

THE UN CONSTITUTIONAL

A Newsletter on United Nations
Constitutional Support



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FOREWORD

“The UN Constitutional” team is pleased to publish the seventh issue of its newsletter featuring articles by constitutional experts, reports from the field, and a digest of recent constitutions-related publications. In this issue, we have interviewed Yash Ghai on his experience as constitutional advisor and drafter, particularly in Kenya and Fiji. The issue also features a brief introduction to federalism and a short case study on women’s national machineries; in addition to updates on UN support to constitutional processes in six countries.

“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.

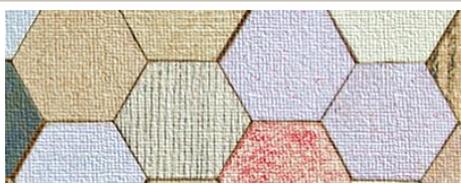
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Interview with M. Yash Ghai, Professor and Advisor on Constitution-making

Questions by The UN Constitutional

Q. Over the past three decades you have been involved in well over twenty constitutional processes throughout Africa, Asia, and the South Pacific – both as a constitutional advisor and constitution drafter. How did you first enter the field of constitution making? And at what point did you realize this was something that would come to define your life’s work?

My first involvement in constitution making was accidental. It happened when I was a young law teacher in Tanzania. Tanzania was moving to a one party state (1965) and my colleague Patrick McAuslan and I were asked by the Constitution Commission how the essence of democracy could be preserved under a one party system.

My real “break” came when I was invited to be a consultant to the constitution commission of Papua New Guinea as it prepared for its independence constitution—a country I knew nothing about. This led me to advise, indeed write constitutions for, several other Pacific island states (including Solomon Islands and Vanuatu), rapidly gathering experience.

A great deal of my work was not constitution making in the narrow sense of writing drafts; instead it was highly political, negotiating peace, mediating, and trying to narrow differences between different “warring” groups. These negotiations helped me in my own country, Kenya, in the preparation of what became the 2010 constitution.

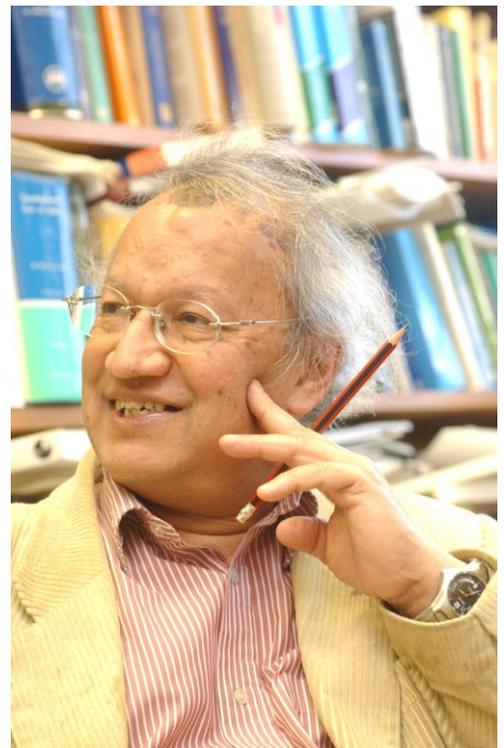
Most of my professional life I was a law teacher and scholar—that was my first love. I never sought consultancies, but received several offers as my practical work got known.

Q. Most famously you chaired constitutional review commissions in Kenya (2000-2004) and Fiji (2013-2014). In both cases your work was somewhat defined by a clash between what you deemed the will of the people versus the interests of the political elite. Can you talk about this tension?

The position of the chair of the constitution commission is a good vantage point to see the dynamics of the process of constitution making. The chair has to deal with all groups, sometimes even individuals, involved in the process. The latest trend of popular participation in the process has broadened the range of interests that the commission has to take into account. However, the distinction between the public and the political elite always held.

Kenya and Fiji both had a long period of demand for constitutional reform. In Kenya more than in Fiji, the number of participants (individually and as groups) increased over the period of the work of the constitutional commission. An essential task of the constitution commissions in both cases was to open up public debate. This brought forth a large number individuals as well as institutions. The complexity of views was enormous, within and as between groups.

These interests and views, which may be based on ethnicity, religion, or economic disparity, among others,



Yash Ghai is a Kenyan law professor who has specialized in constitutionalism and human rights, ethnic conflicts, sociology of law, and autonomy. He chaired constitutional review commissions in Kenya (2000-2004) and Fiji (2013-2014), and advised various other governments and political parties on constitutional matters, including several South Pacific states, Cambodia, Afghanistan, the Maldives, Iraq and Nepal. Ghai is a co-founder and co-director of an NGO, Katiba Institute, which is dedicated to the protection and promotion of Kenya’s 2010 Constitution.

may vary from one stage of the constitutional process to another. And even if the same interests persist, the outcomes may differ depending on the dominance of the interest at different stages of the process. It is therefore

not easy to divide the interests of the public and the politicians.

With such variety of interests, it is necessary to pay attention to the stages of the process and the motives of politicians.

Similarly, it is important to disaggregate the general public. Their preferences regarding the values and system of government vary with their needs, from one area to another, or variation of occupation, and from one class to another.

In these circumstances, the role of the constitution making body is crucial. The first task is that of the constitutional commission, which may be operating based not only on what the people told them, but also may be bound by a broad framework of values in legislation which define its role. This was more of an issue in Kenya, than in Fiji, where considerable attention was paid to what people said because of a lack of prior agreement on key issues. The recommendations/draft of the commission are then subjected to scrutiny by a constituent assembly/parliament, which may not follow those recommendations. In those countries which have a referendum, the final decision falls upon the public.

Q. Over the past several decades, what have you noticed are some of the more significant trends and changes in how constitution making is conducted?

The most obvious change is the participation of the people in constitution making, increasingly accompanied by a referendum (though in South Africa no referendum was held; the deal between two leading political parties was deemed sufficient).

The second feature is the greater international engagement in domestic constitution making: through the involvement of the UN or regional

organisations, and other international organizations. International involvement is increasing through the use of experts in one or more aspects of the constitution (elections, the legislature, reconciliation, human rights, woman's or minorities rights, land policies, federalism, etc.), funded by international organizations, governments, or foundations. International impact is also the result of a number of international instruments binding on states, the foremost being the convention on human rights, but also increasingly about the environment, etc.

A third element is the borrowing of approaches, concepts and text from constitutions of other countries. In this regard the Indian constitution has been much studied, and in recent years the South African, and Kenya (which drew considerable inspiration from South Africa). To some extent this migration takes place because the same experts move from one country to another, often under the auspices of the UN or institutions operating internationally. There is also a growing group of scholars who have begun to specialise in the subject of constitution making.

To a considerable extent these forms of intervention dilute the impact of local participation, and sometimes the sense of ownership of the constitution. In some countries where I have worked I was lobbied intensively by local interests, on rights of women, minorities, equitable distribution of land, the electoral system, when I considered that they ought to lobby their parliamentarians and members of the constitutional assembly.

Q. Constitutional reform is frequently a focal point of post-conflict peacebuilding and democratic transition. In your experience, what are the major challenges for constitution making in post-conflict environments?

In post-conflict peacebuilding situations the role of a third party mediator may be very important.

In recent years, many states have been re-organised to accommodate different ethnic groups within one state. The most common forms are federalism and other autonomy arrangements. Kenya and Fiji are interesting examples of diverse ethnic communities. My own approach is different from the usual approach (especially when the UN or international groups are involved), which tends to find a specific role or land for "minorities". I believe that ethnicity is not as pervasive or deep as we think (though politicians do find it easy to stir up ethnic demands). My approach has been to make a distinction between the public/political and private domains—or as the Kenya preamble notes, "national unity and proud of its diversity". The constitution has been designed to promote national unity, through political parties and other devices; but also to promote diverse cultures, languages, religions, etc. (I must concede that politicians have effectively fought off the unifying elements of nationhood, and emphasised instead the priority of different ethnic communities).

We took a similar approach in Fiji—the public domain belonged to the people of Fiji. Until then parliamentary seats had been distributed on an ethnic/racial basis. Our draft abolished this; seats were based on residence. This coincided with the approach of the government and found its way into the new constitution.

Q. Women often struggle to get fair representation at the constitutional negotiating table. In your experience what have been some effective strategies to increase women's participation and the attainment of enhanced

gender equality and related rights?

Ours is not a bad time for making a constitution from the point of view of women—and their supporters. The role that women play in the process of making the constitution and the provisions that emerge governing their status in society depend to considerable extent on the religion or mores of the people concerned—but there is also a trend towards the greater participation of women in the process as well as gains in the constitution.

In both Kenya and Fiji the constitutional commission included a fair number of women members: in Fiji three out of five members. In both cases the women were every bit as bright and informed as male members, as were the staff of both commissions. In Kenya women of various communities/tribes were better able to organise and present joint demands in so far as their interest as women were concerned—even though for more general issues, they tended to take tribal sides.

In both cases women's organisations made good use of international and regional norms and conventions. And in both cases substantial progress on women's political participation and gender rights were constitutionalized.

Unfortunately, a number of constitutional provisions in favour of women or other marginalised communities have not been followed through in legislation or practice, suggesting that popular opposition is likely at the legislative level, and that therefore the constitution should go beyond requiring enactment of the law to actually providing for enactment within a specified time with clear indication of its substance—as indeed the Kenya Constitution does in relation to some matters.

Q. **It is often said a constitution is only as good as its**

implementation. What have you found are some of the challenges to constitutional implementation?

In two lengthy lectures/papers I have tried to identify the many reasons why a constitution may be sidelined or have more reform-minded provisions marginalized. I trace the fortunes of the constitution to three critical factors, which in different ways are integral to the constitution: state, economy, and society. The state and its structures are in themselves the principal object of a constitution. We need to study the nature and structure of the state and how public control over it can make a greater impact on society rather than the other way round.

The economy is an underlying, and sometimes an overt, concern and theme (and often the ideology) of the constitution. In Africa the economy is less evident on the face of the constitution, but there is little doubt that in most of them, Kenya included, the business community, foreign and local, have a firm control over the state—but less overtly as in the West. The Kenya constitution tries to deal with this phenomenon by establishing social and economic obligations to the people on the state, especially the most deprived people and communities. There is little evidence that the business community is deterred—indeed it has dominated and co-opted the political and bureaucratic elite.

The third element, society, is the underlying basis of the state and constitution; the maker or recipient of the constitution, with complex relationship between it and the constitution, sometimes reinforcing, other times trying to transform, social norms and practices. While newer African constitutions pay lip service to the people, declaring that “all state sovereignty is vested in the people”, the reality is that the rich and powerful classes, new though they might be, have secured a firm control over the

people, to some extent through the state, and some extent through the economy. Poverty in all African states has increased in recent years; the slums have exploded in number and size, causing misery beyond the care of the elite—who create these conditions.

The constitution tries to shape each of these factors (state, economy and society), rather than take them for granted; but each of them in turn reacts on it, supporting or subverting its values and objectives. I argue that this interaction may be the key to understanding the potential of the constitution and to explaining its success or failure.

Conscious of this phenomenon, in the Kenya constitution (and lesser extent in Afghanistan) we tried to build implementation in the constitution itself: a time table for the enactment of new laws critical to implementation; the scheme for the establishment of new independent institutions (with major responsibilities for implementation, and the promotion of constitutional values), emphasis on the Rule of Law, with a strong, independent judiciary, and empowerment of the people, etc. The exploitation of state resources by politicians and their sponsors was to be stopped by a strong regime to fight corruption—and the general emphasis on integrity in public life.

It would be unfair to say that these measures failed completely, quite apart the fact that the constitution is relatively new. There are several areas of success, but many areas where progress is greatly needed.

Q. **You have worked alongside the United Nations providing constitutional support in numerous countries. What advice would you give the UN, and international community more broadly, in the way it provides constitutional support?**



Kenya. Procession for the 2010 celebration of the International Day of Democracy. Credit: UNDP Kenya

It is well recognised that the process of constitution making and the document that results is a sovereign prerogative of the country, and UN and other actors should not interfere. But the UN or regional associations should be free to inform them of international norms that are binding on all states and provide other assistance when requested. From this principle I would offer the following advice to the UN and other international actors. First, particularly if there is conflict but even in more stable contexts the UN should promote good relations between competing groups/leaders, so a proper basis for constitution making can be made. In certain cases this might include promoting interim joint governance arrangements between antagonistic political parties or actors. Second, the UN should promote understanding of human rights and other relevant international conventions.

Third, international assistance should support national actor's efforts and to the greatest extent possible avoid imposing their own views and preferences. Unfortunately, I have seen this happen often, even when international organizations come in with the best of intentions. For example, when chairing the Kenya process (2000–2004) a head of an inter-state organization approached me with an offer that his organization would draw up a constitution for Kenya, at no cost to Kenya. Such an act would have greatly undermined the national ownership of the Kenyan process and any document that came out of it. A different international organization, also working in Kenya, tried to force me to accept money I did not need (presumably either to satisfy its donors, maximize the "credit" it could claim for supporting the process, or both), and eventually – without my approval – used the money to take commissioners out of the country on a

study tour, for which no report and no discernible benefit was derived.

Fourth, the UN should pay a great deal of attention to civil society actors, which are playing an increasing role in conflict resolution and peace building. Fifth, the UN should take care to coordinate its assistance as between different agencies and departments. Poor coordination has, in my experience, undermined the effectiveness of UN constitutional support and undermined the credibility of the UN more broadly. Sixth, international actors should not impose arbitrary timelines – constitution making is often linked to conflict resolution and cannot be rushed. And finally, foreign experts, whether from UN or other sources, should be given training in local history, economy, communities, etc. so that their advice can be grounded in the local context.

Federalism

A brief Introduction

By Rohan Edrisinha, Senior Political Affairs Officer Constitutions, UN DPA

Whether one likes it or not, identity based politics is a reality in many parts of the world. When identity based claims are not recognized or accommodated in the constitutional architecture of a country it can lead to intra-state conflicts. In recent years, therefore, there has been a renewed interest in federalism as a constitutional mechanism that responds to the reality of diversity in society. Many scholars and commentators have argued in recent years that a federal constitution may be more appropriate than a unitary constitution in managing multi-ethnic and plural societies.

Many scholars have cited India's federal constitution as a reason for its success in managing its diversity and preserving national unity. Nepal, following a decade long conflict that ended with a peace agreement in 2006, adopted a new constitution in 2015 that introduced a federal, secular, democratic, republic; South Africa adopted a quasi-federal constitution in 1996 to facilitate a transition from apartheid to democracy while ensuring respect for its plural character. The federal idea has featured in recent years in the constitutional reform debates in countries such as Iraq, Yemen, Syria, Somalia, Nepal, Sri Lanka, the Solomon Islands and the Philippines.

The Difference Between Unitary and Federal Constitutions

The term 'federal' is difficult to define and has no fixed meaning. Both the terms 'unitary' and 'federal' can be considered to cover a range or a spectrum of meaning. However, notwithstanding this, it is possible to develop a working definition by comparing and contrasting the terms, unitary and federal, in order to understand the essence of the federal idea.

A unitary constitution is generally defined as one with the habitual

exercise of political power by one, central authority. (C.F. Strong, Modern Political Constitutions) (Unus= one in Latin).

Power may be decentralized or devolved within a unitary constitution, but this is granted or given by the central authority and therefore can be taken back by that authority **unilaterally**. The power granted to the decentralized authority is therefore relatively insecure.

As Strong has observed

"It does not mean the absence of subsidiary law making bodies, but it does mean that they exist and can be abolished at the discretion of the central authority."

A Federal Constitution, on the other hand, is different, as the powers that are granted to the provinces or states are more secure as they are guaranteed by the constitution, the supreme law of the land.

Ronald Watts, a Canadian scholar, provides a useful working definition of a federal constitution which highlights 5 features:

- Two tiers of government each acting directly through the authority of the people;
- A written, supreme Constitution with a clear division of powers

which cannot be changed unilaterally.

- Provincial/state representation at the centre;
- An umpire to resolve disputes between the different tiers of government;
- Mechanisms to facilitate inter-governmental cooperation.

Contrasting these five features of a federal constitution with the definition of a unitary constitution highlights some key differences. In a federal constitution there is more than one tier of government with powers that cannot be taken away from one tier by another tier through unilateral action. The term "federal" comes from the Latin, *foedus*, which means a covenant or agreement. A federal constitution is deemed to be an agreement and as such any changes can only be made if both parties to the "agreement" consent to such change. The division of powers and competencies is therefore more secure as it is set out in a written constitution that is supreme.

A federal constitution is more complex than a unitary one as it involves at least two rather than one tier of government with constitutionally guaranteed powers. Since there are bound to be disputes between the tiers of government, an independent, impartial umpire, who commands the confidence of both tiers of government, is necessary. In many federal countries the final arbiter/umpire is a Constitutional Court. Watts' final feature is noteworthy as he suggests that modern federations need to be cooperative rather than competitive and that the

two tiers of government have to collaborate and cooperate to make it successful.

The essence of a federal constitution is therefore, a combination of **shared rule and self-rule**.

Watts' third feature, provincial/state representation at the centre is important in facilitating the shared rule dimension of federalism. In most federal countries, the provinces/states are represented at the centre through a second chamber which forms part of a bi-cameral legislature. There are two rationales for a second chamber that provides for the provinces/states to be represented at the centre:

- A Protection of Devolution rationale;
- A Protection of National Unity rationale.

The Protection of Devolution Rationale

In a federal system, the second tier of government (the state/province) is responsible for certain powers and responsibilities provided in the constitution. However, very often, central legislatures tend to encroach upon the powers granted to the provinces/states. If the provinces/states have a voice at the centre in a second chamber, whether it be a Senate (like in the U.S.) or a Council of Provinces (like in South Africa), the provinces have a mechanism whereby they can raise the alarm or object to any attempt at undermining provincial powers in the central legislature itself. Furthermore such a chamber also provides a forum for provincial concerns and interests to be raised at the central level.

The Protection of National Unity Rationale

Ensuring that the provinces have a stake at the centre or in the country as a whole helps to promote national unity and the territorial integrity of the country. If, for example, a minority such as the Madhesi in Nepal who are

largely concentrated in the south of the country are given autonomy to look after some of their own affairs in a federal arrangement, it will be in the long term interests of national unity if they are also given a voice in the affairs of the central government through participation in national institutions in Kathmandu.

Max Frenkel in *Federal Theory* has described federalism as follows:

"A system for decision making is federalist if it is an entity composed of territorially defined groups, each of which enjoys relatively high autonomy and which together, participate in an ordered and permanent way in the formation of the central entity's will."

In the 5 features of federalism, therefore, there is a combination of the shared and self-rule dimensions of federalism. A federal constitution is not merely focused on promoting autonomy; it is also equally focused on promoting power sharing and inclusivity at the centre. The Federal Idea is about more than autonomy; it provides for autonomy AND mechanisms to promote shared rule and national unity. Nelson Mandela referred to the new South Africa as a "Rainbow Nation," where the distinctiveness of each colour of the rainbow was recognized and celebrated, but within the context of one entity. The Federal Idea, which seeks to promote unity in diversity, and the Rainbow Nation concept, have a great deal in common.

The Federal Idea: Myths and Misconceptions

There are many "myths" about federalism. These include:

- That a federal state is established only by previously independent states coming together.
- That a federal constitution must include a right to secession.

Constitutional scholars recognise that there are two ways in which a federal

constitutional arrangement may be established. The more common method known as **Integrative Federalism** is where previously independent nation states integrate to form a new political entity. This is the case, for example, in the United States and Switzerland. The second method, known as **Devolutionary Federalism**, is where a country that is unitary opts to change to a federal system by introducing constitutionally entrenched devolution of power that corresponds to the five features of federalism discussed above, such as in Belgium, Spain and possibly South Africa.

A federal constitution may or may not include a right to secession. Most federal constitutions do not. In many countries federalism is often proposed as an alternative to secession or as a strategy to undermine secessionist tendencies. For example in Canada, it could be argued that a federalist response countered the separatists in Quebec. Federal type reforms have been proposed in several countries in order to counter the threats of secession by addressing reasonable aspirations for self-rule within a united country.

It is also important to recognise that the federal characteristics of a constitution cannot be viewed in isolation. Since federalism seeks to promote the shared and self-rule of the people and recognise their diversity within a common whole, it is interwoven with principles of democracy. Furthermore since a federal constitution is necessarily more complicated than a unitary constitution, respect for the supremacy of the constitution and constitutional principles and institutions is of paramount importance.



Is Constitutional Recognition Sufficient for Effectiveness of State Institutions?

A Case Study of National Women's Machineries

By Beatrice Duncan, Advisor Justice and Constitutions, UN Women
Elisabeth Doyle, Policy Analyst Constitutions & Access to Justice, UN Women

Kick-off Conference of the EU/UN WOMEN Regional Programme 'Ending Violence against Women in the Western Balkan countries and Turkey: Implementing Norms, Changing Minds'. Credit: UIN Women

National Women's Machineries (NWMs) have emerged as critical institutions with mandates for advancing the status of women since the early 1960s.

The Beijing Platform for Action (BPfA) of the Fourth World Conference on Women (1995) identified "Institutional Mechanisms for the Advancement of Women" as one of its 12 critical areas of concern. In this effort States were expected to,

"[b]ased on a strong political commitment, create a national machinery, where it does not exist, and strengthen, as appropriate, existing national machineries, for the advancement of women at the highest possible level of government; it should have clearly defined mandates and authority; critical elements would be adequate resources and the ability and competence to influence policy and

*formulate and review legislation; among other things, it should perform policy analysis, undertake advocacy, communication, coordination and monitoring of implementation."*¹

Typically NWMs have taken the form of national commissions and similar institutions. To date, constitutional provisions on the creation and mandates of NWMs appear in only seven (Egypt, Guyana, Morocco, Nepal, Rwanda, South Africa and Zimbabwe) out of 195 Constitutions, although several other countries have NWMs that are not constitutionally recognized.²

This article is a precursor to more detailed qualitative and quantitative research on the impact of constitutional recognition on NWMs, and is based on a desk review of the Concluding Observations and Recommendations of the Committee

on the Elimination of Discrimination against Women (the Committee) to State Parties in relation to the effectiveness of NWMs as well as Shadow Reports of civil society organizations on the same issue. It determines whether constitutional recognition is a sufficient condition for guaranteeing the effectiveness of NWMs and concludes that it does not. While constitutional supremacy may enhance legitimacy and clout, it can by no means replace the indispensable life line of human and financial resources as well as the political will to ensure the survival and effectiveness of such institutions.

Constitutional gravitas or window dressing?

Studies demonstrate that the effectiveness of NWMs is often constrained by weak mandates, limited human and financial resources,

locational instability and lack of autonomy.³ Unfortunately, this has proven true of NWMs in countries with and without constitutional recognition.

For example, the National Women's Commission of Nepal was established in 2002 through Executive Order and later by the National Women's Act of 2007 as a statutory body.⁴ Nepalese women's organizations were successful in lobbying for constitutional recognition of Nepal's NWM in the 2015 Constitution of Nepal.⁵ A 2016 Shadow Report of Nepalese civil society organizations, however, reveals that the NWM "has not been able to function effectively as the necessary law of the commission has yet to be enacted and the appointments to the commission has yet to take place."⁶ The report stressed the need for the State to "equip Institutions created for advancement of women, including the National Women Commission, with adequate budget and human resources as well as [to] train Staff thereof to be gender responsive in their work."⁷ Given that the shadow report was released within one year of the conclusion of the constitutional review process, it can be argued that more time will be needed to assess the impact that constitutional elevation will have had on the effectiveness of Nepal's NWM.

A much earlier constitutional development may however serve as a benchmark for assessing more recent experiences. The 1996 Constitution of the Republic of South Africa gave constitutional recognition to the Commission on Gender Equality and set forth its mandate to "promote respect for gender equality and the protection, development and attainment of gender equality," accompanied by the power, "as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality."⁸ While commending

South Africa for adopting a number of policies, programmes and plans of action to promote gender equality and eliminate discrimination against women including the establishment of a NWM, the Committee stressed that additional work was needed to ensure the institutional capacity of these national women's machineries. In particular, the Committee expressed its concern regarding the "weak institutional capacity" of the Ministry for Women, Children and People with Disabilities in particular, and "recommends that the State party expeditiously strengthen its National Gender Machinery."⁹ The Committee called upon the State to "provide the national machinery with adequate human, financial and technical resources to coordinate the implementation of the Convention, and work effectively towards promoting gender equality."¹⁰ This sentiment was echoed in a 2011 South African Shadow Report which outlined that the national women's machinery was not effective at "parliamentary, national, provincial or local level" due to a lack of robust "political commitment as well as insufficient capacity, resources and funding."¹¹ The South African experience demonstrates that constitutional recognition does not guarantee political commitment and that political commitment is a necessary condition for unleashing the transformative potential of NWMs.

Similarly, although the Constitution of Guyana recognizes the State's Women and Gender Equality Commission and mandates its duty to "promote national recognition and acceptance that women's rights are human rights, respect for gender equality and the protection, development and attainment of gender equality," the Commission is hindered by lack of human and financial resources to actualize its mandate, and, therefore, lacks the clout needed to be fully effective.¹² The Commission is under resourced and lacks a clear mandate

and in 2012 the CEDAW Committee encouraged Guyana to "to clearly define the mandate and the responsibilities of the national machinery for the advancement of women and to expeditiously strengthen that machinery by providing it with adequate human, financial and technical resources for it to coordinate and work effectively for the promotion of gender equality and gender mainstreaming."¹³

Beyond constitutional recognition

This article has demonstrated on a preliminary scale that constitutional recognition of NWMs without the necessary human and financial resources required to guarantee their effectiveness will not result in "constitutional gravitas". Such continued lack of support to NWMs could be a symptom of the capacity gaps of other constitutional bodies and therefore calls for further research. This does not mean, however, that the practice of constitutionally recognizing NWMs should be discouraged. This is because assuming countries respond to the strategic call by the BPfA and Committee to strengthen the effectiveness of their respective NWMs, constitutional recognition could be boosted by legal clout and possible added protection through constitutional public interest litigation. Being embedded in a constitution is therefore an asset, but like the stock market, investments must be made in catalytic resources to ensure effective implementation of mandates.

FEATURED: NATIONAL WOMEN'S MACHINERIES

- ¹ The UN Fourth World Conference on Women, *Platform for Action*, para. 203, Beijing, China 1995.
- ² UN Women, Global Gender Equality Constitutional Database, available from <http://constitutions.unwomen.org/en>
- ³ United Nations, Economic and Social Council, *Twenty Year Review of the Beijing Declaration and Platform for Action*, 15 December 2015, E/CN.6/2015/3.
- ⁴ *Shadow Report on the 4th & 5th Periodic Report by The Government of Nepal on CEDAW*, p. 7 (2011).
- ⁵ See the Constitution of Nepal 2015, Art. 252.
- ⁶ CEDAW Shadow Report Preparation Committee (SRPC), *Civil Society's Alternative report on CEDAW Convention*, p. 7.
- ⁷ *Ibid.*, p. 8
- ⁸ Constitution of the Republic of South Africa, 1996, with Amendments through 2012, Art. 187.
- ⁹ CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination against Women, South Africa*, 5 April 2011, CEDAW/C/ZAF/CO/4.
- ¹⁰ *Ibid.*
- ¹¹ Centre for the Study of Violence and Reconciliation, People Opposing Women Abuse, and Western Cape Network on Violence Against Women, *South African Shadow Report on the Implementation of the Convention on the Elimination of All forms of Discrimination Against Women*, p. 22, (2011).
- ¹² The Constitution of Guyana 1980, amended 2009, Art. 212Q.
- ¹³ CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination against Women, Guyana*, para.

UPDATE: INVOLVING YOUTH

Involving Young People in Constitutional Research & Analysis

UN Women

UN Women partners with various universities from around the world to promote gender-responsive teaching and research related to constitution-making and constitution-building. The catalyst in this effort is the first global gender equality constitutional database. UN Women launched this database in December 2013 as a repository of gender equality related provisions from 195 constitutions from around the world. It is organized around five geographical regions (Africa, Americas, Asia, Europe and Oceania), 24 categories, and 19 subcategories, which include affirmative action, national/local level quotas, participation in public life, sexual and reproductive health, and sexual orientation and gender identity.

The United States Institute of Peace (USIP) was founded by Congress in



Second International Symposium on Gender, Law and Constitutions
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1984 as an independent, national institute, dedicated to the proposition that peace is possible, practical, and essential for U.S. and global security. The Institute pursues this vision of a world without violent conflict by working on the ground with local partners. USIP provides people, organizations and governments at every level with the tools, knowledge, and training to manage conflict effectively. USIP has long been committed to advancing the broad inclusion of women in peace and security processes. The Institute recognizes that women must be critical actors in all our efforts to achieve sustainable peace and stability.

UN Women and USIP strongly believe that the implementation of the 2030 Agenda for Sustainable Development signals an important need to invest in the next generation of leaders to serve as effective custodians of sustainable development. In this context, the two organizations co-hosted an international symposium entitled *Ensuring Gender Equality in Constitutions: Engaging the Next Generation of Stakeholders*, in Washington D.C. at the United States Institute of Peace from April 12-13, 2017.

The participants comprised 56 students and their law professors from 11 universities to share the findings of research undertaken on various topics related to women's constitutional rights. The universities represented were the University of Chicago, Columbia University, University of Pennsylvania (USA), Adam Mickiewicz University (Poland), University of Birmingham, University of Westminster (UK), Università Bocconi, Università degli Studi di Milano (Italy), Universidad de Alcalá, (Spain), the



Dr. Phumzile Mlambo-Ngcula speaking the Second International Symposium on Gender, Law and Constitutions held in April 2017. Credit: U.S. Institute of Peace

Hebrew University of Jerusalem (Israel), and the University of Malawi (Malawi). Professor Beth English, Woodrow Wilson School of Public and International Affairs at Princeton University was also invited to the event. During the opening ceremony, Ms. Ulemu-Hannah Kanyongolo of the University of Malawi, elaborated on the constitutional reform process that had recently taken place in her country and what these reforms mean for girls in Malawi (see p.13 for more details).

Students congregated in four groups to facilitate their research presentations, which spanned a wide range of topics such as harmful practices, discrimination in family law, property rights, women in leadership, and legislative advances in women's rights. The symposium also included a public event on the sub theme: "Conflict and Constitutions: Ensuring Women's Rights." Kathleen Kuehnast, Director, Gender Policy and Strategy of USIP provided welcoming remarks,

while Professor Susan Deller Ross, Professor of Law, Georgetown University moderated the panel discussion. The panelists consisted of Dr. Phumzile Mlambo-Ngcuka, Executive Director, UN Women; Habiba Osman, Program Specialist, Elimination of Violence Against Women and Girls Program UN Women; Jason Gluck, UNDP Policy Specialist, Political Dialogues and Constitutional Processes; Robin Lerner, Senior Adviser and Counselor in the Secretary of State's Office of Global Women's Issues, US Department of State; and Justice Yassmin Barrios Aguilar, President Judge, High Court, Guatemala.

The two-day symposium concluded with a commitment from students, scholars, and law professors to foster cooperation, networking and enhanced gender mainstreaming in teaching, learning and research in constitutional developments worldwide.

What is the United Nations doing in the area of 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.

GUYANA

Constitutional Reform in Guyana

Guyana has a history of racial division and ethnic-political tensions that precedes its 1966 independence and continues to shape the socio-economic and cultural aspects of life. While daily interactions among the different social groups are typically peaceful, latent ethnic tensions tend to surface during heated political occurrences, particularly elections, between the two largest political parties and their historical majority ethnic constituents – the PNC and Afro-Guyanese and PPP and Indo-Guyanese.

In May 2015 a coalition of two political entities, A Partnership for National Unity (APNU) (led by the PNC/R) and the Alliance for Change (AFC), secured a thin majority in the polls and elected retired Brigadier David Granger as the 9th President of Guyana. During the electoral campaign, the APNU+AFC coalition had actively advocated for Constitutional reform.

Guyana's current constitution is largely the product of reforms undertaken unilaterally by the PNC-led government in the late 1970s, ratified in the 1980 referendum. These reforms created a hyper-presidential system, with few legislative or judicial checks against the executive – amounting to what many Guyanese describe as a "winner take all" system where the opposition (and its constituents) may become politically and economically marginalized. By utilizing a closed list Proportional

Representation (PR) electoral system with MPs serving under the close scrutiny of the party leader, it also made MPs completely accountable to the party as opposed to the electorate. These features mean that the President wields unusually significant power for a democratic society.

Between 1999 and 2001 under the PPP (Civic)-led government, Guyana undertook an important constitutional reform process in response to the governance challenges of previous years, ethnic tensions, and repeated cycles of election-related violence. While introducing a number of power-sharing mechanisms and institutions, the reform was only partially implemented and several issues relating to the powers of the presidency, the electoral system and human rights protection remained unaddressed.

In September 2015 Prime Minister Moses Nagamootoo (AFC) appointed a 5-member Steering Committee on Constitutional Reform (SCCR) tasked to provide "recommendations for the appointment of a Constitutional Reform Commission together with the Terms of Reference and modalities for reform". The SCCR submitted a report to the Prime Minister on 30 April 2016. With this backdrop, the Prime Minister formally requested "UNDP's support for the process of constitutional reform." In response, UNDP and UN Department of Political Affairs conducted a joint constitutional reform needs assessment mission from February 6-10, 2017.

Among the issues that are likely to be central to the review include power-sharing, separation of powers, accountability, and strengthening fundamental rights. Constitutional reform is not just an opportunity for Guyana to address the existing hyper-presidentialism, "winner take all" system, and other substantive matters; it is also a potential mechanism to defuse tensions between the different Guyanese communities and promote nation building, stronger social cohesion, civic education and citizen engagement. In this regard, it is crucial that the process be inclusive and participatory, such that the political opposition and other key stakeholders – including civil society – are involved at each stage of the reform process through consultation, compromise, and credit sharing. Public education on the Constitution is also necessary to enable meaningful citizen engagement in the reform process.

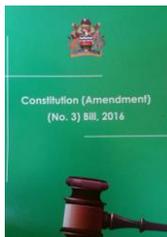
Since the UN assessment mission, the Government submitted a draft bill to Parliament in July 2017 for review by the Parliamentary Standing Committee on Constitutional Reform on the creation of a Constitutional Reform Consultative Commission. Bipartisan support would be important for a bill on constitutional reform – not only because many of the most important amendments will require a two-thirds majority vote (which the ruling party does not enjoy alone), but also because the process will have missed an opportunity to strengthen social cohesion and national unity.

UNDP is drafting a project document with UN-DPA for consultation with the Government, Opposition and civil society to support the Constitutional Reform process.

Briefing prepared by:

UNDP Guyana Office

MALAWI



Reforming Gender Discrimination in Law through Constitutional Review:

In February 2017 the Malawi Parliament passed two constitutional amendments to protect children against early marriage.

The amendments align the constitutional age of marriage and definition of a child with Malawi's international and regional obligations under the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the Protocol to the African Charter on Human and Peoples' Rights on the

Rights of Women in Africa, the African Charter on the Rights and Welfare of the Child and the Southern African Development Community Protocol on Gender and Development. The constitutional amendments also align with Sustainable Development Goal 5 on gender equality aimed at ending all forms of discrimination against women and girls everywhere by 2030. Noting Malawi's international obligations under CEDAW, the Committee, in its 2015 Concluding Observations, urged Malawi to "take all the necessary measures, including by amending its constitution, for the harmonization of the minimum legal age of marriage of 18 years for girls and boys, as provided for in the Marriage, Divorce and Family Relations Act and in accordance with the Convention."¹ The 2015 Shadow Report from Civil Society, echoed the CEDAW Committee's recommendations and called upon the State to review the constitution to "repeal Section 22(7) and set the minimum age of marriage to 18", "harmonise all relevant laws

regulating the age of a child in order to firmly set the limit to 18 years," "operationalize the Marriage, Divorce and Family Relations Act without further delay," and lastly, "raise awareness in communities on the dangers of early marriages" to ensure speedy and progressive operationalization.²

The amendment process involved a mobilization of the UN system, collaboration with the Ministry of Justice and constitutional Affairs, the Women and Law in Southern Africa, a civil society organization, and male and female traditional leaders.

The constitutional amendments are a critical step towards empowering women and girls with equal rights and ending child marriages in Malawi. The reforms will also have a catalytic impact on the elimination of discriminatory laws more broadly and accelerate the achievement of substantive equality in Malawi. However, gender-discriminatory laws are often rooted in



Malawi. Scenes from the CSW61 side event 'Opportunities for women to move up value chains in Malawi through economic empowerment for the vulnerable and most excluded,' organized by the Mission of Malawi and UN Women at the United Nations on March 13, 2017. Credit: UN Women

discriminatory social norms, which are pervasive and difficult to change. It is therefore important to publicize these amendments widely. The Committee on the Rights of the Child, in its 2017 Concluding Observations, noted that it is important that changes in the law relating to the age of marriage are publicized and given “wide public awareness”.³ UN Women Malawi is therefore partnering with networks of civil society organizations to shift perspectives among both lawmakers and the public. In partnership with the UN system, UN Women Malawi, will continue to support the Ministry of Gender and Justice to harmonize the new constitutional amendments and the various pieces of discriminatory legislation against women and girls.

¹ CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination against Women, Malawi*, para. 51, 24 November 2015, CEDAW/C/MWI/CO/7, available from [here](#).

² *UN Convention on the Elimination of Discrimination Against Women (CEDAW) CSOs Shadow Report for Malawi 2015*, Compiled by Women and Law in Southern Africa Research and Education Trust Malawi (WLSA-Malawi) and Faculty of Law, Chancellor College, University of Malawi for Malawi CSOs, (2015), p. 54-56, available from [here](#)

³ Committee on the Rights of the Child, *Concluding Observations on the Combined Third to Fifth Periodic reports of Malawi*, para. 13, 6 March 2017, CRC/C/MWI/CO/3-5, available from [here](#)

Briefing prepared by:

Clara M.W. ANYANGWE, Country Representative, UN Women Malawi
Habiba Rezwana Osman, Program Specialist, UN Women Malawi

LIBERIA

Deepening Citizen’s Engagement in the Constitutional Review Process in Liberia

As the constitutional reform bill works its way through the Liberian

legislature, UNPD and partners continue to engage the legislators and general public on ways reforms could provide direct benefits to some of Liberia’s most vulnerable citizens. As previously reported in the UN Constitutional (see, for example, UN Constitutional Issue #6), the Liberian Constitutional Review Committee (CRC), after dozens of public consultations and a National Conference, submitted 25 proposed constitutional amendments to the President in August 2015. The President then forwarded the proposals to the legislature in September 2015, along with her personal recommendations in a cover letter, for review and action. To date, the legislature is still considering the proposed amendments.

As is often the case with constitutional reform, consensus within the House of Representatives and Senate (both of which need to approve the amendments by a two-thirds majority in order for the amendments to continue on to national referendum for final adoption) has been difficult. In late 2016, the House took up the proposals and consolidated and reduced them to seven proposals, covering a range of

issues including reducing the terms of the President, Vice-President, and Members of the House of Representatives to 4 years and of the Senators to 6 years; enhancing women’s participation in governance and national Affairs; land ownership; and making local officials directly elected. Some of the more controversial items from the 25 proposals, such as restricting citizenship to only persons of negro-descent and restricting dual citizenship, were referred back to committees for further discussion, while the most controversial proposal – constitutionally declaring Liberia a “Christian Nation” – was rejected outright.

The Senate has moved more slowly, questioning the procedural manner under which the constitutional review has taken place (some Senators object to the use of the executive-appointed CRC) and discussing whether to consider the 25 proposals that came out of the National Conference or to widen the scope of review. With the Fall of 2017 dominated by legislature and presidential elections, the prospect of legislative approval becomes more remote. Undeterred, Liberians, with support from UNDP,



Liberia. Snapshot from election day 2017. Credit: UNDP Liberia

continue to engage on multiple fronts to promote the reforms and educate legislators and citizens about them. This includes marshalling the political 'good offices' of the UN Mission in Liberia (UNMIL), which has been intensely engaged in advocacy around the constitutional review and other pending critical legislation; including the Local Government and the Lands Rights Acts, which also underpin the constitutional reform.

The Liberian Law Reform Commission (LRC), with UNDP's support, is working with Liberians CSOs to engage both the House of Representatives and Senate in round table discussions to help legislators reach consensus and move the reform process forward. Roundtable discussions were held in Buchanan City, Grand Bassa County, from June 1-2 and July 14-15, during which the

joint legislative committees from the Liberian Senate and the House of Representatives discussed the amendment process and whether to keep the current process limited to the proposals submitted by the President or expanding the process to address any constitutional matter. The roundtables ended with both chambers resolved to individually consider and vote on a framework to move the process forward.

As the amendments work their way through the legislature, UNDP continues to engage civil society and local stakeholders to deepen citizens' engagement in the constitutional review process and their understanding of the core issues that underlie the reforms. For many Liberians, this is the first time they are being exposed to, let alone debating, crucial matters of constitutional

governance, service delivery, and fundamental rights. At one meeting, conducted in Yawuli, district 5, Margibi County and convened by Liberian CSOs with UNDP support, a local resident weighed in on matters of traditional norms, gender rights, and early marriage, noting: "Since I was born, this is the first time I see they come ask us about the thing they doing in Monrovia." The public outreach not only provides the opportunity for many indigenous Liberians who would not ordinarily participate in these discussions, it also contributes to a greater sense of a shared future for Liberia.

Briefing prepared by:

UNDP Liberia

LIBYA

Constitution Making in Conflict

On 29 July 2017, the Constitutional Drafting Assembly (CDA) reached a key milestone in Libya's constitution-making process by passing a proposal for a constitution. After weeks of discussions on the text, 43 out of the 44 CDA members present voted in favor of the draft, providing the necessary quorum for a valid vote. Overall, the constitutional proposal had broad support from CDA members across all three of Libya's historical regions. Nonetheless, the vote was not immune from the tense political reality on the ground. Immediately after the vote had taken place, the CDA headquarters in the Eastern town of Al-Bayda was surrounded by a crowd who demanded that the CDA vote again. After some negotiation, the crowd withdrew and no further vote took place. Despite this minor disruption, the passage of the constitutional proposal indicated significant progress on the part of the CDA, which was elected in 2014 to produce a draft constitution within four months of its election. Shortly after starting its work in April 2014,



Libya. Participant in the Youth for Reconciliation Conference held in May 2017. Credit: UNSMIL

serious conflict broke out between opposing groups from different towns and regions with fundamental ideological differences, interrupting the CDA's work.

The conflict reflected deep, unaddressed differences over the character of the country and different visions of the path forward, which, naturally, came to be reflected in the CDA. One fundamental issue is how the three historic regions of Libya will form a united country, whether through a decentralized or federal model and what that would mean in practical terms. After the 2014 conflict, the CDA produced two draft constitutions but neither achieved the majority of votes required under the 2011 Constitutional Declaration.

The signing of the Libyan Political Agreement in December of 2015 provided new impetus for the constitution-making process and a new deadline of 24 March 2016 for the CDA had to finalize a draft constitution. A new draft was put to a vote in April 2016, but a number of CDA members boycotted the proceedings over a number of substantive issues in the draft text, including: the role of Islam in legislation, the allocation of legislative seats by geography and not based on population, the powers of a second chamber, the distribution of sovereign wealth and the rights of women and minorities.

There was no one issue uniting those opposed to the text, making it harder to arrive at compromises that would enable more CDA members to vote for the text and allow its adoption. After the text was adopted by 37 votes, the CDA was taken to court by some of the boycotting members in protest at the internal change of rules that had preceded the vote and allowed the adoption with four votes less than required by the Constitutional Declaration. The court ruled against the change of rules, effectively negating the adoption of the text. The

court also upheld the expulsion of the chairman of the CDA for being a dual national – which should have precluded his membership from the outset according to Libyan law.

Whilst the court cases were ongoing, the constitution-drafting process was uncoupled from sensitization and outreach, so that activities by a number of Libyan and international NGO's were not related to a specific text but rather on the constitutional process and issues more generally.

In January 2017, the CDA elected a new chairman, who has driven the process forward as pressure on (and criticism of) the CDA mounted. A consensus committee was formed in March 2017, composed of both those who had signed the April 2016 draft and those who rejected the draft or boycotted the process. The amended draft the consensus committee produced reflected a number of compromises and many of the boycotters subsequently rejoined the CDA to work together to debate and finalise the new text.

The constitutional proposal passed on 29 July 2017 was a significantly revised version of the text produced in April 2016, and reflected some substantive alterations which were demanded by the boycotting members who had not signed on the previous draft. These included: identifying Sharia law as the source of legislation; designing senate formation to allow for significant geographical representation of Libya's three regions; measures to safeguard women's rights; and recognizing Libya's minority linguistic and cultural rights and freedoms.

Despite the increased unity over the draft, there still remains some opposition. Shortly after the 29 July vote, a case was filed against the validity of the vote on the basis that it was held on a Saturday. The court has frozen the validity of the vote until it has considered the case, but many

observers are not convinced by the merits of this case, believing rather that the process has been frozen for political reasons.

The constitutional framework is an important element of the UN's Action Plan for Libya, announced on 20 September 2017 at a High Level Event on Libya by the Secretary General's Special Representative and Head of the United Nations Support Mission in Libya, Dr. Ghassan Salamé. The Plan calls for a clear constitutional framework as the base for parliamentary and presidential elections, marking the end of Libya's political transition.

Briefing prepared by:

Anwar Darkazally, Political Affairs Officer, UNSMIL

PHILIPPINES

Constitution Making, Federalization, and the Bangsamoro Peace Agreement

On August 9, President Duterte announced a plan to appoint 24 commissioners to draft amendments to the Philippines' 1987 constitution. While the Government of the Philippines had intended to launch the full process of the transition to a decentralized—potentially federal—system of governance by early 2017 (Duterte originally announced the formation of a constitutional commission in December 2016), two factors led to the delay. The first was the commitment to the Moro Islamic Liberation Front (MILF) that legislation establishing the Bangsamoro autonomous entity would be passed before the process of constitutional reform, and as a prelude and a possible model for federalism. However, and due to political delays in establishing the joint Government-MILF body that drafted the legislation, the legislation was not transmitted to the Congress till July 2017. Second, since May 2017 the Government and

Moro leadership have been invested in addressing the crisis created by the siege of the Moro city of Marawi by an ISIS-linked radical group, with much national and international attention focused on ensuring speedy recovery from a conflict that destroyed a significant portion of the city and displaced its entire population.

The Marawi crisis has heightened Congress' awareness of the critical importance of passing legislation on Bangsamoro autonomy in the near term before more disgruntled Moros take to violent extremism. However, some measure of convergence will be needed in short term among Moro leaders, and also between them and the Congressional leadership, as to how special autonomy for Bangsamoro will be aligned with a new constitution for the Philippines. Through the UNDP-supported Insider Mediators' Group and in partnership with independent institutes, UNDP has supported these conversations in the first part of 2017, which have yielded some important political shifts. The MILF, which has insisted on the 2014 peace agreement that it signed with the government as being the only basis for autonomy, has made an effort to better understand the potential opportunities provided by federalism. The Moro National Liberation Front (MNLF, which signed a peace agreement with the government in 1996), had been more receptive to the federal path but is now willing to follow a MILF-led process for special autonomy, thus bringing the two groups closer together. The Bangsamoro Transition Commission is expected to convene a formal Moro dialogue around this and related issues in the near future, and UNDP has engaged the chair on how best it could support the process.

UNDP has also been requested by the staff of the Senate President to support a number of studies regarding the operational dimensions, including costs, for a transition to a federal system. These will be commissioned

immediately on the announcement by the President of the membership of the Constitutional Review Committee, and is one way UNDP will contribute to the forthcoming constitutional reform.

Briefing prepared by:

Chetan Kumar, UN Senior Advisor on Peacebuilding, Philippines

TUVALU

Constitutional Reform in the Pacific: the Tuvalu Constitutional Review Process

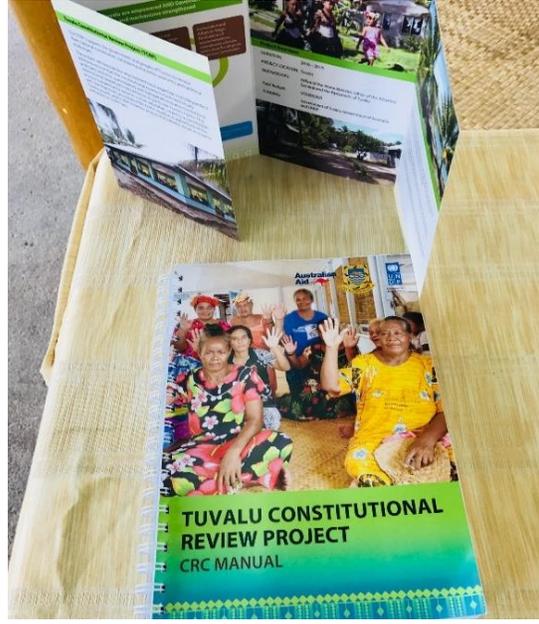
Tuvalu's Constitution dates from 1986, and although the Constitution has generally served the country well there are a number of internal political concerns that have prompted the Government to consider a revision of the constitution. One set of concerns involves the system of government. The current constitution sets up a parliamentary system on the British model, but textual ambiguity on executive-legislative relations has led to occasional constitutional crises, most recently in 2013 when the then-Prime Minister refused to call parliament into session for nearly eight months due to fear he would face a vote of no-confidence. There is also a concern that governments have been too unstable: between December 2000 and December 2010, the country had seven prime ministers – with one exception governments lasted an average of roughly a year each. Several times in their recent history, Tuvaluans have considered changing their political system in various ways, but there has been no consensus on how to do so.

Other issues prompting a constitutional review include the role of religion and religious freedom, which has led to social conflict on some of the outer islands. The issue is a delicate one, as it relates to the role of the Falekaupule, the traditional mechanism of island governance. There are also various ways in which

the constitution does not reflect modern trends in constitutional drafting. Issues identified by Tuvaluans include virtual silence on gender and marginalized populations such as the disabled; silence on socio-economic rights and environmental issues; and a rather inaccessible style of writing. For these reasons and others in 2016 the Parliament of Tuvalu, sitting as a Constitutional Review Committee (CRC), began the process of examining the constitution with an eye towards substantial reform.

Since the establishment of the CRC, the constitutional review process, which is being supported through a UNDP-led support project, has made considerable progress. Two major workshops strengthening the technical and administrative capacity of the CRC have been conducted during which key legal and policy frameworks for the working of the committee and also a support secretariat were tabled and approved. UNDP has also continuously been providing technical and policy advisory support to the CRC through the Secretariat, which includes the key research topics for consideration, key process decisions as the review progresses from one-stage to the other, and most importantly a public civic education campaign. The civic education campaign, which commenced in summer of 2017, saw the distribution of numerous pamphlets and issues based study papers, all available in both English and Tuvaluan, to ensure that they are fully comprehensible to the key stakeholders --- the Tuvalu citizens.

Furthermore, the CRC is also quite actively engaging with Tuvaluan's both living in Tuvalu and in the diaspora, such as Fiji and New Zealand. Two major outreach workshops were conducted in Fiji, which saw around 387 participants (around 60% women) and in New Zealand around 100 participants (around 60%. When considering the



number of attendees, one must bear in mind that the total population of Tuvalu is only around 11,0971. Both outreach events were instrumental in advocating the need for citizen involvement but most importantly to ensure citizens are aware that their voice is important in the review process and building their understanding on the provisions of the current constitution.

The outer island outreach has just commenced and is being preceded by a series of radio campaigns outlining

the review process' key steps, the mandate of the CRC and to some extent the contents of the constitution. This review process, unlike the previous minor review processes, includes extensive engagement with citizens and thorough examination of the constitutional provisions, which over the years have not managed to solve key conflicts resulting from either constitutional ambiguity or imprecision.

UNDP will continue to support the process, which extends into 2019, with the aim of having a revised constitution ready by September 2018. The project is a result of the strong partnership between the Government of Tuvalu, Government of Australia and UNDP.

Briefing prepared by:

Mohammed Mozeem, Governance Analyst, UNDP-Pacific Office

YEMEN

Preparations to Complete the Constitution Making Process in Yemen

Yemen's civil war is in its third year and its humanitarian crisis has escalated to alarming proportions. And while peace, security, and alleviating the suffering of Yemeni citizens are the United Nations' top priorities, it is not forgotten that a trigger for the current violence was disagreement over the constitutional draft produced in the aftermath of the National Dialogue Conference (NDC), and that any durable peace will have to be grounded, in part, on broad-based consensus over fundamental and constitutional matters.

Yemen's constitution-making process followed a National Dialogue Conference (NDC) that took place in 2013-14. In January 2015, a Constitution Drafting Committee completed a draft constitution, but that document was not adopted as a result of strong disagreements between political forces, most particularly on the number of regions and the delineation of their borders. The violent conflict that ensued complicated matters further, delaying notably the prospects for effectively addressing the terms of the constitutional debate. The Office of the Special Envoy of the Secretary General to Yemen (OESGY) is

¹ World Bank 2016 figures.

working with Yemeni stakeholders to lay the groundwork for the resumption of the constitution making process after the signing of a peace agreement. It is thus part of a more comprehensive conflict transformation process and shall both fit within and shape the peace-making process.

This work is being conducted in close consultation with Yemeni political constituencies, legal community and civil society activists. It also involves the contribution of leading international experts who had worked on Yemen and/or on comparable experiences. They include experts from the UN DPA Standby team, the UNDP constitutional specialist, as well as scholars from institutions such as the Max Planck Institute for Comparative Public Law and International law, the European University Institute, Edinburgh University, Humanitarian Dialogue and International IDEA.

Constitutional dialogue

A key element of the OSESGY's approach towards the Yemeni constitutional process consists in launching a national constitutional dialogue forum. This forum consists of a series of meetings that bring together, under different formats, Yemeni experts, civil society activists, and politicians, as well as youth, women, and international experts. The forum provides a venue for direct and in-depth exchange amongst participants who participate in their personal capacity and are not asked to reach agreements nor to negotiate in any official capacity. It aims at helping Yemenis develop a common understanding and shared views on the main challenges in terms of process-design and substantive constitutional issues. It also aims at ensuring that any international support will be based on the inputs, needs and expectations of national stakeholders

The constitutional dialogue forum operates under the assumption that the design of the upcoming constitutional process will have to be enshrined in the peace agreement and rest on an accepted legal framework. This includes the governing principles and objectives, and operationalizing institutions that are to govern the process. The same framework shall also adopt reasonable timelines, develop plans for public participation, and ensure the effective coordination and delivery of international support.

Given the fragmented political scene, the actual constitution-making process is most likely to be incremental and will likely move forward gradually as some security stabilization, economic recovery, humanitarian relief and reconstruction are achieved. The adoption of confidence-building measures are likely to facilitate the conduct and completion of the constitution-making process and encourage more groups to join the peace process.

The scope of review:

Yemeni stakeholders appear to generally agree on the Outcomes of the National Dialogue Conference (NDC) and the Constitutional Drafting Committee's draft of January 2015 as the starting points for their discussions. There are, however, strong disagreements on the details, including on the nature and number of regions and the division of power in the new federal state. In addition, the 1800 Outcomes of the NDC, listed in 400 pages and which are supposed to guide the constitutional drafters work, remain, in some places, vague, incomplete, and inconsistent. As they undertake to complete the constitutional process, Yemenis will need to work through these challenges as they decide on the scope of the planned process.

While focusing on facilitating a peace agreement that will end the current war, the OSESGY keeps engaging with

all Yemeni constituencies while preparing the long-term tasks of the upcoming transition. OSESGY shall continue to assist Yemeni stakeholders in developing and enshrining interim constitutional arrangements and establishing a clear mechanism for measuring the draft constitution against the NDC Outcomes. It shall also provide mediation and technical support to the different bodies tasked with completing the constitution, with a particular focus on the regions issue. OSESGY shall also assist Yemenis to develop a test mechanism to assess the viability of the proposed future institutional arrangements. Alongside these tasks and objectives is the national constitutional dialogue forum, where Yemenis will continue to be able to come together, share views, and test visions for peace and constitutional development in Yemen.

Briefing prepared by:

Omar Hammady, Political Affairs Officer/ Constitutional Adviser at the OSESGY

Highlights of papers on constitution-making offering insights into current debates, including articles from academia, policy- or practitioner-oriented organizations, and material produced by UN entities.



From paper to lived reality: Gender-responsive constitutional implementation in Nepal

By IDEA

This practice-oriented Discussion Paper explores the dynamics and processes of constitutional implementation and the particular challenges of gender-responsive constitutional implementation. It draws on a workshop convened by International IDEA in Kathmandu, Nepal, in February 2016.



Constitutional Advice and Transnational Legal Order

By Tom Ginsburg

The paper surveys the history and practice of providing outside constitutional advice in constitution-making and the transnational nature of the process. Published in the 2 UC Irvine Journal of International, Transnational and Comparative Law (2017).



Tiered Constitutional Design

By Rosalind Dixon & David Landau

The paper explores a “tiered constitutional design” model, and the ways in which it could help combat anti-democratic tendencies in contemporary constitutionalism. Published in the George Washington Law Review (forthcoming); FSU College of Law, Public Law Research Paper No. 839 (2017).



Sub-State Constitutions in Fragile and Conflict-Affected Settings

By IDEA

This workshop report follows the Third Edinburgh Dialogue on Post-Conflict Constitution Building, a series of events co-organized by IDEA and Edinburgh University. The report explores the process and design of sub-state constitutions in fragile and conflict-affected settings, and their role in the broader political settlement and/or peacebuilding process.



Discretionary Referenda in Constitutional Amendment

By Richard Albert

This working paper draws from Canada, Colombia, France and the UK to develop a typology of discretionary referenda in constitutional amendment, to examine why constitutional actors use discretionary referenda to amend the constitution, and to situate their use within the larger phenomenon of the circumvention of formal amendment rules. Published in Working Paper, Boston College Law School Legal Studies Research Paper No. 460.



Constitution-building in states with territorially based societal conflict

By IDEA

This workshop report follows the inaugural Melbourne Forum, which brings together academics and practitioners from across Asia and the Pacific to discuss constitution-building issues, co-organized by Melbourne University Law School and IDEA. This report

focuses on contexts where there is a territorially defined social conflict as a principal driver behind constitutional reform.



Territorial designs and international politics: the diverging constitution of space and boundaries

By Boaz Atzili and Burak

Kadercan

This paper introduces the concept of “territorial designs,” pertaining to the delineation of the external boundaries, to the constitution of the society within these boundaries, and to the interaction between delineation and constitution. Published in 5 Territory, Politics, Governance (2017).



Primer

Government Formation and Removal Mechanisms

By IDEA

The IDEA Primer series provides explanations and comparative approaches to various elements of constitutional design. This Primer discusses the formation and dismissal of governments in parliamentary systems, including key concepts, various forms of negative and positive government formation rules, and the appointment and dismissal of ministers other than the prime minister.



Women's Struggle for Citizenship: Civil Society and Constitution Making after the Arab Uprisings

By IPI

This paper focuses on equal citizenship as a way to safeguard women's rights by promoting equality and confronting discrimination. It examines in detail the constitution-drafting processes in Egypt and Tunisia, which became the key instruments for enshrining citizenship rights and the transition to democracy.

Constitutional newsletters

International IDEA's ConstitutionNet Newsletter

The ConstitutionNet newsletter provides a monthly digest of news of constitution building processes from around the world, analysis and the latest resources, events and vacancies at International IDEA. To read the latest newsletter, and subscribe to future issues, click [here](#).

Constitution Transformation Network Newsletter

The [Constitution Transformation Network](#) (ConTransNet) is a network of expert scholars and practitioners of constitutional transformation, set up in 2016 at the University of Melbourne Law School. The [ConTransNet](#) bi-monthly [ConTransNet](#) Newsletter, which shares information on global constitutional developments and the work of the Network's members, can be found by clicking this [link](#).

Announcement

The Oslo Forum Peacewriter Prize

The Centre for Humanitarian Dialogue (HD) is launching the second edition of the Oslo Forum Peacewriter Prize, an essay competition seeking bold and innovative responses to today's peacemaking challenges. Submissions should take the form of an analytical essay relevant to the practice of conflict mediation.

Entries submitted by 14 January 2018
More info [here](#).

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Empowered lives.
Resilient nations.

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

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