“The UN Constitutional” team is pleased to present the fifth issue of its newsletter featuring articles by constitutional experts, reports from the field, and a digest of recent constitutions-related publications. In this edition, we interviewed the former Nepali Constituent Assembly chair on his role in this unique process. We also explore the importance of ‘context’ in constitutional assistance efforts, and consider the links between the SDGs and gender equality provisions in constitutions. The support provided by the UN System in eight different countries at different stages of constitution-making process is also presented.

“The UN Constitutional” is a manifestation of the collective desire of 6 UN entities to raise awareness around the UN of constitutional issues and themes, share information, and strengthen the provision of constitutional assistance.

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- UN Development Programme (UNDP)
- UN Children’s Fund (UNICEF)
- UN Women

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Interview with Former Nepal Constituent Assembly Chair, Honourable Subash Chandra Nemwang

The new Constitution of Nepal was adopted in September 2015, with a favourable vote from 84% of the members of the Constituent Assembly (CA). Writing a new Constitution through a CA was a commitment from the 2006 Comprehensive Peace Agreement which put an end to a decade long insurgency. However, it was not an easy process, as the first Assembly in 2008 failed to adopt a new Constitution, and the second Assembly encountered several challenges. We spoke with Subash Chandra Nemwang, former chair of the CA, to gain his insight from this unique experience.

Q. The final Constitution was adopted and promulgated on 15 September 2015, what does this milestone in Nepal’s democratic transition represent to you?
A. The dream of the Nepali people to draft their constitution through their own elected representatives has come true for the first time in Nepal’s history. The very fact that the constitution was promulgated through a participatory and inclusive process is a historic event in itself. This historic nature of the moment is what I value most.

Q. The adoption of the constitution took 5 years longer than originally contemplated by the Comprehensive Peace Agreement. Why do you think achieving agreement on a constitution proved so difficult for Nepal?
A. I must admit that constitution process got delayed. But the delay has been justified. We tend to forget things very soon in Nepal, but more than 14,000 innocent lives were lost during the armed conflict, hundreds of thousands were displaced and the whole of national life was in shambles. Everything came to utter ruins. Despite this we brought the constitution in an inclusive manner with as broad a consensus as possible. Finally, the CA brought the peace process to its logical conclusion. All achievements of the democratic revolution have been institutionalized. Seen in this light, I think a little delay in the constitution process can be justified.

Q. What are the major features of the new Constitution that make it different from the previous Constitution of 1990?
A. This is the first time Nepali people have made the constitution themselves through a Constituent Assembly. The adoption of a bottom up approach in constitution writing, institutionalization of the republic, federalism with identity, secularism and inclusion, among other things, are key features of this constitution. Accounting for the inevitable changes in a dynamic society, flexible provisions for constitution amendment have been adopted. This is also a significant feature of the new constitution.

Q. Though it was welcomed by many Nepalis, it was also criticised by some sections of the Nepali population. Why was there this dual response and what could have been done differently to achieve wider consensus?
A. As far as consensus is concerned, 90 percent members of the CA voted in favour of the constitution. A Constitution is a document of compromise. All have compromised their stands, even the parties with popular votes. There are grievances. We need to be serious about all sorts of dissents and grievances and seek a solution through dialogues.
Q. Are you concerned that the opposition to the new Constitution from some sections of the Madhesi, Janajati and marginalised groups will undermine both its legitimacy and also its implementation?

A. We must really be serious about this. We need to discuss issues with the dissenting parties with due respect. All must realize that mutual trust and dialogue can resolve all sorts of issues. As far as inclusiveness is concerned, we made the constitution through a most inclusive process. Despite this, questions have been raised in relation to the constitution. Answers to those questions need to be found out. This is possible through discussion and dialogue.

Q. We all wept for Nepal after the horrific earthquake in April 2015. In what way did the tragedy motivate the Constituent Assembly to complete the constitution writing process?

A. When the earthquakes happened it stunned us all. I called for an all-party meeting and forwarded a formal proposal to them. I told them that we must address the plight of the earthquake victims, that we must immediately avail them with relief materials and speed up rescue efforts. I requested them to heal the wounds of the country and the people during those difficult times. And then I asked them to take the tragedy as an opportunity to take the constitution making process to its logical conclusion. I said that it would be easier to reach consensus in such a situation. Looking back, I believe the parties took my advice seriously and reached the consensus.

Q. The new Constitution has also been criticised by women’s groups for its provisions on citizenship, which it is claimed to fall short of international norms and standards and Nepal’s treaty obligations. What are your comments on this?

A. Like I said, the new constitution is women-friendly, dalit-friendly and janajati-friendly. It has started to pay off. We already have women as the heads (Speaker, President and Chief Justice) in three vital organs of the state; House Speaker, President, and chief Justice. The citizenship issue was raised in the CA as well. Given our geostrategic location, our citizenship provision is not discriminatory. There are some misconceptions about the citizenship issue. They need to be cleared and people need to be educated of the same.

Q. When you reflect back on the constitution making process, what is one thing that you are particularly proud of? What is one thing that you wish had been done differently?

A. Our CA has been uniquely inclusive. I recall an incident from my visit to a Speakers’ Convention of SAARC countries in India. With regard to inclusivity of our CA, when I mentioned that 33 percent members in our CA are women, the audience went on applauding for one minute, displaying their honour and appreciation towards Nepali women. I really felt proud at that moment.

If you look at the composition of the CA, there was representation of 31 political parties in it. The representation of women and other communities in all Committees of the CA ensured their inclusion at committee level as well. This apart, we adopted a bottom-up approach and reached out to the people. We collected feedback from millions of...
people in the initial stage and then we formally reached out to people from various walks of life ranging from the Supreme Court to the Raute community to collect their opinion.

As far as what I wish we had done differently, I urged the parties to learn from South Africa's experience in constitution making and agree on setting ‘basic structures’ and a constitutional court. [Editor's note: before the 1996 constitution could be adopted, the South African Constitutional Court was required to certify it complied with 34 principles laid out in the interim constitution.] But it could not happen. It was argued that the Constituent Assembly is a sovereign institution and that there should be no provision to curtail its powers in the name of ‘fundamental principles'. Later, some attributed the delay in constitution writing to the CA's failure to agree on ‘fundamental principles.' I still feel that if we had agreed on those fundamental guiding principles, constitution making would have been much easier.

Q. How do you see the challenges in the implementation of the Constitution in the years to come and how do you think they will have to be resolved?

A. It would be apt to say that the new constitution itself is capable of managing every affair of the country because it has spelt out the provision of both rights and duties. But it should also be remembered that it's not the constitution that can inculcate in us the wisdom, conscience and capabilities. Therefore the pro-constitution forces must stand together once again. But to our dismay, it so happened that the parties which stood united during the constitution’s promulgation stood poles apart during the last PM’s election. However, as a matter of solace, parties have said there will be no opposition and ruling parties when it comes to constitution implementation. Madheshis, Janajatis and all other parties must also stay united for constitutional implementation.

Q. The constitution making process in Nepal was led by the Constituent Assembly that you chaired but was also supported by the United Nations and the international community. Was this support useful? How might it have been improved?

A. International organizations like the UN, friendly counties, including our neighbours all provided huge support. The international community’s support and assistance in this process was extremely positive, successful and unforgettable. Building on the success of all this, we need to conclude the remaining tasks of the peace process. I extend my sincere thanks to the UN and other friends of Nepal including neighbours through this forum.

Q. Is there one piece of advice you would give to a country that is just now undertaking constitutional reform?

A. Many supported Nepal’s constitution making process. We got a huge amount of international support. However, whatever the external support, constitution making is fundamentally an internal affair that must conform to the ground reality of the country. Every country has its own experience and context to live with. We can take knowledge from others as we move on but the experiences we live with are essentially ours. Ultimately, we succeeded in delivering a constitution by taking into account our own context.
Unpacking Context:
What exactly do we mean by context-driven constitutional assistance?

By Sumit Bisarya, Senior Project Manager Constitution-building, International IDEA

Context is important. These might be the most often repeated three words in the world of constitution building assistance. However, whilst being incontrovertibly important the words themselves are not of enormous practical use. What exactly is it about the context that one should seek to understand?

The easy answer to this question, of course, is that it is context dependent! What might be of critical import in one country may not be significant in another. For example, the demographics of the natural topography of Nepal is instructive in understanding drivers for federal demands, but one would find less value in connecting topography to constitutional design in Tunisia. Nevertheless, there are a set of issues which do seem fundamental to the process of understanding context in almost any circumstance, and should form the basis of a preliminary assessment for any constitutional advisor before they start providing advice or designing assistance programmes.

Where am I?

Perhaps the most significant influences on constitutional design choices might have nothing to do with the people in government and society, or with the current constitutional crisis or conflict. Rather, where a country is located and its history will often define the parameters of the possible universe of constitutional options. So (with a few exceptions) Latin American constitutions tend to be presidential, European constitutions tend to be parliamentary and post-Soviet space constitutions tend to be semi-presidential in form and progressing from hyper-presidential to parliamentary as one moves from East to West.

As well as the geographic region, a country’s history can provide important clues regarding its constitutional future. The majority of former British colonies still maintain parliamentary constitutions, while the semi-presidential system of France is replicated in many of her former colonies. Also, countries may delve into their past to resurrect a constitutional form from previous times, for example Argentina’s 1853 constitution was resurrected in 1983, and the 1922 Constitution of Latvia was resurrected following independence in 1991.

What is the Culture?

What is referred to by ‘culture’ is the collective prism through which the constitutional and political order are understood. For example, it will not take long for any visitor to Chile to note the strong legalistic culture, the high regard for the rule of law. This was highly influential in designing the current constitutional reform process as one which would maintain strict constitutional continuity. Suggestions to bypass Congress to elect a Constituent Assembly in violation of the current constitutional rules just could not be countenanced and to provide advice to that effect would be barking up the wrong tree.

In certain countries the religious and traditional views affect the lens through which the political system is constructed and perceived. Sometimes, legitimacy in the constitutional order may require a separation of church and state, while other times to separate the two would be to delegitimize the state. Further, whether society is viewed as a collection of autonomous individuals or also as being composed of cultural/ethnic groups can affect constitutional negotiations over subjects ranging from state structure to land ownership and fundamental rights. As a final example, traditions of civil or common law will lend themselves to not only different understandings and forms of the constitutional order, but often to a different vocabulary.
If Constitutional Reform is the Cure, What is the Disease?

Too often, both national and international stakeholders rush into debating different constitutional design options without taking enough time for a full analysis of the problem. A thorough examination of the previous political and constitutional failures should perhaps be the first agenda item for both constitution makers and international advisors.

The disease to be diagnosed may be acute in nature (e.g. a recent conflict), but often recent problems may only be symptoms of a longstanding pathology (e.g. the 2007-2008 electoral violence in Kenya as a symptom of longstanding ethnic divisions which were reinforced and polarized through politics). Previous pathologies might also inform the demands of different national stakeholders but may be unrelated, or not directly related, to the crisis which brought about constitutional reform. For example, the ‘constitutional moment’ of Nepal was defined predominantly by its ethnic conflicts and accompanying demands for federalism, but there was also a problem of government instability which informed the provisions regarding formation and removal of government.

Of course, perceptions of constitutional failure may differ depending on the viewpoint. To some, recent conflict may have been rooted in insufficient autonomy for minority groups, for others it may have been the consequence of too much autonomy which led to a polarization and a weakened sense of national unity. These differences are the essence of constitutional negotiations, but the adviser should familiarize herself with all sides of the debate and seek to understand the problem at its most basic, fundamental level.

It’s the politics...

While the geo-historical and cultural background, as well as the immediate crisis at hand, will inform the parameters of the debate, the outcome of negotiations will depend on relative strengths of the negotiating parties.

Thus, a key step in understanding “context” is to analyze the political strengths of each party. What are their electoral expectations at national or local level, in a presidential race or a parliamentary election? These considerations will undoubtedly affect negotiations over structure of government and timing of elections.

For example, in Tunisia the negotiating parties believed that the superior party organization of Ennahda would enable them to win parliamentary elections (although this turned out to be incorrect), while the secular parties would be able to field a candidate with broad enough appeal to win the presidency. These electoral expectations drove negotiations regarding the constitutional design of legislative-executive relations and the sequencing of legislative and presidential elections.

Without an understanding of the forces driving the bargaining positions of the main political actors, advice is likely to be ineffective.

The Appetite for Reform

External advisors may be tempted to imagine the perfect constitutional solution to political and societal problems; however, the reality of constitutional change is that it can often lead to more instability as deep conflicts are exposed and confronted. In this regard, a well-experienced constitutional advisor recently remarked ‘I find it is always better to do as little as possible’, or - to continue the medical analogy – non-intrusive measures should be considered before major surgery.

Sometimes, of course, and in particular following large-scale conflict the entire constitutional order will need to be rebuilt from scratch or fundamentally reformed. But in other situations massive reform might not be the best option. The advisor should take account of the level of political stability: is the government pushing for constitutional reform secure with a strong electoral mandate, or part of a weak and fragile coalition? How capable are potential spoilers of fracturing the process? For example, the need to maintain a loose, five-party coalition in Ukraine may limit the scope of reforms, while in Sri Lanka the fragile coalition between two historically opposing parties coupled with potential spoilers waiting to polarize opinions at either side of the ethnic divide may leave only a tightly delimited space in which a compromise can be found. Sometimes, steady piecemeal reforms may offer better hope of sustainability than an immediate and wholesale rewrite of the constitution, as in Indonesia in the 1990s-2000s.

One could probably add many more to this list of issues for consideration when seeking to make advice context-specific, and even when armed with a sound understanding of context there is always a need for experience and sound comparative knowledge. However, one might consider this as a bare minimum thought process which should be triggered when one thinks about the words “context is important”.

The views expressed in this article are the author’s own and do not necessarily represent the views of the United Nations.

> For more resources, go to the “Constitutional Assistance: Process” toolkit on UN Constitutionmaker here.
The 2030 Agenda of the Sustainable Development Goals (SDGs) is described as a universal “agenda of unprecedented significance” with a vision to, inter alia, ensure that all legal, social and economic barriers to the effective empowerment of women and girls are addressed.

SDG 5, with its specific focus on achieving gender equality and empowering all women and girls with six substantive targets on ending discrimination against women and girls, is particularly important in this regard. The Goal calls for eliminating all forms of violence; recognition of unpaid care and domestic work through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibilities within the household and the family; ensuring women’s full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life; and universal access to sexual and reproductive health and reproductive rights.

SDG 5 is supported by three additional implementation targets, which correspond to reforms to promote women’s equal rights to economic resources, including access to ownership and control over land and other forms of property, financial services, inheritance and natural resources; enhancing the use of enabling technology, and adopting and strengthening policies and legislation for the promotion of gender equality and the empowerment of all women and girls at all levels. While advocating for gender mainstreaming across the entire 2030 development agenda, UN Women and partners proposed this standalone Goal 5 with the primary aim of assisting countries to examine and address the historical under-investment in the capabilities of women and girls.

In its country level constitutional support, UN Women similarly advocates for the mainstreaming of gender across all constitutional provisions and standalone or specific provisions on women’s rights. In the light of these two similar approaches, a comparative overview of the content of Goal 5 and standalone constitutional provisions on women’s rights.
rights becomes a matter of interest.

An analysis of data emerging from the database demonstrates three layers of provisions which support women’s rights, namely (1) standalone or specific clauses on women’s rights, (2) broader gender equality constitutional provisions and (3) general human rights clauses.

Standalone or specific clauses on women’s rights are contained in 25/195 or 12 per cent of constitutions (see figure 1 below). Similar to SDG 5, these provisions cover a broad range of issues of importance, particularly to the women of the countries concerned. Among them include equal treatment with men in all aspects of social, economic and political life, protection of women from violence and other harmful practices, equality in marriage and property relations, specific affirmative action measures in participation in decision making structures, and providing women the means to realize their productive potential through the provision of day care facilities.

Related to these clauses are emerging constitutional clauses in 7 constitutions on Gender Equality Machineries (see Figure 1) and by virtue of which these institutions are elevated to the position of “constitutional bodies”. This is a progressive development in the advancement of women’s rights as national women’s machineries have traditionally been limited in visibility and importance. Placing their broader mandates within constitutions accords them “constitutional importance” and therefore, extra teeth.

Gender equality principles are also seen reflected in broader constitutional provisions on affirmative action (85/195 or 44 per cent of constitutions), marriage and family life (182/195 or 93 per cent of constitutions), property, inheritance and land tenure (183/195 of 94 per cent), political quotas at national and local levels (20/195 or 10 per cent and 11/195 or 6 per cent of constitutions respectively), protection from violence (183/195 or 94 per cent of constitutions) and sexual and reproductive health (43/195 or 22 per cent of constitutions). Similarly, at the broader level of participation in national affairs, the database demonstrates that 155/192 or 81 per cent provide for broader levels of participation in public life, 195/195 or 100 per cent to political participation broadly. In the area of the provision of social services, 166/195 or 85 per cent reflect constitutional support for a diverse range of public services such as housing, health, education and social security and 171/195 or 88 per cent reflect the right to employment and protection.

Additionally, there are a few constitutional developments which may be regarded as “embryonic” in the sense that they have emerged in relatively recent times in a handful of constitutions, including groundbreaking constitutional recognition of unpaid household work in Bolivia, Cambodia and Ecuador. In these, recognition is accorded to domestic work supported by the right to social security—representing a broader potential breakthrough in the recognition of this type of work, which disproportionately affects women, in systems of national accounts.

In the third category of human rights constitutional provisions, the database demonstrates that 192/195 or 98 per cent of constitutions contain provisions on equality and non-discrimination. These include provisions on equality before the law, equal rights between men and women in all spheres of activity, the duty of the State to protect all individuals from discrimination and the promotion of substantive equality. In the protection of human rights 180/195 or 92 per cent reflect the enforcement of human rights as an obligation of the State and 89/195 or 46 per cent provide for the

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1 Other constitutional bodies include constitutional courts, electoral commissions and various public service commissions.
creation of National Human Rights Bodies.

From the above analysis, it becomes clear that with the exception of the implementing SDG 5 target on "enabling technology" all other aspects of the Goal tend to be covered in varied degrees across a significant number of constitutions. In view of the highest position of constitutions in the legal order of States and the corresponding high commitment placed on the SDGs, there is no doubt that the two frameworks bear a symbiotic relationship and thereby, potentially reinforce and complement each other in national level efforts to promote gender equality and women’s empowerment. In so doing, UN Women’s Global Gender Equality Database could serve as a resource for assisting stakeholders in taking stock and moving towards the goal of gender equality.

> For more resources, go to the "Women’s Rights & Gender Issues" toolkit on UN Constitutionmaker website [here](http://constitutions.unwomen.org/).
FIELD & HQ UPDATE

What is the United Nations doing in constitutional assistance? This section offers an overview of the latest developments, challenges and lessons in this key area of support sourced directly from our field missions, country offices and other UN entities.

Chile

Supporting the Chilean constitutional process

Chile is embarking on a review of its constitution drafted under military dictatorship in 1980 as part of the most comprehensive set of political reforms since the transition to the democracy in 1990 (other significant reforms include changes to the electoral system and the laws governing political parties).

This constitutional process is unprecedented for Chile, which has never drafted a constitution with the participation of common citizens. The government of President Michelle Bachelet announced a process that began during 2015, and includes seven stages. The first, already finished, was a civic education campaign. The second stage, now in progress, involves citizen participation based on a bottom-up approach at individual, local, provincial and regional levels. Citizens are invited to respond individually - electronically or via public consultation. Then, they are called to organize local consultations (with a pre-established methodology) to discuss the principles, rights and responsibilities that should be contained in the new constitution, as well as the role of different institutions. It is expected that more than 10,000 consultations will be organized during a three-month period with approximately a quarter million people participating. The outcomes of the local consultations will be sent to an independent council of citizens’ constitutional observers appointed by the government (24 members). These local self-convened encounters will be followed by 54 provincial and 15 regional forums.

The result of the participatory stage will be systematized and will lead to stage three: the elaboration of the Citizen Basis for the Constitution, which will serve as guidelines for the constitutional draft. The discussion will then move on to the institutional arena, leaving in the National Congress the decision of either drafting the new constitution itself, or through other alternatives (Constituent Assembly or a Mixed Convention of citizens and legislators). This constitutes stage four. Stages five, six and seven are the elaboration of the new constitutional draft, its discussion by the next elected Congress, and a final ratification through referendum.

Since the beginning of this debate different UN agencies, UNDP in particular, have been actively participating in several aspects of the process. UNDP launched a report with information about best practices on constitutional processes in other parts of the world (Mechanisms for Constitutional Change in the World). Complementarily, a UNDP team will be in charge of assisting in the systematizing of the information compiled at individual, local, provincial and regional encounters. Moreover, UNDP and UNICEF Chile together with the ILO Regional Office for the Southern Cone and OHCHR office for South America, have been asked by the government to integrate an independent observer council that will oversee the indigenous consultation and participatory processes. Finally, with the purpose of decentralizing the constitutional debate, the Parliamentary Academy, the Senate’s...
Communication Center, the Library of the Congress, the Association of Regional Universities together with UNDP-Chile have organized a series of seminars throughout the country, to foster debate and contributions from academics and university communities.

Due to the importance of the constitutional processes underway in Chile, the UNCT decided to create an interagency constitutional group to coordinate the actions and inputs of the UN system. It has begun making available to the public information produced by the UN System in support of constitution making processes, particularly international norms on human rights.

Constitutions fulfill the role of translating broad social and political consensus on how to organize a community into norms and rules. Although a process of this magnitude confronts different challenges, it is certainly an opportunity to strengthen democracy and the respect of human rights in the country. The UNDP country office in Chile is highly committed to assist Chile in the achievement of these objectives, and will continue to provide technical support to this unprecedented constitutional process.

See publications developed by UNDP as part of the constitutional assistance in the Readers Digest.

Briefing prepared by: Marcela Ríos Tobar, Governance Officer, UNDP Chile

Liberia

Liberian Women’s Minimum Agenda for Constitutional Reform

In 2015 Liberia’s Constitutional Review Committee (CRC) held its National Constitutional Review Conference, a participatory process to review the most recurrent views from the consultation process which spanned all 15 counties and select countries with a high concentration of Liberian diaspora. The consultation process sought input from Liberians into the constitutional reform process.

In advance of the conference, and to allow women participants to discuss and formulate their inputs strategically, UN Women hosted a two-day conference in March 2015. Over 70 women from all walks of life and across all geographic locations of Liberia attended. UN Women and the Office of the Gender Advisor-United Nations Mission in Liberia (UNMIL), working in partnership with the Ministry of Gender, Children and Social Protection supported the women’s caucus to effectively inform and position women’s agenda in the Constitutional Review Conference.

The network of women was able to define, with UN Women support, a Minimum Agenda for Constitutional Reform, which has fed into and informed the constitutional review process to date. The Women’s Minimum Agenda was articulated around the following key issues:

- The right to equality and non-discrimination;
- Rights of women in marriage and special measures/protections therein;
- Protection of the rights of the child;
- Protection against all forms of violence;
- Equal participation, including through specific measures and opportunities; and,
- Use of gender responsive language throughout the Constitution, with clear reference to the pronouns “he” and “she” and replacing the reference to persons with women, men, girls and boys, and or male and female.

Through the advocacy efforts of Liberian women, along with critical UN Women support, there is now increased visibility toward gender equality within the constitutional review process. With the women’s caucus proposals having been made,
delegates of the Constitutional Review Conference adopted the following specific recommendations for the legislature and subsequent adoption through referendum:

- Children’s rights
- Women’s participation and governance (to include affirmative action)
- Definition of the age of marriage
- Gender responsive language throughout the Constitution
- Equal access to social economic opportunity (equal rights)
- Guarantee of inheritance rights.

Although there is no firm date set for the referendum, an in-house committee set up by the National Legislature to review the propositions coming out of the National Conference continues to be engaged by the Women’s Constitutional Review Taskforce (consortium of women groups engaged on the constitutional review process). UN Women also supported the drafting of an Equal Participation Bill which aims to maintain the momentum on parliament whilst it considers the proposed amendments. UN Women advocates for continued visibility of the proposals emerging from women’s groups among male champions. As part of such efforts, two such male members of the National Legislature were sponsored by UN Women to participate in the 60th Session of the Commission on the Status of Women as part of the official Liberian delegation.

Briefing prepared by:
Mahmoud Koroma, Programme Associate, UN Women Liberia
Peter Ekayu, Inter-agency Gender Advisor, Liberia

Libya

From the first draft, towards a new Libyan Constitutions

Libya’s political turmoil and instability were and continue to be a formidable challenge to its constitution review process. Space constraints necessitate that the following report focus on the final months of the Libyan Constitutional Drafting Assembly’s efforts to negotiate, draft, and adopt a constitutional text without fuller consideration to the volatile political and security environment that surrounded it.

On October 6, 2015, the Libyan Constitution Drafting Assembly (CDA) published its first draft of the new Libyan constitution. The draft was an important step towards the CDA meeting its mandate to complete its work by March 2016, at which time the draft would be submitted for ratification by public referendum. The CDA, upon receiving comments from Libyans and internationals, including UNSMIL, published a second draft on February 3, 2016. This draft strengthened fundamental rights and resolved some contentious issues the system for presidential elections, and an agreement on a decentralized local governance structure. However, several contentious issues remained.

In an effort to help resolve the outstanding issues, UNSMIL and UNDP facilitated a retreat for the CDA from 16 March to 6 April 2016, hosted by the Omani government in Salalah.

The retreat was attended by 32 CDA members, including four of the CDA’s minority representatives. Over the course of three weeks the CDA discussed the powers and regional representation in the 2nd Chamber of Parliament (Senate), the transitional mechanism (only for the first election) of electing the President, the location of the capital (the February draft proposed three capitals (Tripoli as political capital, Benghazi as economic, and Sabha as cultural/touristic), whether to include minority languages as official languages, and issues related to gender and minority rights, among others. Consensus was reached on
the resolution of most of these issues: Tripoli would remain the only capital of Libya; the second chamber would have equal regional representation, but with limited powers; there would be a 25% percent quota for women during a transitional period for the first chamber and six seats permanently reserved for women within the Senate. In addition, the President would be chosen through direct elections, while Islamic law would remain the main source of all legislation. Unfortunately, no agreement was reached with the two Tebu representatives on the status of their language, their demands on political participation and the demands to review Libyan nationality given since February 2011.

On 29 April 2016, 38 CDA members approved the new draft at the CDA headquarters in Beida, Libya, formally adopting it and submitting it to the Libyan House of Representatives to issue a referendum law and submit the draft to public referendum. Shortly thereafter, however, a local court handed down a decision invalidating the amendment that the CDA adopted to amend its internal Rules of Procedure and adopting the draft with a smaller majority. The rules for adoption set forth in the Constitutional Declaration mandate a 2/3 majority vote in favor to approve. At dispute is whether this should be applied to those CDA members voting (in which case the draft was successfully approved); 2/3 of the originally mandated CDA (60 people, which would make the 38 short by three votes in favor), or 2/3 of the actual number of CDA members (58 – two Amazigh seats were never filled due to a boycott – which would make the 38 short by one vote in favor).

While the legal battle around the draft continues, the CDA has moved to develop a communication and outreach plan through which they would try to reach out to the Libyan public and discuss the draft among their respective constituents.

**Briefing prepared by:**
**Mohamed ElGhanam**, Principal Political Officer Constitutional Support, UNSMIL
**Ahmed Ghanem**, Senior Rule of Law Officer, UNSMIL

## Nepal

### Nepal Adopts a New Constitution

In September 2015, Nepal adopted a new Constitution with 84% of the members of the Constituent Assembly (CA) voting in its favor – a landmark achievement in Nepal’s democratic transition that began with the signing of the Comprehensive Peace Agreement in 2006 and witnessed several challenges, including a failed CA and a humanitarian disaster that devastated the country when two powerful earthquakes struck Nepal in April and May 2015.

The first CA, elected in 2008, was dissolved in May 2012 without finalizing the Constitution despite a two-year extension. Though the CA made significant progress in a number of areas, it could not resolve key contentious issues, including federalism, the form of government, and the electoral system.

An agreement among the major political parties paved the way to the election of the second CA in November 2013 under a neutral, caretaker government. In the aftermath of the devastating 2015 earthquakes, the main political parties forged a 16 point agreement to expedite work on the Constitution.

The new Constitution was the first to be promulgated through a popularly elected representative assembly of the people. Key features of the Constitution include commitments to a federal, democratic and secular republic, a parliamentary form of government, comprehensive fundamental rights, and provisions to promote human rights and inclusion.

### Issues and Challenges

Despite the fact that the constitution was promulgated with an overwhelming support of CA members, about half a dozen southern plains-based Madhesi political parties and parties representing other ethnic minorities did not accept the new constitution, alleging that the major political parties had back-tracked on agreements with regard to the demarcation of the provincial boundaries, proportional inclusion in the state structures, the electoral system design, and citizenship provisions.

Ensuring national ownership of the constitution from all segments of the society, including those who were outside the constitution writing process, is now essential. There is a need to develop a comprehensive transition management plan owned by all political forces with clear priorities and sequencing, particularly in areas such as federalization/decentralization and elections. Significant financial and technical resources will be required to fully and appropriately implement the Constitution.

### Lessons Learnt

- Transparent, participatory and inclusive political processes are essential for any constitution writing exercise to be effective;
- People should be given enough time to digest the process and content of the constitution and should be able to see their expectations reflected in the constitution;
- Focused deliberations and negotiations among differing
parties is a good strategy to resolve outstanding issues;

- Loose networks of experts, key political leaders, CA members, academics and social activists were very useful for discussing and resolving differences on contentious constitutional issues;

- Use of option/issue papers around thematic areas proved to be helpful to political leaders and other stakeholders for reviewing their positions, minimizing potential conflict, and clarifying myths and misconceptions in order to narrow gaps around the contentious issues;

- Use of civil society for outreach initiatives such as the Democratic Dialogues proved to be a very effective and low cost model of civic education and community outreach; and

- Targeted interventions for women and marginalized groups were very useful for bringing the voices of those groups into the constitution making process.

**UN Support in Constitution Making**

A range of UN agencies provided support in the specific areas of their respective mandates.

Through its project “Support to Participatory Constitution Building in Nepal“, UNDP provided logistical and technical support to the constitution making process throughout the process. The support provided to the two constituent assemblies included: providing space for political dialogue; expert advice; producing issue/option papers as well as several knowledge products around contentious issues; providing international best practices; capacity-building of the constituent assembly members; and collaboration with civil society organizations, including women and marginalized groups, to promote inclusion and partnerships with civil society groups for public education and engagement.

OHCHR provided advice on the citizenship issues, UNWOMEN on gender equality, UNICEF on the issues of children rights, among others.

**Briefing prepared by:**

**UNDP Nepal**

*Editor’s Note: The Nepal constitution also contains ground breaking provisions on sexual orientation and gender identity, which the UN Constitutional will explore in a future edition.*

**Sierra Leone**

**Sierra Leone Constitutional Review Process: Opportunities and Challenges**

The Sierra Leone Constitutional Review Committee released its first draft report in February 2016, proposing five new chapters and significant constitutional amendments against the existing provisions of the 1991 Constitution. A nationwide public consultation campaign, as well as consultations with key officials, is currently taking place to get feedback on the proposed amendments. The CRC will make adjustments in the draft proposal based on the feedback and submit its final Report to the government of Sierra Leone in September 2016.

The draft report includes a number of crucial proposals for amendment, including provisions dealing with local government and decentralization; citizenship; land, natural resources and the environment; information,
Major proposals for constitutional amendment

The February 2016 draft report proposes the inclusion of provisions guaranteeing citizenship rights to anyone who has at least one parent who is a Sierra Leone citizen; the 1991 constitution only confers automatic citizenship on children born of a Sierra Leonean father. The proposed amendment also abolishes the requirement that only those of “Negro African descent” could be citizens of Sierra Leone, thereby delinking citizenship from considerations of race and gender.

The proposals also include a transfer of powers and resources to local governments and mandates that all local elections are non-partisan.

In terms of gender, the report removes discriminatory provisions in the current constitution that allows customary law to discriminate against women in matters relating to adoption, marriage, divorce, burial, and devolution of property on death, among others. In the current draft the anti-discrimination and equality clauses cannot be overridden by customary law. The draft also enhances women’s political participation through guarantees of gender equality and the establishment of a gender equality and women’s empowerment commission. The CRC has been criticized for failing to include specific methods of ensuring women’s political participation, such as 30% quota for public offices, on the ground that that could be achieved through ordinary legislation.

The proposed amendments also include guarantees of justiciable socio-economic rights such as education, health and shelter. These rights were either absent or non-justiciable in the 1991 Constitution. The draft enhances separation of powers and judicial independence, and retains the two-term presidential limit, ending initial concern that the president could use the reform process to extend his reign.

The CRC declined to establish a senate due to considerations of cost, the potential to delay law-making, and concerns that senate seats could be used to reward party loyalists. Instead, the CRC proposed the establishment of a separate National House for the Paramount Chiefs to discuss issues affecting traditions and traditional authorities.

Given the deep divisions in Sierra Leone regarding the death penalty, the CRC did not make a final proposal on this matter. Instead, the issue has been returned to the people for further consultation and validation. A final proposal will be made upon the completion of the ongoing public validation exercise.

The CRC conducted consultations to validate the draft report and gage public opinion on contentious issues, such as the death penalty. The CRC is scheduled to present its final report to the President in September 2016. Cabinet will discuss and respond to the CRC draft in the form of a white paper which will inform which recommendations the President transmits to the Parliament. The parliament will consider each recommendation, which will require a vote of not less than two-thirds of the Members of Parliament to pass. In addition, certain “entrenched” provisions cannot become part of the constitution unless approved by referendum.

Briefing prepared by:
Sana Baloch, Chief Technical Adviser, UNDP Sierra Leone
Solomon Moses Sogbandi, Member CRC Sierra Leone

Sudan

Supporting women’s engagement in constitution-making in Sudan

Sudan is currently governed by the Interim National Constitution of 2005. Despite the starts and stops in the process of developing a new constitution, women’s groups have been preparing to actively participate and shape the constitution. With the support of UN Women, Sudanese civil society and government actors established in 2013 the Engendering the Constitution Forum (ECF). Since 2014, the ECF held several workshops, in the capital of Khartoum and outside, that led to two foundational outputs for women’s participation in constitution-making: (1) a women’s common agenda, including proposed constitutional rights provisions; and, (2) guidelines for women’s engagement in the national dialogue process, which will encourage and provide strategic support to women leaders in their negotiations with powerful constituencies and leaders on the integration of the common agenda.

Workshop discussions reflected both breadth and depth, covering a wide variety of issues related to women in constitution-making and delving deeper at times to consider some of the complexities involved, such as women’s diversity as group. One discussion point included, for example, addressing the needs of working women, such as those in the agriculture sector, in their ability to obtain legal protection, particularly in terms of their ownership of land, control over natural resources and access to finance. There was also a clear consensus on the important role...
Sudan. UN Women has been working to engage Sudanese women in dialogues on the constitution including through workshops held by the "Engendering the Constitutions Forum" Credit: UN Women Sudan

of civil society organizations in constitutional dialogue and women’s inclusion at all stages of the process, including constitutional drafting. In this regard, participants discussed legal quotas, child marriage and female genital mutilation. The role of religion in the constitution was also discussed, with some participants citing to an Islamic religious foundation for gender equality that should be incorporated into the text of the constitution and its implementation.

In addition to the workshops, the Forum held a consultation with women political party members at the University of Khartoum, once again with the support of UN Women. The consultation came about in response to an enquiry from the head of an association of women political party members. More than twenty women leaders from different political parties attended the event. Event participants acknowledged the importance of women’s empowerment and support for women’s participation in constitution-making, as well as the need to raise awareness from the bottom-up to address the wide variety of social and cultural obstacles to their participation.

With the support of UN Women, Sudanese actors are making significant progress in ensuring that gender equality is on the constitutional agenda.

Briefing prepared by:
Fatou Aminata Lo, Deputy Country Representative, UN Women Liberia

Tuvalu

Constitutional Review in the Pacific: A brief story of Tuvalu

Although the Tuvalu Constitution of 1986 has generally served the country well, there are a number of internal political concerns that have prompted the Government to consider constitutional reform. The political system in Tuvalu has experienced a number of crises over the last decade, most notably with regard to executive/parliamentary relations, which the Constitution was unequipped to address. There was also a need to review the Constitution to reflect new developments, international best practices and Tuvalu’s commitments under international law.

Hence, in 2015, the Government of Tuvalu committed itself to undertake a major review of the country’s Constitution to ensure it reflected current needs and was in line with recent trends around the world. While the work on developing a new Constitution is still at an early stage, significant prerequisites for the review process have already been embarked on, including the formation of a committee of the House in Parliament for the review process; and undertaking an independent external study through UNDP, which included an analysis of the socio-economic and political drivers for the review, the current needs of the populace that are not being met by the current constitutional arrangement, and ways to make the constitution more accessible and easier to understand by the average Tuvalu citizen.

The Constitution making process is likely to encounter several challenges. For one, the government has emphasized the need to consult with Tuvalu citizens despite the fact that the population of Tuvalu is dispersed among nine islands spread out over an ocean area of 900,000kms. Additionally, there are sensitivities over political and religious diversity among Tuvalu’s Christian and religious minority citizens. Discussions on these issues need to be undertaken very carefully to ensure that the review process does not create further divisions in society. For such issues, it is quite critical that an adequate level of civic awareness on the current constitution as well as generally on the process and strong technical expertise on
Zambia


The new constitution of Zambia came into force on 6 January 2016, upon the signing of the Constitution Amendment Act No2 of 2016 by President Edgar Lungu. This brought to partial closure the constitution making process which commenced in 2003.2 UNDP- Zambia was associated with the constitution making process since its inception in 2003.

Contribution of UNDP

UNDP in partnership with UNDEF supported:

- Provision of experts: Subject matter specialists were made available to the secretariat to advise the commissioners on concepts such as decentralized governance, electoral systems, environment and climate change, human rights, gender equity and equality etc.
- Capacity Development of Secretariats and Commissioners: This included provision of skills in chairing meetings, mediation, report writing and process management. In addition, UNDP facilitated the development of strategic documents including communication strategies.
- Best Practices: This included facilitation of study visits to African, European and Asian countries. The support provided insights on the importance of thematic areas such as human rights, gender equality and coexistence between traditional leadership and democratic state.

In the later stages of the process UNDP facilitated mediation of an impasse between the Government and the CSOs regarding the release and publication of the final draft constitution.

UNDP coordinated a single response by the UN agencies to enhance the protection of human rights in the draft constitution. The UN agencies’ inputs focused on areas within their mandates. For example, UNICEF provided evidence for the need to improve protection of children’s rights, UNPFA addressed reproductive rights, ILO advocated for better protection of the rights of workers and decent work, and, UNHCR supported the formulation of provisions to strengthen protection of refugees. A single UN response also increased the visibility and impact of UN support to the constitution making process.

Unique opportunity

The Constitution making process provided the country office a unique opportunity to develop new approaches towards supporting sovereign national processes. The support culminated in a draft constitution which has stronger human rights and gender equality language and provisions as well as an improved accountability framework.

Key lessons

Five main lessons are drawn from the Zambian process. These are:

- Importance of identifying key group/people interests: This promotes inclusiveness and rigour in process and content and reduces undue pressure from individual and/or group interests.
- Balance between content and process: Much focus was placed on the process as well as content.
- Weak CSOs can undermine the discussion on process and content: CSOs that did not have a specific constituency had difficulties to develop an agenda and lobby for it. Funding sources became the primary driver of their agendas on both process and content. In contrast, women’s organisations, which had a clear mandate and constituency, developed minimum standards for gender equality, and disability rights groups led the campaign for people with disability.
- Impartial advisory versus sovereignty questions: Caution needs to be exercised especially by external partners not to create the impression that they are willing to financially support specific agendas.
- Technical versus political process: The UN is uniquely positioned to assist national processes to identify nationally driven political processes to complement technical considerations.

Prepared by:
Mohammed Mozeem, Governance Analyst, UNDP Pacific Office

Briefing prepared by:
Michael C. Soko, Democratic Governance Advisor, UNDP Zambia
This section highlights a selection of papers on constitution-making offering insights into current debates. It includes articles from academia, policy- or practitioner-oriented organizations, and material produced by UN entities.

**Electoral Provisions in Libya’s Draft Constitution, By Democracy Reporting International**

This paper offers an assessment of Libya’s draft constitution, which includes electoral provisions for the President, for the Shura Council (House of Representatives and Senate), for provincial and local council elections, and for referenda.

**The New Vision of Local Governance in Libya by the Draft Constitution of 03 February 2016, By Democracy Reporting International**

This paper reviews the provisions of this draft to form a perspective on the emerging new vision of local governance for Libya.

**Transitional Provisions in the Libyan Draft Constitution and Political Agreement, By Democracy Reporting International**

This Briefing Paper analyses the transitional provisions in both the Draft Constitution and the Political Agreement in Libya.

**Constitutional Provisions for Democratic Governance of Armed and Security Forces, Briefing Paper 50, By Democracy Reporting International**

This paper highlights international obligations and best practice of democratic control of the security sector.

**Nepal’s Divisive New Constitution: An Existential Crisis, By ICG**

This report summarizes the evolution of the federalism and inclusion debate since the collapse of the first CA in 2012 and assesses ways to mitigate the risks from unaddressed social discontent.

**Judicial Review Systems in West Africa – A Comparative Analysis By International IDEA, Hanns Seidel Foundation**

This comparative study offers insights into the historical evolution of constitutional justice systems as well as trends in the contemporary design, structure and mandates of institutions responsible for judicial review and constitutional justice in 16 West African countries.

**Chile**

These three reports were developed by UNDP Chile with various partners as part of the efforts of the UN Country Office to support the constitutional process in the country.

**Mecanismos de cambio constitucional en el mundo. Análisis desde la experiencia comparada, By UNDP Chile**

This report provides an overview of various mechanisms that can be established to draft new constitutions.

**Opinión ciudadana y cambio constitucional. Análisis desde la opinión pública, By UNDP Chile**

This report analyzes the demand for constitutional change by studying opinion polls in Chile; and to create a timeline for the constitutional debate from the perspective of public opinion.

**Representación Indígena en Poderes Legislativos. Claves desde la experiencia internacional, By UNDP Chile**

This report presents different mechanisms used to promote the representation of indigenous peoples in national parliaments, and reviews the options proposed during the constitutional process in Chile.

**Sri Lanka**

**CPA Working Papers on Constitutional Reform in Sri Lanka**

These working papers seek to address a number of critical issues in the current Sri Lankan constitution-making process. It is product of the partnership between CPA and the Edinburgh Centre for Constitutional Law in support of the Sri Lankan constitutional reform process.

- **Paper1: The Sri Lankan Conception of the Unitary State: Theory, Practice, and History**
- **Paper 2: Reshaping the Executive: Choosing the Prime Minister in a Parliamentary System**

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Online Tool
UN Constitutionmaker

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**Constitutionmaker** is an online constitutional assistance resource centre, developed by the Mediation Support Unit (MSU) in the UN Department of Political Affairs (DPA) in close partnership with the United Nations Development Programme (UNDP). Intended for UN staff, the resource centre is populated with documents from a wide range of academic and practitioner-oriented sources.

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We welcome your comments and suggestions. Please contact us at:
constitutionmaker@un.org

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