

Background Document

AGORA E-discussion: The role of representative assemblies in constitution-drafting processes

In democratic transitions, constitution-drafting processes are at the core of the political and institutional transformations. The constitution-making process consists not only of an exercise in drafting and adopting the basic charter of the new state, but also in a unique opportunity for a national dialogue on the core values of the state.

Assemblies, playing an essential role in the constitution-drafting process, have the crucial responsibility of defining and implementing the nation's new social contract.

The legitimacy of these Assemblies does not only depend on the fair and transparent election of their members, but also on the manner in which they exercise their mandate and, in the degree of openness, participation and transparency of their work. Additionally, to ensure the credibility of the constitution-drafting process the rules of the game should be carefully yet clearly developed. All of these elements should be embedded in their internal functioning and in their actions towards the population, civil society and the media.

Currently, several countries in the Arab region are experiencing constitutional reform, in highly varied ways:

- Egypt adopted a provisional constitution or constitutional declaration, which will serve as a transitional constitution until a new constitution is drafted by the parliament (to be elected in September 2011).
- Tunisia will elect its Constituent Assembly, which is to finish the constitutional process within one year from its election. The Constituent Assembly will be granted a parliamentary mandate as well.
- Morocco and Jordan have installed experts committees to draft or to amend their respective Constitution. In this context, role of representative assemblies is minor or non-existent.

These experiences are very different in scope and set-up, reflecting varying degrees of popular sovereignty, representation and citizen engagement in constitutional processes.

As a first point, when they have a role to play, representative assemblies can differ greatly in their composition and structure. Assemblies can, for example, be especially established for the constitutional process, with limited mandate, or can be a parliamentary assembly granted with an additional constitutional mandate. As a result, in some cases Constituent Assemblies operate in isolation from the existing legislature. In other cases, Constituent Assemblies 'double' as a temporary parliament, or are envisioned to transition to normal parliamentary business once the constitution is adopted.

In addition to the great variety in composition and structure, representative assemblies face many important questions with respect to representation, rules and procedures, and inclusion and transparency. These three key pillars of the constitution-making process are listed below.

Representativeness of the Assembly

The mechanisms to select the assembly's members may differ. Members can be directly elected in general public elections, through a myriad of electoral systems and political realities. Constituent Assemblies can also include representation of civil society actors, ethnic groups, women and other interest groups. Whether and how to include these groups, is an important element which will determine the role of the assembly in the constitutional process.

Democratic and Efficient Rules of the Game

As a representative institution, any assembly with a constitution-drafting mandate has to ensure its democratic functioning and efficiency. These elements are a condition sine qua non for reaching a consensus on a draft constitution ready for adoption. This is even more pressing when assemblies are in charge of constitution-making as well as more classical parliamentary functions.

As a first point, the establishment of a professional and neutral assembly secretariat is essential, as it provides indispensable facilitation of the work of the institution and its members.

Secondly, internal democracy is enhanced when the rules of procedure guarantee a pluralist and organized constitution-making process. Drafting and adopting these Rules of Procedure is a key part of the constitutional process: by outlining the institutional and negotiating framework of the Assembly, they have a defining impact on the scope and result of the entire process. They delimit the rules of engagement of Assembly members, issues on leadership and power-sharing, as well as adoption mechanisms within the Assembly.

Following from this, an important consideration is whether the Assembly should make the difficult exercise of producing its own rules of procedure, as was the case in Nepal in 2008. Alternatively, it could operate within a pre-election framework, which establishes the principles and limits of its mandate, as was the case in the South African constitutional process in 1996.

Inclusive participation and transparency

Comparative experiences indicate that inclusive, participatory and transparent constitution-making processes carry greater legitimacy and are more likely to be adopted by the assemblies. Inclusive and participatory processes are also more likely to engender a constitutional framework agreeable to all citizens.

In this framework, assemblies should organize the outreach to all groups in society, while supporting public education and consultation campaigns. There are many mechanisms to mobilize and produce qualitative participation to a constitution-making process. In Ecuador, the Constituent Assembly established, in 2008, a 'Social Participation Unit' to ensure the centralization of citizen views. The Nepal Constituent Assembly established three specific procedural committees to gather citizen feedback in the process. These and many other examples offer food for thought on the wide variety of avenues available to tackle the issues of inclusive participation and transparency.