

Arab Digest- February 2014- Parliaments and Constitution-making

Process and Substance of the New Constitution

Tunisia- A Case Study of UNDP's Support

I- Background and definition

A constitution is the fundamental law upon which all other laws of a country are based and must conform. The constitution is the written (sometimes unwritten) basic definition of the character of a country and the structure of the government in that country. It is a relatively rare opportunity for a legislator to be directly involved in the drafting and adoption of a nation's constitution. But there is a growing trend that elected representatives should be actively involved in the development of such a crucial document.

Constitution building is a process that reconciles conflicting groups, strengthens national unity, empowers people and enables them to participate in public life and ultimately leads to enhancing the legitimacy of the state¹. The writing of a constitution² often occurs under exceptional circumstances, such as the independence of a nation or after a revolution or political transition from one form of government to another. Amendments to a constitution are more commonplace, but any change to the fundamental law of a country must be done with great care.

There are various means by which a constitution can be drafted including direct participation by citizens, an appointed working group of experts and an elected body of representatives. With regard to an elected body, its role can be limited or very active, including adoption/approval of a draft presented to the parliament, consultation where the draft is subjected to debate and public

¹ http://www.constitutionnet.org/files/the_role_of_constituent_assemblies_-_final_yg_-_200606.pdf

² <http://www.agora-parl.org/resources/aoe/parliamentaryinstitution/constitution-making>

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consultations and drafting where the parliament is commissioned to develop the wording of the constitution.

II- The United Nations Framework for the Constitution-making process

The United Nations Rule of Law unit denotes the constitution as the highest law of the land, which defines and limits the powers of government and its various branches, vis-à-vis each other, and the people, and provides a strong foundation for a state based on the rule of law. The term constitution-making covers both the process of drafting and substance of a new constitution, or reforms of an existing constitution. Both process and substance are critical for the success of constitution-making.

The design of a constitution and its process of development can play an important role in peaceful political transitions and post-conflict peacebuilding. It can also play a critical prevention role. Constitution-making presents moments of great opportunity to create a common vision of the future of a state, the results of which can have profound and lasting impacts on peace and stability. The process and substance of the new or reformed constitution go in parallel to ensure better results.

The UN guiding principles and framework for UN engagement in constitution-making processes is centered on national ownership and support for inclusive, participatory and transparent processes. Support is to be tailored to the specific national context and is drawn from a wide range of expertise to ensure access to international and comparative best practice.

Advance planning is required for the creation and implementation of public information and civic education campaign, public consultation process and the securing of funds, human and material resources. A structured (and time intensive) national dialogue or consultation process that feeds back the views of the people to the decision makers involved in the drafting and debating of the constitution is an essential element of an inclusive, participatory and transparent process³.

III- Democratic Transition and Constitution-making processes

Following the Arab uprisals and regime change in some countries, the people have placed their trust in newly elected parliaments to draft a new social contract; a constitution that protects their rights and duties, and shape their relation with the state. As a new parliamentarian this is possibly the most important yet difficult task you may have to undertake.

Drafting a new constitution or amending an existing one can be carried out either by a Constituent Assembly whose members are tasked with drafting a new constitution, or through parliamentary members revising or at least endorsing the revised constitutional text as in the case of Morocco. Arab countries have opted for different models of constituent assemblies. In Tunisia, the elected constituent assembly was tasked with drafting the constitution that was submitted to a public referendum for approval, and at the same time acted as a parliament with the power to appoint an interim government. In Egypt on the other hand, the elected parliament appointed members of the constituent assembly that drafted the constitution that was also submitted to a public referendum for approval.

Recent experiences, flawed as they may be, have highlighted several lessons that should be learnt for successful constitution making processes. One of the critical factors determining the success

³ http://fr.unrol.org/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf#page=3&zoom=auto,0,443

in drafting and adopting a new constitution is how inclusive the constitutional drafting process is. Countries undergoing transition usually suffer from political polarization and social fragmentation. It is crucial that proactive efforts are therefore made to reach out to political parties across the spectrum, as well as to other political stakeholders (eg. sub-national political leaders, religious or clan leaders, trade unions) and different social groups (eg, women, young people, ethnic minorities) in order to ensure a representative constitution which is seen as “legitimate” and has the buy-in of the people and their political representatives. As a parliamentarian, and a member of a political group, you should encourage the inclusion and deliberation with various stakeholders.

In addition to endowing the constitution with legitimacy and longevity, an inclusive process will result in a constitution that better addresses the demands and expectations of the public. Involving as many “constitution builders” – such as CSOs, experts, activists, women, and youth – in the process through open consultations, will give you a better understanding of what priority issues need to be addressed. It will also facilitate consensus over the new constitution, which can be crucial to hastening national reconciliation following violent episodes.

IV- Institutions and procedures for developing the constitution framework

In addition to goals, it is usual to agree on the institutions and procedures for process. This is normally the responsibility of the legislature or the executive. A legal status is a requirement to denote the functions that are agreed upon. Sometimes it is entrenched through a detailed act by the parliament and at other instances the process is prescribed in a previous constitutional instrument.

A-The Role of Constituent Assemblies and legislature in Constitution Making⁴

The significance of the common phrase “constituent assembly” is that it refers to a body representing the people that is vested solely (or mainly) with “constituent power.” An assembly is

⁴ <http://www.constitutionmakingforpeace.org/part-3-institutions-groups-and-procedures/31-institutions-multiple-roles/312-constitutional>

thus the body designed to represent the nation, assigned—at a minimum—the task of debating in detail a draft constitution of the country, and of approving that draft. It may or may not also have the task of preparing the first draft, or have the final responsibility for passing it into law. Constitutional assemblies differ in size and composition and in how their members are chosen. They also vary in their roles, although they must at least discuss and adopt a constitution.

B- Parliament may have—or give itself—functions in relation to the constitution-

- Making process and debate the content of the constitution
- Pass the laws setting up the process
- Appoint members of the constitutional commission
- Vote the necessary resources for the process
- Insist on overseeing the process
- support the implementation through legislation

V- Support to the Constitution- making process

In the field of parliamentary development, it is generally understood that the content of a constitution is to be determined by the citizens of the nation. However, there are two aspects to the work in which capacity support can be provided.

- Support to the Constituent Assembly: First, where a decision has been made to create a Constituent Assembly, support can be provided in the development of the temporary institution. A constituent assembly is a body that acts like a parliament but has as its main mandate the creation and adoption of a constitution.

- **Public Consultations:** Even though a constituent assembly may be elected and, therefore, the members are chosen to represent the citizens, it is always a good idea to conduct extensive public discussions about the content of the constitution. The greater the extent of the consultations, the greater the legitimacy of the document with the citizens of a country.

What is the United Nations doing in constitutional assistance⁵?

Since the Arab Spring, UNDP has been providing assistance to National Constituent Assemblies in Libya, Tunisia and Iraq to support their work as constitution-making bodies; build their capacities as the institutions that will become the Parliament following the adoption of the new national documents; and facilitate a productive engagement between civil society and the NCA.

UNDP has been supporting the democratic transition in [Tunisia](#) since the revolution of 2011, and is the main international partner to the National Constituent Assembly in supporting the constitutional process, parliamentary strengthening, and national dialogue, a project which runs from 2012 to 2015. This work is carried out in parallel to UNDP's other governance projects in Tunisia, which include support to the election process and to the justice system. Particular emphasis has been placed by UNDP on assisting the National Constituent Assembly in ensuring an inclusive constitutional process, including extensive public consultation and engagement with civil society organizations across the country.

The constitution-making process in [Libya](#) will play an important role in Libya's political transition. The United Nations is engaging in a range of efforts in support of the Libyan constitutional process. The *United Nations Support Mission in Libya* is currently in the

⁵ http://www.agora-parl.org/sites/default/files/unconstitutional-issue_1.pdf

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preparatory stage of working through options for supporting government officials and institutions, particularly the Constitution Drafting Assembly (CDA) which is to be elected in early 2014. UNDP has also provided support to civil society, with a focus on public outreach, civic education and other efforts to enable the public to participate meaningfully and productively in the process. The UNDP “Assistance to Building a Constitution” (ABC) Project is working to support UNSMIL’s mandate to assist with the constitutional and national dialogue process by addressing the urgent need for developing public engagement and dialogue capacities in Libya.

On 20 August 2012, [Somalia](#)’s Transitional Federal Government ended its official mandate and was replaced in November by the Federal Government of Somalia (FGS), comprising the (selected not elected) National Federal Parliament (NFP) and a new President and Prime Minister endorsed by the Federal Parliament. The new institutions of Somalia are guided by the Provisional Constitution, which was endorsed in August 2012 by a National Constituent Assembly comprised of selected political and community representatives from across the country. UNDP is supporting the NFP to engage in both constitutional review and implementation. To date, this has primarily been done through UNDP’s overarching Parliamentary Support Project, which is supporting the new Federal Parliament to establish its institutional capacities to undertake its roles of law-making, oversight and representation. UNDP is now working with UNSOM to support the Speaker, the Oversight Committee and MPs generally to undertake outreach, information and education and to promote buy-in for the constitutional process.

The Constitution-making Process

Tunisia Case Study

A- Background

Despite a complex and sometimes volatile political landscape, the new constitution in Tunisia was adopted on January 27, 2014 by the country's National Constituent Assembly. The prominence of the document lies not only in its progressive approach to a number of sensitive yet highly important issues namely the role of religion in the state and commitment to human rights but more to the inclusive process through which it was produced.

B- The Tunisian Constituent Assembly

The peaceful transition of power in Tunisia following the uprising was initiated by the end of 2011 with the election of 217 members to take part in the National Constituent Assembly (NCA). The projected timing for drafting the constitution was foreseen for a period of one year, yet political, economic and security issues prevailed and thus the process was delayed. The NCA adopted a provisional constitution in December 2011 which served as the backbone to the new constitution adopted on January 27th, 2014.

C- UNDP's Constitutional Support Project in Tunisia⁶

UNDP's Constitutional Support Project in Tunisia operated along the same framework and focused in chorus on the content as well as the process to ensure representativeness of the Tunisian people aspirations. Throughout the transition process, UNDP has been Tunisia's main international partner in providing support to the constitutional process and capacity development

6 UNDP Tunisia- Celebrating the first bloom of the Arab Spring: Success in the Tunisian constitution-making process

to the new Assembly. The project prioritized support to the National Constituent Assembly in three key areas namely the open and participatory constitutional process; the strengthening of institutional capacities; and the development of constitutional dialogue mechanisms to ensure citizen and civil society input into constitutional and political process.

1- Drafting process and the provision of technical expertise

Throughout the whole process and at the request of the NCA, UNDP has provided in-depth technical constitutional and legal expertise which fed into the draft document and was subjected to negotiations to achieve consensus.

UNDP was also keen to build the capacity of the civil society to boost its participation in the political process through sessions on constitutional drafting, policy advocacy and consensus building/conflict prevention with a particular focus on marginalized areas.

2- Dialogue and consensus building

In order to ensure the integration of citizens and civil society's input into the constitutional and political process, UNDP supported local and national dialogue through capacity building sessions on a number of issues namely legislative and constitutional drafting as well as public consultation techniques.

Within the same scope, UNDP supported a national dialogue throughout all the governorates which brought together more than two-third of the members of the NCA with citizens, civil society organizations and university representatives. The later provided input which was featured in a report later discussed in the plenary sessions.

UNDP also supported the consultation activities of 30,651 citizens on the draft Constitution through civil society initiatives and was keen to assess the desires and expectations of the youth through a national survey.

3- Conformity to human rights commitments and gender equality

UNDP in collaboration with other UN agencies was keen to ensure that international treaties and conventions are reflected in the document and conform to Tunisia's international commitments.

UNDP also promoted gender issues through communicating and sponsoring the exchange of good practices and the constitutionalization of equality provisions as well as dedicated activities on the political participation of women.

4- The way forward -Effective legislature

In order to ensure the successful implementation of the constitution, capable and effective legislatures are imperative. It is within this scope that UNDP worked towards ensuring access to international and comparative parliamentary best practice, prioritised South-South parliamentary assistance, and focused on building partnerships with sister parliaments.

Furthermore, UNDP helped in establishing partnerships with parliamentary departments that will fuel the sustainable exchange of good practices in addition to key training sessions for the NCA members as well as the parliamentary administration.

The three features hailed by the UN guiding principles on constitution-making are inclusiveness, participatory and transparent processes. Within this scope UNDP invested in the information infrastructure and encouraged interaction with grass roots to promote the transparency of the NCA activities.

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