challenges, for example:

- A highly inclusive constitution-making process (which may come about when a constitution-making body is elected, for example) may deepen the peace process and contribute to building a stronger political settlement,

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<sup>47</sup> Abrak Saati, *The Participation Myth: Outcomes of Participatory Constitution Building Processes on Democracy* (Umeå, Sweden, Umeå University, 2015).

based on broad social consensus. Conflict parties, however, may fear that such a process will dilute their influence. Even if the core components of an earlier peace agreement are respected, reducing the influence of these parties may make them feel insecure and less willing to engage in other aspects of the peace process.

- As noted in section 3.3, agreements reached in peace negotiations may be difficult to maintain in a constitution-making process in which a range of new parties participate. Peace agreements often require a delicate political compromise. Reluctant parties may use the cover of an inclusive and participatory constitution-making process to undermine the compromise, thereby threatening the entire peace process.
- Groups that were not party to the initial peace negotiations may be unwilling to support the incorporation of the political agreement into the constitution unless other significant concessions are made.
- Single-issue groups that disagree with a specific component of the agreement may mobilize and impede or even block the process.
- As noted in section 6.2, large-scale constitution making, with broad participation, may raise issues unrelated to the conflict, which may provide an opportunity for national debate that would not otherwise occur. It may also hold constitution making, and thus the peace process, hostage to issues that are not urgent.

These challenges underscore the need to design a constitution-making process that is well integrated into the broader peace process, and to invest in building confidence and maintaining strong political leadership.

## 7.2 Voting as part of peace processes and constitution making: elections and referendums<sup>48</sup>

In a conflict-affected context, constitution making and voting, whether in elections or referendums, are closely linked to establishing the legitimacy of ensuing political arrangements. They unfold in many different ways, based on context rather than according to any standard, best or even typical sequence. Indeed, the dynamic nature of most conflicts makes it challenging to predetermine the sequence of events.

In peace talks, decisions concerning holding elections are often affected by two key

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<sup>48</sup> This section draws on William Underwood, Sumit Bisarya and Kimana Zulueta-Fülscher, *Interactions between Elections and Constitution-building Processes in Fragile and Conflict-affected States – Fourth Edinburgh Dialogue on Post-Conflict Constitution-building* (Stockholm, International Institute for Democracy and Electoral Assistance (International IDEA), 2017).

factors. The first involves agreement on the sequencing of significant events in a transition and the stage at which elections can serve to legitimize new arrangements. The second factor is political judgment on how long an unelected interim authority can govern a country.

Planning elections and constitution making can be very closely linked. For instance, there may be a need to elect a constitution-making body, prepare a new constitution or revise an existing one before elections can be held. In guiding parties on these matters, mediators need to be alert to the ways in which both politics and practicalities affect the peace process.

### 7.2.1 Purpose of an election or referendum

Addressing election-related issues in peace talks and constitution making raises many questions. Among other things, conflict parties and other stakeholders need to agree on which positions are to be up for election and what electoral system is to be used. The first set of elections under a peace agreement could, for example, be for an executive president, a new legislature or both. A constitution-making body may be elected instead of a legislature, at the same time as other bodies or later. A constitution-making body may also double as a legislature or be entirely separate. The electoral system that is used for the election of a one-time body with the specific purpose of constitution making may not be used for subsequent elections. Further complexity is added by the possible need to distinguish between elections to transitional bodies and to permanent institutions. Finally, voting may also take place in a referendum on a peace agreement or a new constitution, for example.

When the question of whether a constitution-making body is to be elected arises in peace talks, a number of factors come into play:

- **The legitimacy and status of governing authorities:** Will newly elected authorities govern the country when a constitution-making process takes place or will incumbent or unelected transitional officials remain in authority? Newly elected authorities may enjoy sufficient popular legitimacy to appoint a constitution-drafting body and even approve a new constitution or constitutional amendments without resorting to a referendum. In contrast, self-declared transitional authorities or those established through peace negotiations are more likely to consider holding elections for a constitution-making body (Tunisia 2011).
- **The status of the legislature:** Is the existing legislature considered a legitimate body for constitution making or is there a need for a separate constitution-making body, elected either directly or indirectly (Nepal 2008)?<sup>49</sup> Can an appointed constitutional commission build sufficient legitimacy

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<sup>49</sup> If a constitution-making body is elected, it is commonly elected directly; however, indirect election or some kind of combination is also possible.

through other means, such as civic education and public consultation, to compensate for the lack of an elected body? Do the main stakeholders and the public perceive a process that does not include elected bodies as inherently less legitimate or impartial, as in Libya in 2012?

- **The history and tradition of the country:** Is constitutional change expected to take place in an elected constituent assembly, in line with previous practice? Or does the history of the country provide an adequate basis for constitution making and even approval by a body that is not specifically elected for the purpose of constitution making?
- **Inclusivity deficiencies in existing bodies:** Is the existing legislature sufficiently inclusive? Does it include women and minority groups, for example, and is regional representation adequate or is there a need to establish a new, more inclusive body? Is an election the best approach to establishing a more inclusive body or are there better options, such as reaching agreement on special measures, for example by supplementing existing bodies with additional members, as in Burundi in 2000?
- **Use of a referendum to approve the constitution:** If the constitution-making body is elected, is it likely to enjoy sufficient popular legitimacy to approve and adopt a constitution? If so, the time, expense and possible divisive politics of a referendum could be avoided (see section 7.2.3). Conversely, if a referendum is required to approve the new constitution, it may be more politically acceptable for an existing legislature or an unelected, appointed body to carry out the drafting.

There are risks and benefits to electing a constitution-making body. Drafting a constitution prior to elections entrusts the drafting process to an unelected and perhaps not wholly trusted transitional authority or to a body elected before the start of the peace process. In contrast, as described above, the legitimacy and accountability of the drafting process may be boosted if it is conducted or supervised by an elected body.<sup>50</sup> However, elections themselves may exacerbate political divisions and, if the conflict parties that negotiated the peace agreement do not feel sufficiently represented in a subsequently elected constitution-making body, the constitution it produces may lack their support (Timor Leste 2001; Libya 2014). Moreover, although electoral systems can be designed to promote inclusion, elected bodies will not always be adequately inclusive. In other words, an elected body may claim a form of democratic legitimacy, but it may fail to incorporate the range of interests that need to be accommodated for peace to be sustained.

These risks need to be managed if an elected constitution-making body is essential for national stakeholders to accept the legitimacy of the process. Risk management involves careful process design, including the design of the electoral system, the integration of mechanisms that bind constitution makers to earlier agreements (see section 3) and a requirement for approval from more than one body.

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50 Haysom and Kane, *Understanding the Transition* (see footnote 20).

## 7.2.2 Elections and the wider peace process

Elections can bring benefits to a peace process, particularly when they legitimize a political system and representation or bring previously excluded groups into the political process. Indeed, peace agreements generally include credible and inclusive multiparty elections as an important means to enable political transitions from conflict to “normal politics”. Such elections are often deemed essential to ensuring the legitimacy of transitional or new governing arrangements.

Yet, even technically sound elections are unlikely to build and maintain peace if the outcome is not accepted or if it is perceived to result in representative bodies that exclude significant parts of the society or simply replicate pre-existing power arrangements. In both the negotiation of peace agreements and constitution making, the design of the electoral system and preparation for voting can thus emerge as central issues.

As part of the constitution-making process, mediators and other third parties can help decision makers and the broader public develop a nuanced understanding of the ways in which different electoral systems may function in their particular context, ideally in a way that takes their history and broader expectations into account. For instance, the design of the electoral system can contribute to building a more inclusive system, including by reigning in a “winner-takes-all” pattern of governance, and increase confidence in any new governance arrangements.

In developing agreement on an electoral system and in understanding the impact of holding elections on the broader peace process, attention needs to be paid to:

- **Agreement on the rules of the game:** Conflict parties and the mediators who support them often underestimate the challenges inherent in reaching political agreement on new electoral architecture and, when necessary, a new legal framework for conducting elections.
- **The formal preparation needed for elections:** Elections require robust legal and institutional frameworks. Unless those involved understand the overall technical requirements and preparation needed to hold an election in a particular context, an electoral process may be delayed or deemed insufficiently credible. This may undermine the peace process and lead to a resurgence of violent conflict.
- **Securing credible election outcomes:** Acceptance of electoral results depends on a combination of factors, including the technical quality of the balloting process, the commitment of political leaders to respecting the electoral process and political arrangements that incentivize even defeated candidates to continue to participate in politics.<sup>51</sup> Other parts of a peace

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<sup>51</sup> United Nations, *Report of the Secretary-General: Strengthening the Role of the United Nations in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections and the Promotion of Democratization*, A/72/260 (New York, 2017), para. 30.



process – such as power-sharing, reconciliation processes and security arrangements – are also likely to play a role.

- **The impact of elections on trust-building:** The period of transition immediately following the conclusion of a peace agreement is one of trust-building among opposed parties. Campaigning in the run-up to elections or referendums, however, may deepen pre-existing divides, undermining whatever reconciliation, nation-building and consensus had been secured. If a peace process does not enjoy broad support, certain parties might actively undermine it in their electoral campaigns; they may also question the validity of election results or refuse to accept them altogether.
- **The impact of elections on a peace process:** The outcome of elections may change the course of a peace process. Genuine elections can change power balances, whether they are for governing bodies (the legislature or presidency, for example), a constitution-making body, or a body that will both govern and prepare a constitution (Nepal 2008). Matters are especially complicated if negotiating parties do not win representation or if a party forms a government that is less supportive of the agreement than its predecessor (Burundi 2005; Colombia 2018). In Timor Leste, for example, constituent assembly elections in 2001 returned a clear majority for the revolutionary party, which then lost any incentive to reach a consensual agreement with others.
- **The timing of constitutional decisions:** If parties negotiate constitutional change immediately before elections, they may favour decisions whose impact is more short-term.

### 7.2.3 Referendums<sup>52</sup>

Referendums may be held in a peace process for many reasons, including:

- To provide a mandate to negotiating parties or a constitution-making body, in a way that legitimizes a process or demonstrates popular support. In 1992 the Government of South Africa held a referendum to gauge support for its ongoing negotiations concerning a transition to democracy. The vote in support of the process confirmed the legitimacy of the Government's programme.
- To approve a peace agreement (Northern Ireland 1998; Colombia 2016).
- To determine whether a region wants independence (Timor Leste 1999; South Sudan 2011; Bougainville/Papua New Guinea 2019).

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<sup>52</sup> For a more detailed discussion of referendums and constitution making, see Brandt and others, *Constitution-making and Reform* (see footnote 2), and Stephen Tierney, *Reflections on Referendums* (Stockholm, International IDEA, 2018).

- To approve certain aspects of a new constitution. Specific issues may be identified in advance as requiring approval in a referendum, or a referendum may be provided as a deadlock-breaking mechanism, to settle controversial issues. Both South Africa (1994) and Tunisia (2011) made a provision for a referendum as a deadlock-breaking mechanism, but neither country made use of it.
- To adopt a proposed new constitution or constitutional amendments (Spain 1978; Iraq 2005; Kenya 2010).

Referendums can act as double-edged swords, however, because they can:

- **Create a make-or-break moment:** By presenting a stark choice between complete acceptance and complete rejection, a referendum may represent a single moment in which the fate of the whole peace process is at stake (Colombia 2016).
- **Delay the peace process:** Preparing and implementing a referendum can require considerable time and attention, diverting focus away from other parts of the peace process. This is especially true for referendums on long, complicated documents that may first require a public education campaign.
- **Undo a carefully crafted compromise:** Agreements in a peace process generally reflect a set of delicate compromises to balance power dynamics and interests. Campaigns during the lead-up to a referendum provide an opportunity for spoilers to influence the vote. Public discourse may be focused on one or more particularly emotive issues, putting a carefully crafted package at risk. Without sustained political agreement between the most powerful forces, a referendum may be deeply divisive, undoing hard-earned progress and having a negative impact on the implementation of the peace agreement (Guatemala 1999).
- **Entangle process and substance:** Referendum results may not always reflect the public's opinion on substantive provisions. Indeed, they can be influenced by factors associated with the process that led to the peace agreement, rather than the agreement itself, or they may be determined by other, completely unrelated matters (Kenya 2005).

## 8 Conclusions and key considerations

As this Primer describes, constitutional issues arise in many peace processes, adding complexity but also providing opportunities for building sustainable peace. They surface in different ways and are highly political and contentious. Resolving them has profound implications for peacemaking and is critical to the effectiveness of the process.

External mediators and other third parties may be particularly influential early in peace negotiations, when conflict parties make decisions with constitutional implications. Once a formal process of constitutional reform begins, however, international actors typically provide lower-profile support to national actors and processes, since the authority of a constitution is closely linked to its legitimacy as a document that expresses the will of the people.

Key considerations for conflict parties, mediators and constitution makers include:

### **1. When constitutional issues are among the drivers of a conflict, resolving them is an integral part of the peace process**

Violent conflict is frequently a result of deep grievances with the nature and structures of the state that are embedded in constitutional arrangements. When this is the case, regardless of whether the issues are explicitly framed in constitutional terms, it may be impossible to resolve the conflict without negotiations on constitutional issues. Parties and mediators are likely to confront constitutional issues sooner than may be expected. Early decisions about how to resolve such issues and what processes to follow have direct and significant political and legal implications for the peace process overall. Thus, recognizing them and their implications when they arise and integrating them fully into the process can strengthen the process and contribute to securing a durable settlement.

In supporting parties as they address these issues, mediators and constitutional experts can complement each other with their different perspectives and experience, leading to a better balance between securing immediate needs (ending violent conflict) and long-term needs (building a sustainable, fair and stable democracy).

### **2. There are no set paths, sequences or model processes for making constitutional decisions in a peace process**

In peace processes, constitutional decisions are usually made over time in a combination of informal, semi-formal and formal settings. How they are made follows no set patterns. An ability to adjust approaches as demands change can strengthen a process.

Sometimes, parties may want decisions on constitutional issues to be given legal status at the time they are made through legal changes to existing constitutional arrangements. In other cases, parties may want to wait to change the constitution until later in a process. Among other things, these decisions reflect the degree of trust among parties, the legitimacy of existing institutions and whether parties desire a clear break with the past. As a peace process develops, perceptions about the best approach may change and the anticipated sequencing may need to be reconsidered.

### **3. A thorough understanding of a country's history and legal traditions is essential to gauging expectations, securing legitimacy and adopting workable constitutional arrangements**

Understanding the full context of the conflict is critical in every aspect of a peace process. In the context of constitutional decision-making in a peace process, a solid grasp of a country's historical and legal context, including its constitutional history, is particularly important. Past practice and the legal traditions of a country may set expectations for how a constitution is replaced or amended; they may also have a significant influence on what new arrangements are acceptable and likely to be implemented, how new arrangements will work in practice, and whether the new or amended constitution is likely to secure legal and political legitimacy.

### **4. The implications of constitutional "pre-commitments" need to be carefully assessed**

Early decisions on constitutional matters – whether on substance or process – are often essential building blocks in a peace process and can lay the foundations of a more just society. At the same time, they may restrict options later on, limiting flexibility and locking in particular interests and outcomes. In particular, constitutional decisions made early in a process may serve the short-term interests of parties rather than the longer-term interests of the people; they may raise political, technical and practical problems later in a process and during implementation.

### **5. A constitutional commitment made in a peace agreement will not automatically be incorporated in a future constitution**

It can seldom be guaranteed that constitutional commitments in a peace agreement will automatically be adopted in a constitution-making process. Such commitments may be contested in a more inclusive constitution-making process that accommodates a wider range of decision-makers and more varied interests. Another risk is that parties that were reluctant signatories to the peace agreement may use a constitution-making process to renege on earlier commitments.

If mediators and constitutional experts work together to draw on the full range of local experience and expertise, the constitution-making process and broader peace process can be better integrated. In turn, constitution makers may be more sensitive

to the broader peace process and increase the chances that conflict parties retain confidence in the possibility of resolving grievances through a political process.

## **6. Transitional constitutional arrangements may provide a bridge to peace but are challenging to implement and may have long-term implications**

Agreement on transitional constitutional arrangements usually marks a critical step forward in peace negotiations. Such arrangements can provide an important political space in which to build government institutions and relationships, yet they may also create path dependency, for example by giving more powerful conflict parties significant leverage over the future. The uncertain context and the challenges conflict parties face in moving from violent confrontation to political accommodation also make transitional arrangements difficult to negotiate and implement. In addition, these arrangements are often inconsistent with the existing constitution. Parties and mediators need to consider how their legitimacy and credibility can be secured and how to forestall potential legal challenges.

## **7. The process used for adopting constitutional arrangements for the long term may be more or less elaborate and depends on the context**

Constitutional change for the long term may be “light”, such as when a constitutional amendment follows existing procedures with limited engagement. Alternatively, it may be “large-scale”, as when the process involves inclusive bodies and general public participation, as well as a broad agenda. An appropriate process for constitution making is one whose design reflects its goals, takes the stability of the country into account, includes a realistic time frame, and is sensitive to the legitimacy of existing institutions and legal traditions.

## **8. Inclusive constitution making can contribute to more sustainable settlements**

Mediators and constitution makers share a commitment to increasing the inclusivity of processes, including by developing mechanisms for engaging the broader population. Through concerted efforts, they can help peace processes, and any constitution making that is part of them, to be more inclusive and responsive to the needs and interests of different segments of society.

Conflict parties seek to control which actors are brought into peace negotiations, which can make securing inclusivity particularly difficult in the initial stages and requires creativity from mediators. A peace agreement that provides for a constitution-making process may create opportunities to expand inclusivity. Specifically, mediators may be able to leverage such an agreement to boost participation in the peace process – for instance by bolstering engagement with civil society, women, youth, minorities and other frequently marginalized groups – and to strike the difficult balance between ensuring both elite buy-in and wider public support for the overall peace initiative.

### **9. Constitution making requires both political skill and technical expertise**

A constitution is the fundamental law of a country. Writing one requires skilled legal drafting and considerable technical expertise across a wide range of areas. Like most laws, a constitution is not merely a technical document but has profound political implications. Constitution making is thus more than a technical matter; it is a process that generates highly significant political decisions that may have a long-term impact on peace, even if they are buried in the detail of the text. A constitution-making process is more likely to contribute to peacebuilding if it integrates technical support with a sound political understanding of the context and if local experience and expertise inform and guide international practitioners.

### **10. Expectations of what constitutional change can achieve should be realistic and the challenges of implementation acknowledged**

Constitutional reform may provide an opportunity for conflict parties and the wider population to engage in a deliberative process to seek ways to address the root causes of the conflict, accommodate diversity and difference, and establish a common vision for the state. Achieving this goal depends on a number of factors, however, including the willingness of the elite (and particularly conflict parties) to engage in discussion about the nature of the state and to support effective implementation of new constitutional arrangements. Unrealistic expectations can easily lead to polarization, hostility and a recurrence of conflict.

## Further reading and key resources

### A. Material from the project "Towards Sustaining Peace: The Nexus of Peacemaking and Constitution Building"

(A joint project of the Berghof Foundation and the Mediation Support Unit in the Policy and Mediation Division of the United Nations Department of Political and Peacebuilding Affairs; available at [berghof-foundation.org/pmcb](http://berghof-foundation.org/pmcb))

#### Thematic papers

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**Nathan, Laurie.** The imperative of constitutionalizing peace agreements. Berlin: Berghof Foundation, 2019.

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**Centre for Peace and Conflict Studies (CPCS).** Publications. [centrepeaceconflictstudies.org/publications](http://centrepeaceconflictstudies.org/publications).

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**Constitution-making for Peace Resource Center (Interpeace).** Resource Center. [constitutionmakingforpeace.org/resource-center](http://constitutionmakingforpeace.org/resource-center).

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## C. Other material

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## **About The Berghof Foundation**

The Berghof Foundation is an independent, non-governmental and non-profit organisation that works to create space for conflict transformation. Based on the principles of partnership, inclusivity, sustainable peace and local ownership, Berghof engages with all relevant state and non-state actors to support mediation, negotiation and dialogue processes. Since its establishment in 1971, Berghof work has been grounded in the research-practice-education nexus of peace.

## **About The United Nations DPPA Mediation Support Unit**

The Mediation Support Unit (MSU) in the Policy and Mediation Division of the Department of Political and Peacebuilding Affairs (DPPA) is the United Nations' system-wide service provider on mediation and dialogue. MSU provides direct operational and technical support to peace processes around the world as well as comparative analysis, capacity building, and assistance in developing mediation strategies, to a wide range of actors, including the UN system, regional organizations, Member States, NGOs and other partners. Established in 2006, MSU provides expertise on a number of thematic issues such as process design, inclusion and gender, security arrangements; constitutions, transitional justice, reconciliation and the mediation of natural resource disputes.



Auswärtiges Amt