

National Dialogues and Constitution Making

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February 2017

Abstract

National Dialogues and constitution-making processes are increasingly part of political settlements. This Chapter focuses on the relationship between Dialogues and constitution-making processes but also explores the relationship between Dialogues and state institutions (such as the legislature, executive and judiciary) and state processes (elections). Both National Dialogues and constitution-making processes occur in a wide variety of circumstances and take many different forms so it is hard to generalize about their form and roles. However, although Dialogues often engage in constitutional issues, they generally do not produce final constitutions. The Chapter suggests that aspects of most constitution-making processes, such as a level procedural formality, greater technical expertise and, sometimes, greater formal legitimacy, explain why they and not Dialogues are used for constitution-making. It also explores ways in which Dialogue decisions may be followed up in a constitution-making process or by state institutions. It concludes with lessons for National Dialogues from constitution-making processes.

About this Publication

This publication was produced in the framework of a two-year project (March 2015 – April 2017) to develop a Handbook on National Dialogues funded by the German Federal Foreign Office in cooperation with the Swiss Federal Department of Foreign Affairs. The purpose of the Handbook is to offer a practice-oriented guide for comprehensively designing and implementing National Dialogues. It rests on participatory methods including 1) strategic dialogue and exchange between local stakeholders, international development and peacebuilding practitioners, and policymakers, 2) a comprehensive mapping exercise of National Dialogues across the world, and 3) in-depth case studies on National Dialogues produced by local researchers on Guatemala, Lebanon, Libya, Nepal, Sudan, and Tunisia. The

project is implemented by the Berghof Foundation, in cooperation with swisspeace. This publication is one of three conceptual studies; others include Dilemma in National Dialogue and National Dialogue and Development. The overall aim of the project is to improve National Dialogues and enhance the capacities and contributions of conflict parties, local stakeholders and external actors towards their successful implementation.

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To cite this publication:

Murray, Christina 2017. National Dialogue and Constitution-Making. National Dialogue Handbook Background Paper No. 2. Berlin: Berghof Foundation.

Online at: www.berghof-foundation.org/publications/national-dialogue-handbook

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1 Introduction

For at least the last three decades, processes to avoid or end violent conflict, to break political deadlocks and/or to reform societies in fundamental ways have increasingly involved forms of engagement that are underpinned by the view that inclusive, open discussion and an exchange of ideas can build trust, expand possibilities and, eventually, generate consensus about the future shape of society and that are not simply focused on striking a deal about political power but are also concerned with addressing underlying economic and social issues. Recently, these processes have been called National Dialogues. Over roughly the same period, constitutional reform has come to be seen as a key mechanism for bringing about fundamental social change, particularly after violent conflict.

The Berghof Foundation is concerned generally with developing greater clarity on National Dialogues, and with their potential as well as the challenges that they present. This paper addresses the particular question of the relationship between National Dialogues and other governance processes, especially constitution-making and elections but also the relationship between Dialogues and state institutions such as legislatures, executives and the courts. It is limited to Dialogues used as a form of crisis management (to prevent or resolve violent conflict), to break political deadlocks, to reform society and/or to re-establish minimal political consensus and redefine state-society relations.

Chapter 2 sets out what this paper understands by National Dialogues and constitution-making and discusses the functions each process may fulfil. Chapter 3 builds on Chapter 2 with a comparison of National Dialogues and constitution-making processes. Chapter 4 considers the relationship between National Dialogues to formal state institutions and processes, including the support other governance institutions may provide for National Dialogues and some tensions that may arise. Chapter 5 concludes with key lessons that National Dialogues could take from constitution-making.

2 Understanding National Dialogue and Constitution-making

Any discussion of National Dialogue and constitution-making processes is bedevilled by questions of definition. Neither political-settlement nor constitution-making processes follow any standard forms or use standard forums; each process develops according to its particular context. To discuss their possible different uses and the type of relationship that may exist between them, this Chapter opens with an explanation of what the paper understands by National Dialogue and constitution-making processes respectively. It continues to discuss the way in which a National Dialogue may engage in constitution-making, the similarities and differences between the processes, and their functions.

2.1 National Dialogue

This paper understands a National Dialogue to be an inclusive process for building national consensus around social, political or economic concerns through an open and tolerant exchange of ideas. To be considered a National Dialogue, the process must be on a ***national scale*** and address ***national issues***, and involve honest and constructive ***dialogue***. Sometimes National Dialogue may be expected to reach agreements (Yemen). However, Dialogues need not be designed to decide matters. There is value in the

process of exchange alone – it may provide an opportunity for active listening, recognition, respect, understanding, catharsis, relationship-rebuilding, visioning, etc.

As noted above, this paper is concerned particularly with National Dialogues that aim to contribute to preventing or ending violent conflict, to breaking political deadlocks and/or to reforming societies in fundamental ways. These Dialogues are established when the nation confronts problems that cannot be resolved in established institutions or through existing procedures because those institutions are weak, absent or lack legitimacy, or because they are not adequately inclusive or flexible, for instance. Such Dialogues take place in a wide variety of processes and in many different types of forums with many different names (e.g. round table; national conference; political dialogue; National Dialogue). They are sometimes based on long-standing practices and have traditional names ('bosberaad' in South Africa; Loya Jirga in Afghanistan, for instance). Over the past five years, as practitioners and others have sought to understand the role of dialogue in political settlement and fundamental political change, these processes have been clustered together in the category of 'National Dialogue'. National Dialogues may be small, involving just a few parties (a 'summit dialogue' as in Kenya 2008, Lebanon 2008 (Odendaal 2011)), or large including representatives from across society (Yemen 2013); they may be designed to address a small number of specific political questions (Tunisia 2013) or have a broader mandate (Benin 1990); their mandate may or may not include constitutional review; and, they may have a certain level of formal decision-making power (Afghanistan 2002), or their influence may be purely political (South Africa 1993).

Two of the best-known recent examples of National Dialogues, those in Tunisia and Yemen, illustrate the diversity of dialogue processes. They were different in many significant ways. The Tunisian National Dialogue of October 2013 ran parallel to the Constituent Assembly (CA) and, finally, was used to resolve the underlying political disputes that prevented the CA from reaching agreement. It involved representatives of parties that had been elected to the CA and it ran without formal rules or decision-making processes. The process exhibited a great degree of flexibility – pausing and resuming as the political dynamics changed. Its self-determined mandate was limited to settling the composition of the government, determining an election date and facilitating the finalization of the constitution. By contrast, the Yemen Comprehensive National Dialogue was intended as a precursor to a constitution-making process. Its mandate was wide – to engage with the full gamut of social, economic, institutional and political problems in Yemen, and to come up with recommendations for addressing them. It was formally constituted under the Gulf Cooperation Council (GCC) 'Implementation Agreement' and had a carefully designed decision-making process. The two processes nevertheless shared certain goals: to develop, as far as possible, through a deliberative and inclusive process, a common understanding of the problems that they were mandated to address, and to come to a consensus on how to resolve them.¹

Although the understanding of National Dialogues adopted here emphasizes their role in providing a forum for open discussion, National Dialogue processes vary greatly in the extent to which they succeed in doing this and all involve a degree of bargaining in reaching decisions. The South African and Tunisian dialogues achieved a relatively high level of constructive deliberation. The Kenyan political dialogue of 2008 primarily involved intense negotiations about the allocation of political power but it also reached some agreement on the root causes of the post-electoral violence of 2007/8. Sometimes the label 'National Dialogue' is used very broadly to include processes in which an agreement is hammered out among contesting parties and in which the idea of dialogue in the sense of open and exploratory discussions has little role. Examples of such processes are the Bangui Forum in the Central African Republic (CAR) in 2015 which was relatively inclusive and attempted to address some of the underlying problems in the ongoing CAR conflict but which operated primarily as a negotiation between conflicting

¹ See Peacebuilding Commission Working Group on Lessons Learned 2009 on differences in National Dialogues.

parties, and the Bolivian ‘dialogues’ between 2007 and 2008 that paved the way for agreement by the Bolivian National Congress on the 2009 Constitution (Pinto 2011, 4).

2.2 Constitution-making

The term constitution-making is used in a variety of different ways. However, using the term ‘constitution-making’ rather than ‘constitution-drafting’ signals that it is a process that involves more than drafting a document. The term is sometimes used very broadly to cover everything that might be linked to constitutional review from the very first activities by citizens many years before any process is formalized, through the process of achieving consensus on a proposed constitution, to formal adoption and the implementation of the constitution. This paper uses a narrower understanding of constitution-making, excluding very early activities that promote constitutional reform² but including negotiations that start a constitution-making process, the process itself and implementation of the constitution.

On this understanding, constitution-making may include:

- ≡ Agreeing to undertake constitutional reform or to introduce an entirely new constitutional order as after a revolution or when a new state is formed.
- ≡ Agreeing on basic values of the state in a peace process (for instance, that it will be democratic, adhere to the principle of equality, and respect freedom of religion). Such agreement may be reached in many different forums including peace negotiations and National Dialogues. They are considered to be part of constitution-making because they have constitutional implications.
- ≡ Designing a process of constitutional reform, agreeing on its participants and how it will proceed, including the role of the public, etc.
- ≡ Making decisions on substantive constitutional issues and preparing a draft constitution or constitutional amendments in a formally recognised process (this may include debate on nation-building and policy).
- ≡ Negotiating contentious constitutional matters outside an existing constitution-making body or before such a body is established.
- ≡ Engaging with civil society organisations and the broader public on the proposed constitutional review and what the constitution should say including educating the public on constitutional issues.
- ≡ Deliberating on constitutional proposals
- ≡ Adopting the constitution
- ≡ Implementing the constitution (including, for instance, adopting laws required to establish institutions or regulate constitutional processes and making appointments required under the constitution)

Like National Dialogue processes, constitution-making takes place in a great variety of forums, determined by the context in the country, its history, regional and international influences, the nature of any conflict, and so on. Often a relatively small committee prepares a draft constitution which is then considered by the legislature or a specially established constitution-making body (usually called a constituent assembly or constitutional assembly). Constitutions and constitutional amendments may be adopted in many ways as well: in democratic systems, the most common methods are by an elected body

² ‘Constitutional reform’ may be of varied ‘degrees’. For example, it may involve a small number of changes such as introducing multiparty democracy or changing the electoral system, it may involve complete replacement of the constitutional system with a new system, or it may be somewhere in between.

(such as the legislature or constituent assembly) or by referendum; in military or other authoritarian regimes constitutional decree may be used; and in certain other cases, an international agreement or a peace agreement may create or amend a constitution.

3 National Dialogue and constitution-making compared

The National Dialogues with which this paper is concerned frequently include elements of constitution-making. Less frequently, constitution-making processes include processes that resemble National Dialogues. In 'normal' times, constitution-making is generally not accompanied by a National Dialogue as understood in this paper. The state institutions charged with constitution-making may be inclusive and deliberative and they may facilitate widespread public debate, engaging with specific interest groups and the public. In the best processes, the public debate is extensive and thoughtful and influences constitutional decision-making. It may also contribute to moulding a society's sense of shared vision. But, these processes usually differ from the National Dialogues as understood in this paper because they occur within established state institutions and processes, have an agenda limited to constitution-making and, unlike almost all National Dialogue processes, there is a definitive mechanism for making binding decisions on a proposed constitution or constitutional amendments.

During times of fundamental social change, a process with a mandate limited to constitution-making may resemble National Dialogues much more closely than at other times. In particular, debates may be more wide-ranging and there may be more emphasis on consensus. The inclusive Kenyan National Constitutional Conference convened in 2002 is an example of a body that was not, strictly speaking, a National Dialogue. It had a narrow constitution-making mandate: it was to discuss and approve a draft constitution. However, it sought to restructure the state entirely. Among other things, Professor Yash Pal Ghai, chairperson of the process, emphasized that a new constitution should provide 'a vision of the country and a statement of its values' based on the views of the people (Ghai 2009, 15). Its working groups considered many fundamental social issues in an open and constructive manner and the programmes of both the Constitution of Kenya Review Commission that prepared the draft constitution and the subsequent Conference were designed to build national consensus. The public discussion that the Conference engendered contributed to a national debate about the nature of the state. Kenyan did engage in processes that might be categorized as National Dialogues when the Conference deadlocked and the Government delegation threatened to walk out. The negotiation mechanisms they used (unsuccessfully) to resolve the crisis were similar to those used in the Bolivian National Dialogue of 2008.

If a strict classification is necessary, constituent assemblies, as in Tunisia and Bolivia, would not be considered National Dialogues. The narrow mandate of the 2003 Constitutional Loya Jirga in Afghanistan and the formality of its processes, also suggest that it would not be properly classified as a National Dialogue while the Emergency Loya Jirga, with its broader mandate (that, in fact, excluded any aspect of constitution-making), was a National Dialogue. Of course, the name of a forum or process is not determinative. The Venezuelan Constituent Assembly, established by presidential decree in 1999, was initially intended to restrict itself to constitutional issues but it soon declared itself a 'state superpower', assuming powers of government that vastly exceeded its brief. It could not be described simply as a constitution-making body. It could also not be described as a National Dialogue because it was not a forum in which different interests were considered and a national consensus sought. Instead, it was dominated by the governing political party (Brewer-Carias 2010, 513ff).

As already noted, National Dialogues frequently include elements of constitution-making when fundamental change is demanded. They may engage with constitution-making in many ways. With the

exception only of implementing a constitution, all the items on the list of elements of constitution-making in section 2.2 above have been on the agenda of one or another National Dialogue:

- ≡ *Agreeing to undertake constitutional reform*: Francophone National Conferences; Central European Round Tables. However, frequently this decision is taken between opposing parties, before a National Dialogue (e.g. the initial meetings between the African National Congress and Government in South Africa in the early 1990s).
- ≡ *Decisions on basic values of the state*: South Africa, Yemen.
- ≡ *Designing a process of constitutional reform*: South Africa, Yemen (unsuccessful).
- ≡ *Decisions on substantive constitutional issues, preparing a draft constitution or constitutional amendments*: National Dialogues commonly make decisions on transitional government arrangements (Inter-Congolese Dialogue 2002; South Africa 1993; Francophone National Conferences between 1989 and 1992); they may prepare a complete interim or transitional constitution (South Africa 1993; Poland 1992); and they may set parameters of future constitution-making by deciding certain issues (South Africa 1993 in the 34 Constitutional Principles agreed in the Multi-party Negotiating Forum). As discussed below, a national conference rarely makes a definitive constitution. The short *Benin National Conference* did not produce a constitution. It preceded constitution-making and established a transitional government which, in turn, established the Transition Constitutional Commission. However, the committee of the National Conference that decided on transitional government structures considered various arrangements for the post-transition constitution, including the future system of government (Seely 2009, 76) and the Conference also mandated a large number of constitutional institutions (including a constitutional court) to act as checks on executive power. The *Yemen* process that ultimately failed was designed to follow roughly the same sequence. Although the National Dialogue Conference was not expected to produce an interim constitution or settle interim government arrangements, it was formally required to “establish the main components necessary for constitutional reform” and “[determine] the process of formulation of the constitution”.³ It had some success on the former but could not reach agreement on the latter.
- ≡ *Negotiating contentious constitutional matters outside an existing constitution-making body or before such a body is established*: South Africa 1992-3; Bolivia 2008; Tunisia 2013. The negotiations in a National Dialogue type process in Bolivia in 2008 did not produce agreement but, unlike a number of earlier attempts, they eased tensions in a manner that, observers suggest, contributed to constructive decision-making in Congress (Pinto 2011, 11).
- ≡ *Engaging with civil society organisations and the broader public on constitutional issues*: Yemen 2013.
- ≡ *Deliberating on constitutional proposals*: National Dialogues deliberate on constitutional matters when they discuss the form of the government (either for a transition or for the longer term).
- ≡ *Adopting the constitution*: A National Dialogue may adopt a transitional or interim constitution. Frequently, however, this function is transferred to a formal state institution (Poland 1989, South Africa 1993). I am not aware of any case in which a National Dialogue has prepared or adopted a definitive (final) constitution (see section 2.5 below).

National Dialogues as understood in this paper and more ambitious, dedicated constitution-making processes are both concerned with fundamental reform of the state. To succeed in deepening democracy, and promoting good governance and inclusive citizenship, both need to be inclusive, engaging with as

³ Presidential Decree 30/2012. The Agreement on the Implementation Mechanism in Yemen that set out a roadmap for the transition required a constitution commission (para 32) so it was details, such as the composition of a commission, that the Comprehensive National Dialogue was expected to settle.

broad a range of interest groups as possible.⁴ But, as noted above, both may take a wide range of different forms, perhaps involving multiple stages and multiple forums.

There are no hard and fast differences between National Dialogues and bodies whose mandate is limited to constitution-making. However, National Dialogues tend to have certain features that most dedicated constitution-making processes do not and, conversely, dedicated constitution-making processes tend to share certain features that are rare in National Dialogues. The following table highlights some contrasts between the two.

	National Dialogue	Constitution-making
<i>Formal establishment</i>	May be formally established, for example by law or peace agreement, but operate outside existing state institutional structures; usually established when existing institutions cannot address problems and when a process is needed that includes both state actors (parliament, government, etc.) and parties outside these institutions.	Constitution-making bodies are usually formally established according to the pre-existing constitutional and legal arrangements, under new or amended constitutional arrangements (Benin 1990, Kenya 2008, South Africa 1994, Zimbabwe 2008) or by a special law (Bolivia 2006). As in Colombia in 1990, a constitution-making body (in that case a Constituent Assembly) may be established by a process that is devised to by-pass existing procedures.
<i>Mode of operating</i>	Strive to engage in constructive deliberation.	May engage in constructive deliberation but may follow more formal procedures and not be concerned with deliberation. Some constitution-making bodies follow standard legislative rules of procedure which are often not conducive to constructive problem solving but instead may involve deeply partisan and competitive decision-making.
<i>Mandate</i>	Usually has a broad mandate which may include constitution-making but is not limited to it.	Will consider broader social and political issues only in the context of its constitutional mandate.
<i>Participants and decision-making</i>	Not based on the democratic principle of representation in relation to percentage of support in the country (but see Lebanon 2008) but based on the need to include all stakeholders who are affected by the concerns of the Dialogue. A form of political representation is achieved through inclusiveness (Siebert 2013). Similarly, because a degree of consensus is sought, decision-making is not majoritarian. Instead, usually an attempt is made to balance decision-making in a way that is not simply concerned with numbers. In the Inter-Congolese Dialogue of 2001, all participants had equal status (Rogier 2003). South Africa used the device of sufficient consensus to enable it to balance the need to ensure that numbers were not all determinative but that, at the same time, minor stakeholders could not hold the process to ransom.	Final decision-making on a constitution is usually through a democratic process such as a referendum and/or adoption of the constitution by an elected body (e.g. constituent assembly, legislature). Thus, the decision-making process in the Constitutional Assembly that made South Africa's definitive constitution was numerical: a two-thirds majority of the elected members was required for the constitution to be adopted.

⁴ A constitution-making process that is not inclusive may succeed in producing a constitution (e.g. a constitution imposed by a military dictatorship). The concern here is with processes that seek to promote democratic values.

	National Dialogue	Constitution-making
<i>Status and implementation of decisions</i>	Not a formal state process, it usually cannot make binding decisions or implement them directly. An exception occurs when the Dialogue marks a rupture with the existing legal order as in a number of countries in Francophone Africa where National Conferences declared themselves ‘sovereign’ and effectively assumed the authority of the government. This was a contentious issue in Yemen 2011-2013 and other countries of the ‘Arab spring’.	Usually binding procedures for adopting a constitution are set.
<i>Determination of procedures</i>	Procedures are often determined by the parties themselves, either in preliminary meetings or after the Dialogue is constituted.	Constitution-making bodies may adopt their own rules, but this is usually within a framework set out by the law or agreement under which they are established. For example, decision-making rules and, particularly, special majorities are not usually determined by the constitution-making body itself.
<i>Engagement with the public</i>	Often do not include broad public engagement – sometimes because they take place at a time when public engagement is not feasible, particularly in cases of elite or ‘summit’ dialogues. Kenya’s Dialogue process of 2008 is interesting: although the political actors refused to open the process to other groups, the panel of mediators consulted civil society.	Increasingly, a process of constitutional review includes a programme of public engagement.
<i>Flexibility</i>	Often quite flexible and may develop and reshape as participants develop their understanding of needs and adjust to new realities.	Bound by legally prescribed forms.
<i>Attention to legal detail</i>	If the agenda is very broad, the ability of a Dialogue to pay attention to legal detail may be limited. The interim constitution adopted at South Africa’s Dialogue (1992-93) is an exception as it produced a precise and carefully prepared document.	Ideally either includes enough members with technical legal ability or is supported by a strong technical team that can deal with legal detail.

3.1 Functions

The preceding discussion suggests both distinct and overlapping functions of National Dialogues and constitution-making processes. However, as indicated by the table above, some functions are better suited to dialogues and others to constitution-making bodies. For example, a National Dialogue can provide an opportunity for engagement when existing constitutional arrangements cannot, in particular by including parties that are not represented within formal structures. An inclusive National Dialogue may also enable the resolution or at least discussion of fundamental national problems including those relating to institutions and governance and may engage with policy issues. In addition, in Siebert’s words, National Dialogues “have also served a much broader function: to provide spaces and instruments for reconciliation, developing joint visions between former enemies, and slowly evolving an understanding of the needs, perceptions and perspectives of the ‘other’” (Siebert 2014). He adds: “National Dialogues hold the potential to strengthen constitutional, state and political reform processes with joint knowledge creation and comprehensive approaches to reform and transformation” (ibid.). In addition to leading to a better understanding of problems and agreement on ways to resolve them, and the less tangible results of greater social cohesion and intercommunal communication, a Dialogue may have ‘process results’ such as improving deliberation and negotiation skills (Peacebuilding Commission

Working Group on Lessons Learned 2009). The ability of National Dialogues to facilitate consensus is enhanced by the fact that they may have relatively flexible procedures. Although larger Dialogues are frequently bound by rules that are difficult to change because of the size of the body and competing interests (Yemen 2013), smaller ones (South Africa 1992) can change procedures and develop new forums as needs develop.

As noted above, to fulfil their functions, National Dialogues may have all-encompassing agendas, including some aspects of constitution-making as in Yemen 2013, or more limited agendas. The Bangui Forum for National Reconciliation in the Central African Republic (2015) is an example of a Dialogue with a limited agenda, intended as one step in a longer process. It concluded with agreements on disarmament, child soldiers, elections and the transitional government, among other things, which are underlying issues that require addressing if the conflict is to be ended. Similarly, as noted above, the Tunisian Dialogue of 2013 was concerned with a small number of clearly identified issues.

A body established exclusively for some aspect of constitution-making is expected to do only that. This may be determining a process or preparing a constitution, for instance. Dedicated bodies for formulating a constitution can have certain advantages over National Dialogues: they may be better able to focus on constitutional issues and make the important decisions about what is constitutional and what should not be determined in a constitution but instead left to the policies of successive governments; because their mandate is to produce a legal text, they may be set up in a way that enables them to deal with the legal issues that arise in preparing a constitution better than a Dialogue (but see South African Dialogue of 1993); and, because they are not also engaged with large social and economic issues, they may be able to act in a less partisan way. However, in many cases the reason for choosing a dedicated process for making a constitution is probably to confer greater legitimacy on the constitution itself.

3.2 Legitimacy

There are obvious reasons for taking legitimacy into account when determining the process for making a constitution. Constitutions are the fundamental law of a country and bind the future. They set limits on the exercise of power and often grant rights that those in power may not wish to respect. There is always a tension between majoritarian democracy and constitutionalism, and if the constitution lacks legitimacy, it is unlikely to be able to resist demands for majoritarian decision-making. In post-conflict situations, the pressure on a constitution may be particularly great as dominant groups seek more power. In addition, constitutions have an active, creative role in the developing world both in establishing processes and institutions tailored to specific problems and in envisaging a nation (Hart 2003; Ghai 2005). As already noted, they can contribute to nation-building, giving people a sense of collective identity and a democratic constitution may be concerned with justice. To succeed in doing these things, a constitution must have the support of the people.

The legitimacy of a constitution may be considered from four general perspectives: legal legitimacy (because the constitution is adopted in a manner set out in an earlier constitution for instance); conceptual legitimacy (because the constitution rests on higher authority, most commonly now the sovereignty of the people); sociological legitimacy (the constitution is recognised as having authority, the public have 'bought into' it); and functional legitimacy (the constitution works). At a time of fundamental change one cannot depend upon sociological and functional legitimacy alone. Functional legitimacy is acquired over time and, at the beginning of the life of a new constitutional order, sociological legitimacy will depend on the origins of the constitution, in other words, on legal and/or conceptual legitimacy.

A number of characteristics of National Dialogues weaken their ability to adopt a constitution that is perceived as legitimate. First is the problem of the democratic deficit. Even if a National Dialogue is inclusive and considered more legitimate than existing state institutions, it may not be established through a democratic process. There is concern that the legitimacy of a constitution will suffer if it has been drafted by a body that is not composed through democratic elections or established by a democratically elected body. Second, there may be an expectation that constitution-making takes place outside the environment of the Dialogue which is often highly political. Thus, in Benin, the National Conference decided to transfer responsibility for preparing a constitution to another body. Third, it may not be appropriate to make the definitive constitution during the tumultuous process of political transition. An interim constitution may convert a peace agreement into a legally enforceable agreement, providing an element of stability while other aspects of the conflict are settled. Definitive constitution-making can then take place in conditions of greater certainty and in a dedicated process. Fourth, related to concerns about constitution-making in difficult times, National Dialogues often take place behind closed doors.

A dedicated constitution-making process, established under law and designed to be inclusive of the influential elites and civil society, can secure legal legitimacy and may contribute to achieving conceptual legitimacy. Among other things, as noted above, it is more likely to comply with generally accepted understandings of fair representation and the expectations of a democratic process than a National Dialogue.

Nonetheless, as already indicated, National Dialogues may produce transitional or interim constitutions (Poland 1989, South Africa 1993). There are various reasons for this. An interim constitution has different objectives from those of a definitive one. They are intended to provide 'a bridge between an illegitimate and a more legitimate regime, generally providing both a temporary institutional framework for government during the transition and a bargaining framework for negotiating a new structure of government and the procedural requirements for drafting the final constitution. Interim constitutions are a useful mechanism of deferral' (Davies 2014, 5). Thus, although it is critical that they enable realistic and constructive processes, they are understood to be temporary and their adoption in an unorthodox process is more likely to be acceptable.

It should be noted also that legitimacy is not irrelevant to interim constitutions and in Poland and South Africa, for instance, an attempt was made to confer legal legitimacy on the interim constitutions through securing 'constitutional continuity'. In Poland, the first transitional constitutional changes were part of the 'Round Table Agreement' of April 1989 but they were formally adopted through amendment of the 1952 Constitution by the existing legislature, following the procedure for constitutional change laid down in that constitution (Garlicki and Garlicka 2010, 392). Other Eastern European countries followed the same pattern of avoiding a total legal rupture with the past, in part because of their shared experience of modern revolutions (Arato 1993, 355). In South Africa, the racist, apartheid legislature formally adopted the interim constitution in 1993. The South Africans agreed to use the old process because, through the recognition this gave to the apartheid parliament, it facilitated securing agreement from the regime for the democratic transition and, in the eyes of some sectors of society, it protected the constitution from legal challenge. As these examples illustrate, there may be contradictions in the quest for legal legitimacy. In both Poland and South Africa discredited institutions were used to adopt the interim constitution.

4 The relationship of National Dialogues to Formal State Institutions and Processes

National Dialogues take place outside the formal institutions of government.⁵ As noted above, they usually occur because the existing institutions of government are not legitimate or do not have the capacity to engage adequately with the problems facing the nation. They may be formally convened by the executive (as in Benin and Lebanon) but, unless they are being used cynically by the government to provide a mere semblance of openness to change, they usually function on their own terms. The benefits of this relative autonomy are clear: it gives all participants a sense of ownership of the process and permits it to be flexible and responsive to emerging concerns. However, there are disadvantages. State institutions may deliberately undermine dialogue processes. For instance, security forces may block meetings or refuse to provide adequate security to certain groups. In addition, the implementation of Dialogue agreements is frequently difficult. Reflecting on Yemen and Burma, Siebert notes that “[a] major challenge that each of these processes has faced has been how to link change processes to existing constitutional bodies and stimulate real structural change” (Siebert 2014).

This Chapter first considers logistical and administrative support a Dialogue might require from state institutions. It then outlines ways in which National Dialogues may be dependent on state institutions for implementation of their decisions (3.2). Section 3.3 looks specifically at the links between National Dialogues and constitution-making processes, concluding with a discussion of certain challenges that arise in the relationship between constitution-making and National Dialogues.

4.1 Logistical and administrative support for the process

At the most practical level, most National Dialogues require administrative, financial and logistical support to function. Sometimes this can be provided by the international community (Kenya 2008) or by an independent secretariat (Yemen 2013, funded by the international community). But, often, the process will be dependent on state institutions for their administrative arrangements and, particularly, security. This is frequently a challenge when the dialogue process is designed to seek new political and economic arrangements. Most seriously, security forces can pose threats to a peaceful process. When the State itself is contested, administrative support provided by the existing bureaucracy may itself be mistrusted. The agreement on which a Dialogue is founded or the preparatory arrangements may deal with the way in which administrative support will be given to the Dialogue.

4.2 National Dialogue outcomes and state institutions

As noted above, the agenda of a National Dialogue may include virtually any political, social or economic issue. They frequently consider: values and shared understandings of the nation; confidence-building measures (e.g. release of prisoners, repeal of restrictive laws); constitutional issues (e.g. a process for future constitution-making or substantive decisions concerning constitutional

⁵ National Dialogues may be institutionalized as in the Rwandan Constitution which requires annual dialogues. Institutionalizing the dialogue by making it a regular occurrence was also considered in Tunisia. However, as set out in Part 2.1, this paper is concerned with National Dialogues established in the context of conflict, political deadlock or major reform of a society.

arrangements); electoral systems and dates for elections; political arrangements, whether transitional or permanent; political parties; transitional justice; land; extractive industries; and the treatment of marginalized groups among other things.

For resolution of most of these issues, the participation of many state institutions is valuable. First, the state may have access to the most reliable information for decision-making. Thus, in an ideal situation, a National Dialogue will engage with state institutions so that its decision-making is based on a full understanding of the capacity of the state including, for instance, information concerning budgets, the capacity of the bureaucracy to implement change, time frames and so on. Access to credible information can assist the Dialogue to tailor its proposals realistically, and avoid overreach and creating wholly unreasonable expectations. (See also 4.4.4 on overreach.) In addition, engaging with bureaucrats during decision-making can contribute to securing their support in implementing decisions.

Second, the participation of state institutions is likely to be necessary to implement most National Dialogue proposals. There may be some decisions on which visible agreement among opposing sides is important but which do not require formal implementation. However, for a Dialogue to succeed in contributing to transformation of the state, structural change is usually necessary. Sometimes even agreement on national values will need to be implemented in some way (notably in South Africa a shared commitment to equality and non-racism required racist laws to be repealed). For example, the *legislature* may be required to adopt new laws; some agreements will fall directly to the *executive* and *public service departments* to implement (such as prosecuting corruption, delivering services to previously neglected sectors, or releasing prisoners); and *security forces* may be required to implement or manage a cease fire or change their behaviour to particular groups, for example. In addition, *courts* are often called upon to interpret agreements and determine the legality of actions taken under them.

It is not ever easy to change fundamental structural elements of the state such as the control of the economy, land or the extractive industries. The problem is exacerbated in the context of the National Dialogues with which this paper is concerned because they occur in times of great political upheaval and uncertainty and invariably face sustained resistance from powerful sectors (Acemoglu and Robinson 2013). However, without strong political commitment by the major stakeholders, Dialogue agreements are unlikely to be implemented.⁶ However, sometimes the problem of implementation is reduced by the way the Dialogue is established and/or, perhaps as a result of, international pressure (Kenya). Below, three specific situations are considered: (i) a National Dialogue that acquires authority over the formal state institutions that must implement decisions; (ii) a Dialogue established under an agreement or law that establishes an obligation for some or all agreements to be implemented; and (iii) Dialogues that depend entirely on political commitment and support from state institutions.

4.2.1 National Dialogue has authority to implement decisions

The 1990 Benin National Conference declared itself sovereign and assumed all state authority. It put this authority into effect by appointing a High Council of the Republic as a transitional legislature and a transitional government which in turn appointed a commission to prepare a constitution. This model was followed in Togo, the Congo and Niger (Robinson 1994, 606).⁷ It is an approach that removes the gap between the Dialogue and the formal state institutions, but it will work only rarely and only when the conditions for major political transformation exist. The existing regime will need to be weak and, in particular, security forces will need to support the process. Most importantly, in Benin, the collapse of the economy that left the incumbent President with little leverage and the shared view that the situation

⁶ The inclusion of senior political actors with the authority to implement decisions may be important, as opposition groups in Bahrain (2011) understood.

⁷ In Venezuela, the 1999 Constituent Assembly did the same (Brewer-Carias 2010).

in the country had become untenable were significant factors (Seely 2009). Moreover, although the goal of the National Conference was regime change, it did not oust the President but instead reduced his powers substantially. This strategy avoided a full-on conflict between the President and the opposition. The outcome of the process in Togo, among others, was completely different because the President held on to power, supported by the military, and the conflict continued for a number of years (Seely 2009). As Robinson (1994) argues in her analysis of the Dialogue process in Niger (1991), to succeed, it needed not only popular legitimacy and a coherent opposition but also needed to renegotiate relationships between civilians and those holding power (the military).

4.2.2 A formal agreement requires the implementation of the outcomes of a Dialogue

Although a National Dialogue does not take place through existing institutional arrangements in the state, it may be formalised by law or by a transitional peace agreement. The law or agreement may specify that decisions of the Dialogue are binding or the authority of the Dialogue may be understood from the nature of the agreement. In such cases, the National Dialogue acquires an official status and the formal, if not practical, authority to implement all or some of its decisions.

The Afghanistan Emergency Loya Jirga was established under the 2001 Bonn Agreement. That agreement effectively amended the constitution and conferred authority on the transitional government that the Loya Jirga was to select. The Presidential Decree setting up the preparatory committee for the Yemen Comprehensive National Dialogue Conference specified that outcomes of the Dialogue were to be reflected in a constitution drafted after the Dialogue.

The effectiveness of a legal assertion in the founding documents for a Dialogue that its decisions must be implemented depends on the context, including the formal legal authority of the document itself,⁸ the weight that legal commitments carry in the state concerned, the underlying commitment to the Dialogue itself, commitment to agreements made in it, and the support of state institutions (and the individuals in them) in the implementation process. However, without the commitment of a substantial number of the major stakeholders in the process, a legal assertion of the binding nature of agreements will not be effective.

4.2.3 Political commitment and institutional change

Ultimately, the decisions of a National Dialogue will be implemented only if those who control the relevant institutions (legislature, executive, different government departments, etc.) are willing to implement them and if those institutions and other institutions controlled by the state (perhaps including oil companies, agricultural boards, institutions that supply and maintain infrastructure) themselves undergo substantial change.

Formal mechanisms may be devised to ease this problem. For instance, under the Implementation Mechanism Agreement in Yemen, the President was given power to make law if the legislature could not. In Kenya in 2008, a special court was established so that the regular courts which were widely believed to lack integrity could not be used to block the process of constitutional review. In South Africa, an inclusive Transitional Executive Council with the authority to block programmes that ran counter to Dialogue agreements shadowed the executive.

⁸ Note that the legal status of many peace agreements is unclear (Bell 2006).

4.3 National Dialogues and elections

Decisions about the timing of elections and the system of representation are frequently taken in a Dialogue and they pose both legal and practical challenges. Although the challenges may not be different from others that arise in relation to implementing decisions of a Dialogue, they may be of special concern because both local actors and the international community consider an election urgently necessary to legitimate a process of change, implement new government arrangements and/or end a period of transition. In some cases, a commitment to dates for new elections is a condition for the successful conclusion of a Dialogue (South Africa 1993, Kenya 2008).

The principal legal and constitutional issue in relation to elections is to give a legal basis to the decisions on elections by a Dialogue. The dates for elections and/or the system of representation may be set in the existing constitution or in ordinary law. To change these, the simplest approach is to follow the existing procedures but these will almost always involve the legislature because legislative approval is invariably needed to change laws and usually also required for constitutional change. As discussed above, sometimes the existing legislature will be prepared to pass the required laws. However, in many cases the existing legislature will be discredited and/or resistant or (in contexts of major upheaval or State failure) simply dysfunctional.

These situations raise a classic conceptual problem of fundamental constitutional change: What gives a new constitutional order (or, in this case, an element of it) its legitimacy? This question falls outside the ambit of this paper (but see the discussion of legitimacy in section 3.2 above). From a practical perspective, in such cases, even if there is a desire to proceed in a manner that as far as possible respects legal procedures, a break in legal continuity may be the only solution. Thus, as already noted above, in some cases Dialogues have declared themselves sovereign or a peace agreement overrides the constitution and permits the Dialogue to settle election matters, usually with at least the acquiescence of major political actors.

Practical problems may be raised in relation to electoral issues when Dialogues set dates without considering the real logistical challenges. Ideally, before electoral dates are set, Dialogue participants will be provided with technical support that enables them to make a realistic judgment about an election date, particularly if a new system is to be implemented. State institutions are most likely to have relevant information but, when electoral bodies and processes have been captured by partisan dominant state elites or are not legitimate for other reasons, Dialogue participants will not be able to rely on them. Expertise from external sources may provide a way of verifying information from state institutions. The resolution of this essentially practical problem will depend on the situation in each country.

4.4 Links between National Dialogues and constitution-making

As indicated in Chapter 2, there is no standard relationship between National Dialogues and constitution-making. The relationship between National Dialogues and constitution-making may be considered from three angles. First, a strong National Dialogue that engages with political, economic and social issues can contribute to creating the conditions necessary for successful constitution-making (South Africa, Tunisia, Benin) (section 4.4.1 below). Secondly, a National Dialogue may engage directly with procedural and substantive aspects of constitution-making by, for instance, determining a legitimate process for future constitution-making or settling aspects of a constitution (section 4.4.2 below). Third, the way in which National Dialogues operate can introduce practices that facilitate constitutional decision-making (South Africa, Benin) or contribute to overcoming impasses in a constitution-making process (Tunisia 2013; Bolivia 2007).

4.4.1 National Dialogues and the political, economic and social foundations for constitution-making

Constitution-making on its own cannot resolve the kind of social and economic problems that face most states after conflict or when fundamental institutional change is necessary. New institutions established in a new or revised constitution may provide a basis for better and more equitable government in the future, but for effective social change and political stability, the transformation of institutional arrangements usually needs to be accompanied by deeper changes (Acemoglu and Robinson 2013).

As discussed above, a National Dialogue that is part of a political settlement often has a broad, inclusive agenda and is mandated to discuss the fundamental matters relating to the state, its identity and its future that have caused instability or underlie demands for fundamental change. Through deliberation a Dialogue can build agreement on the root causes of the problems the society faces and how to address them, providing the broader consensus necessary for contributing to real social change. Many of these matters will not inform the content of the constitution directly but agreement on them is important if parties are to agree on a constitution and that constitution is to be properly implemented.

South Africa provides an example of a National Dialogue process that laid the political and social basis for constitution-making in a particularly comprehensive and politically sensitive way. First, the Dialogue provided a comprehensive framework for the political transition. In addition to transitional political arrangements (formally captured in an interim constitution), the Dialogue dealt with matters concerning the security forces, addressing past injustices, the election date and running free and fair elections, and race discrimination, among others. Many decisions in the Dialogue led to immediate changes (e.g. the release of political prisoners, repeal of unjust laws), providing what might be characterized as confidence building mechanisms. As a result, the Constitutional Assembly operated in a context in which many of the most deeply divisive political and social issues had been acknowledged and, for those that were not resolved, in which discussion on how to resolve them was on-going. Agreement among antagonistic parties in the Constitutional Assembly was possible because non-constitutional matters were also being addressed.

The Tunisian National Dialogue had narrower concerns than those of the South African process. Its agreed mandate was: to resolve the conflict about the current government; to determine an election date; and to ‘facilitate’ the conclusion of the constitution-making process. But, the issues with which it dealt had a direct impact on the work of the Constituent Assembly because that body could not secure the two-thirds majority required for decisions while the current government arrangements were disputed. Famously, by breaking the political deadlock concerning the government, the National Dialogue enabled decision-making in the Assembly.

In contrast to the Tunisian process, Yemen’s Constitution Drafting Commission worked in an environment in which, despite the many ‘outcomes’ of the Comprehensive National Dialogue Conference, there was deep disagreement among elites on the major political questions (including federalism), mistrust because major social problems had not been addressed and no confidence that the governing elite was committed to implementing the outcomes of the Dialogue. Under these circumstances, proper agreement on a constitution was impossible and, for this and other reasons, the process failed.⁹ Similarly, in Libya, a constitution-drafting commission operating apart from political negotiations and in the absence of an underpinning social and political consensus has struggled to reach agreement.

⁹ The Dialogue outcomes were comprehensive, covering social, economic, developmental, political and security issues. See www.ndc.ye. In many areas there was little disagreement on the identification of the problems or even how to resolve them. But few believed that the Outcomes would be implemented. The Yemen Constitution Drafting Commission produced a draft constitution, however, it was imperfect and possibly unworkable and deeply contested both within the Commission and outside.

4.4.2 National Dialogues and constitution-making processes: the substantive issues

As mentioned in Chapter 3, a National Dialogue may determine the process of constitution-making and key elements of the content of a constitution. Against that background, some of the dynamics of constitutional decision-making are discussed here.

A National Dialogue is often considered to be an appropriate forum for achieving a broad consensus on constitutional issues that will form the basis for a future constitution. The success of the South African process in this regard has led to promotion of the idea. Section 3.1 discusses some of the problems in having a National Dialogue adopt a ‘final’ or definitive constitution. But challenges also exist when Dialogues, more modestly, set basic principles for a future constitution.

The Yemen process and, to a lesser extent, the Benin National Conference, exemplify the difficulty in expecting a large and inclusive dialogue process to reach agreement on any constitutional issue. For such agreements to hold, the Dialogue needs to be designed to secure elite agreement, properly linked to realities on the ground. Moreover, agreements that bind a future constitution-making process should not be contradictory or make unrealistic demands. That is particularly difficult to achieve in a long process with a large number of participants who do not have strong party affiliations, and without clear mechanisms to achieve consensus that engage the most powerful parties. In Yemen, these and other problems led to a set of Dialogue outcomes that lacked adequate political or military support and that were contradictory and sometimes out of line with positions negotiated politically. The problems were accentuated by the detailed nature of the outcomes. The proposals of the Benin National Conference shared another problem with the outcomes of the Yemen Dialogue. Rather than simply demanding that the future constitution included appropriate checks and balances on executive power, leaving the detail to the constitution-making process, both demanded a large number of institutions intended to provide checks. In both cases, there is a real concern about overburdening the constitution and providing for institutions that the country cannot maintain. By contrast, the smaller South African Dialogue process avoided both problems of absence of real agreement among elites and problems of being over-ambitious because participants represented clear political groupings that behaved in a disciplined way, there was ongoing interaction between state departments and Dialogue participants, and participants developed clear mutual vision of how the constitution-making process would unfold. This enabled coherent and consistent decision-making in the Dialogue.

The failed constitution-making process in Kenya between 2000 and 2005 is an example of the difficulty of reaching a constitutional settlement without an elite consensus to underpin it. There the process failed in part because the government rejected the proposals of the National Constitutional Conference.¹⁰ The more nuanced process of 2008-10, which involved a National Dialogue of sorts, succeeded.

4.4.3 National Dialogue methodology and constitution-making

A successful dialogue process will be inclusive, bringing together diverse voices, and be truly deliberative. It will demonstrate that constructive engagement across factional lines is possible; participants will come to understand underlying issues and different interests, consider alternatives, and make trade-offs in an environment of trust and with a level of mutual understanding and common purpose. In some Dialogues rules of engagement are relatively tightly defined, but often flexibility is a strength of a Dialogue, allowing it to adapt its processes to newly emerging needs as deliberation progresses.

The experience of honest, open and constructive engagement in a National Dialogue can have a profound influence on a constitution-making process. South Africa provides an example of the way in which experience in constructive negotiation developed during the Dialogue enabled decision-making in

¹⁰ However, it is not likely that the government would have been willing to participate in a National Dialogue.

the constitution-making process. In the Dialogue, participants learnt how to negotiate in a mature way, without grandstanding and threats, to listen and accommodate new ideas, to be flexible in devising forums and procedures to escape blockages in the process, to trust one another and, perhaps most importantly, and to understand their different positions. This had a major influence on the subsequent process in the Constitutional Assembly because the main decision makers in the South African Constitutional Assembly were veterans of the Dialogue process and their shared experience of negotiation in the National Dialogue influenced their mode of engagement in the Assembly. This was evident both in the way participants engaged with one another and in the procedural creativity that they showed in devising ways of overcoming difficulties. Sometimes, the Assembly adopted the same techniques for avoiding deadlocks that had been used in the Dialogue. For example, when negotiating teams reached an impasse in the Assembly, they were referred to ‘the channel’, an informal arrangement developed in the National Dialogue in which the lead negotiators for the two dominant parties, the African National Congress (ANC) and the National Party (NP), met privately to resolve problems. Experience with this forum in the National Dialogue meant that Assembly participants trusted it.

Processes in a Dialogue that is parallel to or, effectively, a part of constitution-making may also influence the behaviour of those directly involved in constitution-making. As noted in Chapter 3, the negotiations in Bolivia in 2008 eased tensions in a manner that opened the way to resolving disagreements about the constitution in Congress (Pinto 2011, 11). The precise role of the Tunisian Dialogue in forging agreement on specific issues in the Constituent Assembly remains unclear. Some suggest that, in certain cases, intervention by the National Dialogue was critical, but M’rad et al. (2015) insist that settling constitutional issues was not a priority of the Dialogue; instead, “it had some influence politically and even technically”. So, they argue, decisions on the most intractable issues were made in the Committee of Consensus of the Constitutional Assembly but add that “[t]hat does not undermine the merit of the National Dialogue whose role was to push the parties to find a compromise within the committee on consensus”. Thus, in addition to resolving the most serious political dispute in Tunisia at the time, through its political legitimacy, the Dialogue could facilitate decision-making in the Assembly.

The process in the Benin National Conference also influenced subsequent constitution-making and government in Benin in various ways. In particular, according to Seely (2009, 92), the campaign to popularize the constitution and, in particular, persuade out-going elites to accept their marginalization, drew directly on the experience of the National Conference.

4.4.4 Conclusions on the interplay between National Dialogues and constitution-making processes

Overall, the preceding discussion suggests that *a National Dialogue may enable and reinforce a constitution-making process*. It can establish the political and social environment for successful constitution-making, it can set either a procedural or substantive framework (or both) for a future constitution, and it can provide a model of deliberation that facilitates productive discussion and decision making in a constitution-making process. Moreover, as the example of Tunisia shows, during a constitution-making process, a Dialogue may resolve underlying political problems that are blocking the process. By contrast, without an effective process of Dialogue around substantial social issues, constitution-making often fails. It may be that an inclusive National Dialogue in which broad social, political and economic issues were properly aired and some consensus reached might have assisted Kenyans to adopt a new constitution in 2004. However, as noted above, the primary reason for that process’s failure was the absence of elite agreement.

Constitution-making processes may reinforce National Dialogues through implementing the vision (or agreements) of the Dialogue in a constitution. But, this process of reinforcement may not be seamless.

- (a) If the Dialogue has overreached, by for instance making unrealistic decisions which cannot be implemented or by pushing through agreements without sufficient underlying elite or social consensus, those decisions may not be adopted in a constitution. Two examples of this can be drawn from the Yemen process. First, an agreement concerning federalism (negotiated by northerners, southerners and representatives of the Houthi) was adopted by the Comprehensive National Dialogue Conference. But, detached from political realities, it had little traction. Second, the Yemen Dialogue agreed to a 30% quota for women in the legislature. Secure in the knowledge that this was not supported by influential elites, the Constitution Drafting Committee would not include this decision in its proposed constitution.
- (b) If a Dialogue has not had a strong process of coordination to ensure coherence in its decision-making, constitution drafters may be expected to implement contradictory provisions or provisions that are in tension with one another. In drafting a constitution attention must be paid to ensuring the institutional arrangements dovetail and will work effectively together. As the draft develops, adjustments are made to principles and processes to secure consistency and ensure that the overall goals of the constitution can be achieved. A decision on one issue may require reconsideration of other aspects of the draft constitution. If the agreements reached in the Dialogue are too detailed (or contradictory as was the case in Yemen), this process is constrained and tensions may arise between those guarding the results of the Dialogue and those arguing for a better conceptualised constitution.

Parallel and disconnected National Dialogues and constitution-making processes are likely to be counter-productive. Libyans elected a constitution drafting committee a few years ago. Over the past years, Libyans have also attempted to set up National Dialogues on a number of occasions. The Dialogues were to discuss issues that concerned constitution-making, but no mechanisms were considered for ensuring that the processes were mutually reinforcing and that competing visions of the constitutional future of the country were not adopted.

5 Lessons for National Dialogues from constitution-making

1. *Process models are not easily transferable:* Each constitution-making process needs to be tailored to the needs of its political and legal context and sensitive to the particularities of different communities. In addition to immediate political demands, the legal and political traditions of each jurisdiction influence what will and will not work. The Zimbabwean constitution-making process of 2008-2012 was largely modelled on the highly successful South African process. However, in part because one of the parties was not seriously committed to reform and was able to use force to influence public responses, that process unfolded very differently from its South African predecessor. Similarly, the Round Table model first adopted in Poland that was mimicked across Eastern Europe is said to have worked less effectively outside Poland (Arato and Miklosi 2010).
2. *Successful constitution-making depends on elite agreement. Similarly, if the conclusions of a National Dialogue are not supported by those with power, they are unlikely to be implemented:* Despite the recognition that constitution-making should not be an elite affair and that an inclusive process with broad public participation in constitution-making is important, without agreement of political elites the process is unlikely to succeed. The success of the South African process that concluded in 1996

was largely due to an agreement among elites. The failure of the Kenyan process in 2005 was a result of the absence of elite agreement and, similarly, the constitution-making processes established by the Fiji military regime in 2012 was aborted because the regime did not agree with aspects of the constitution prepared by the Commission that it had appointed. Moreover, agreement needs to be genuine. The new Zimbabwean constitutional arrangements are already being challenged by the regime despite its ostensible agreement.

3. *Timing*: Both premature Dialogues and premature constitution-making are unlikely to succeed. There is often both domestic and international pressure to adopt a constitution. Iraq and Yemen are examples. However, if the conditions for reaching a stable constitutional settlement do not exist, constitution-making should not be undertaken. Interim constitutions may fill the gap. Similarly, National Dialogues are not appropriate in all circumstances. Often, for a Dialogue to be taken seriously and for participants to honour its outcomes (and the compromises they make) parties will need to have provided some concrete demonstration of their intentions in advance. Such confidence building measures preceded the South African dialogue process. In Yemen, the Technical Preparatory Committee for the Comprehensive National Dialogue Conference urged that, pending the start of the Conference, a list of '20 Points' (i.e. pressing grievances and concerns) should be addressed by the government. While the President was sensitive to most of the Points, and some steps were taken, the Conference was undertaken without significant action on the 20 Points. This contributed to the political failure of the transition.
4. *What is appropriately decided? Scale down ambitions; avoid fixing policy*: Both constitutions and the proposals of National Dialogues may be over ambitious. The constitutions of Brazil and Ecuador are examples of overly ambitious constitutions that in their detail and promise place unrealistic demands on the government. Similarly, National Dialogues may raise expectations excessively which, when they are not met, cause disappointment and can generate anger and opposition to the overall process and outcomes.
5. *Build legitimacy and engage civil society*: There is broad agreement that constitution-making benefits from engagement with civil society: proper public participation in constitution-making leads to a better and more legitimate constitution. A similar approach is gradually developing with respect to National Dialogues. The importance of maintaining good contact with citizens and developing ways in which they can participate is usually recognized in large Dialogues. It is less often embraced in smaller 'summit' Dialogues through which political settlements are negotiated. In both constitution-making processes and political Dialogues, some matters cannot be negotiated in the public spotlight. Nonetheless, increased openness and inclusiveness in even summit Dialogue may lead to more durable outcomes.
6. *Avoid self-interest (on the part of the drafters)*: No Dialogue or constitution-making process can avoid entirely participants pursuing their own interests. Moreover, of course, as representative actors, participants are expected to present the interests of their constituencies. The question is how to increase discussion that focuses on the general good and avoid personal interests determining outcomes. Some commentators argue that the design of the constitution-making forum is important here. For instance, if a legislature is used to draft a constitution, that constitution is likely to confer significant powers on the legislature (Elster 1995). This reasoning may apply to Dialogues as well and is reflected in increasing pressure for summit Dialogues to be more inclusive, thus reducing the ability of rival elites to push for agreements that take account of their (often short term) interests alone.

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