

SOUTH-SOUTH DIALOGUE ON CONSTITUTION BUILDING PROCESSES

*“Strengthening Constitutional Legitimacy
through inclusive and participatory drafting processes”*

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Background Paper*

[DRAFT 1]

□ This background paper is adapted from two papers, “*Constitution Building Processes and Democratization*” (2006) and “*The Role of Constituent Assemblies in Constitution Making*” commissioned by International IDEA and authored by Prof Yash P. Ghai

I INTRODUCTION

Overview

1. Since the end of 2010, historic events in North Africa and the Middle East have changed or are threatening to transform the political landscape of much of the region and the Arab world in, hitherto, inconceivable proportions. In Egypt, Libya and Tunisia, mass popular protests, led by marginalised youths have resulted in the demise of the autocratic regimes of Zine el Abidine Ben Ali, Hosni Mubarak and Muammar Gaddafi – each of which has been in power for over two decades. In Bahrain, and Yemen and Syria (where protests continue to date), incumbent regimes have also been called to step down and pave the way for new political reforms. To pre-empt the protests and similar outcomes, other regimes in the region have since been forced to launch reform processes. In Morocco, the monarchy quickly averted the crises through widespread reforms in July. Earlier in April, Algeria’s Abdelazziz Bouteflika and Jordan’s King Abdullah II took similar steps towards political reforms.
2. In cases where protests met with some degree of success, a common concession made to protesters was constitutional reforms. In Morocco, a new constitution was promised and fast-tracked for adoption by popular referendum in July. Algeria’s Bouteflika promised constitutional changes and reforms to the electoral law while Jordan’s Abdulla II set up a Royal Commission to recommend changes to the constitution. Following the demise of Tunisia’s Ben Ali, Egypt’s Mubarak and Libya’s Gaddafi, the three countries are now in transition phase, all preparing for constitutional reform process that will hopefully result in new and nationally owned democratic constitutions, as well as catalyse democracy and fair economic opportunity for all segments of society.
3. The current dynamics in North Africa and the Middle East mirror similar events that have resulted in constitutional reforms elsewhere in the global south over the last three decades. Examples include the Philippines (1987) Brazil (1988), Benin (1990), South Africa (1994), Thailand (1997), Indonesia (1999), Ecuador (2008), and Bolivia (2009). In each of these cases, constitution building was, amongst other things the result of pressure (mostly national but also external) to democratise, following disillusionment with existing regime structures.

Purpose and Structure of the Background Paper

4. Reflecting on the above observations and the events that continue to unfold in North Africa and the Middle East brings out one important issue: constitutions and the processes through which they are made [constitution building] remain, and will continue to be relevant especially in contexts of conflict and political transformation. From a 'process' perspective, a fundamental question emerges from this assumption – what is most critical for constitution building practitioners to consider when designing national processes of constitution building? As the answers to this question will mostly depend on the particular context, it will be presumptuous to attempt to provide clear cut solutions here. This background paper therefore seeks, instead, to unpack the question, flagging options and highlighting their challenges and opportunities for further interrogation by participants to the dialogue. Following the introductory section (I), the paper is further divided into five sections examining the notion of constitution building (II), the relevance of constitutions and constitution building processes (III), practical considerations in the process design of constitution building (IV), public participation (V) and a conclusion (VI).

II PROBLEMATISING CONSTITUTION BUILDING

The Notion of Constitution building

5. Any discussion around constitution building must necessarily start an enquiry into the meaning and understanding of the term 'constitution building'. International IDEA, in the recently published policy paper *"Constitution building after conflict: External support to a sovereign process"* identifies three dimensions of constitution building. The first relates to the founding of new structures as well as the re development of existing ones as part of an ongoing process. The second implies developing and adding long term value to governance and the political system. Finally, constitution building, involves *"reducing exclusivity [...], taking a long term perspective and following an overall aim or design for the 'social contract' of government as a whole, rather than occasional changes to deal with highly specific problems"*. Hence, a distinction is made with the language of 'constitution making' which creates artificial boundaries to the process by confining it to the drafting, enactment and promulgation of the constitutional text. Constitution building is therefore not seen as a one off event but rather just one element in a larger process of change that affects the constitution (International IDEA,2011:11)

6. This approach is consonant with that of Ghai and Galli (2006:9), who see constitution building as an evolutionary process that stretches and involves the nurturing of the text and facilitating the unfolding of its logic and dynamics. Having addressed the question of “what is constitution building”, a second and necessary enquiry must look into the functions of constitution building to understand its relevance in the process of democratization.

III RELEVANCE OF CONSTITUTION BUILDING

Importance of constitution building processes

7. Defining fundamental rules for governing a political community, sharing power, managing and meeting expectations of its members and constituents, historically, has been and remain key features of constitutional design. Viewed from this angle, constitution [building] is essentially a state /nation building endeavour (Hart 2010) - regardless of whether it is a state in transition, formation, or one emerging from protracted conflict. In societies in or emerging from conflict, constitution building can therefore play many important functions, including, but not limited to the following:
 - Facilitate governance and political transitions by creating a common vision for the future of the state and a road map on how to get there,
 - Enhancing the process of reconciliation and trust building among groups that have been in conflict for long
 - Empowering people and preparing them for public life,
 - Elaborating national goals and broadening the agenda for change
8. Constitution building is also increasingly assuming important economic functions as it creates the opportunity for developing the framework for the institutions and mechanisms that promote economic growth, development and poverty reduction as well as critical choices on wealth sharing, anti-corruption measures, economic rights, and legal empowerment of the poor. The political protests across Tunisia, Libya, Egypt, Syria, Yemen and other countries in the region, that have translated into demands for constitutional change had their roots in the economic frustrations of a largely youthful population suffering from high unemployment rates and lack of economic opportunities. In this context, their demands, not only for regime change, but also for new,

democratic and nationally owned constitutional framework developed through transparent and participatory processes, serves to highlight the importance of constitution building as a tool for addressing the economic ills and injustices of the past.

9. For the reasons discussed, constitution building has gained such importance in state building and democratization that norms and principles have developed at national, regional and international levels to inform processes of constitution building.

Norms and Principles of Constitution building

10. There are many sources for the norms and standards that inform the practice of constitution building. Some are national – determined by the national legislature, or the product of a compromise agreement between different opposing parties. National sources also include local customs and legal traditions. Others are extra national and framed in international legal instruments as well as other regional conventions. These have also informed the development of national norms and standards. Key examples include the two international human rights conventions - the United Nations Declaration of Human Rights (1948, article 21) and the International Covenant for Civil and Political Rights (1977, article 25); the African Union Charter on Democracy, Elections and Good Governance (2001, article 2), and the Harare Commonwealth Declaration (1991, article 4), all of which have recognised the right to public or [democratic] participation in the conduct of public affairs as a key principle. The Human Rights Committee created by the Protocol has interpreted this right as also applicable to constitution building.

IV PRACTICAL CONSIDERATIONS IN THE DESIGN OF CONSTITUTION BUILDING

PROCESSES

Establishing new constitutional frameworks in the wake of the Arab uprisings

11. As the uprising and transitions continue to unfold and some of the countries in the region gear up for constitutional reforms, reformists, practitioners and policy makers must address two basic general concerns. The first – a process question and most relevant for the purpose of this paper – is how to design a democratic constitution building process? What should be the key stages of the process? What institutions should drive the process? What is the appropriate role of the public? What approaches have worked (or not worked) where and why? Secondly, as Ghai has argued,

contemporary constitutions will virtually always be a negotiated document amongst the diverse communities and regions, often with conflicting interests that may derail or stall the process. This is particularly the case where the constitution building process has also been provoked by some conflict – whether past or ongoing (as is currently the case in Libya, Egypt and Tunisia). What therefore are some of those intractable issues that might result in deadlock during the drafting and negotiation process and how can they be resolved? What best practices exist for resolving them?

The pre constitution making period

- *Agreeing on rules, principles and goals setting*

12. Due to the multiple functions constitutions play in the social, economic and political development of a country, the processes through which they are made can be very complex and often divisive. Often, where the process has been provoked by past or ongoing conflict, stakeholders may disagree on the rules of the game or sequencing of events resulting in protracted processes of pre negotiations. In South Africa and Fiji, for instance, these took about three years while in Kenya, they took almost a decade. Further, where, as a result of the conflict, state institutions have been destroyed or existing institution and authorities have lost credibility and legitimacy, there is often the question of whether elections should be held before the writing of the new constitution – an issue over which stake holders may, for different reasons, disagree. The current tension between organising elections before constitutional reform (or vice versa) in Egypt and Tunisia illustrate how such disagreements can unfold and hold down the process of constitution building.

13. Further, countries engage in the process of constitution building, partly because of the socio-economic and political functions of constitutions. However, because the process will have an impact on the outcome, it creates the need for parties to set and agree on the specific goals and guiding principles of the process through which that constitution is to emerge. Why is this relevant? As seen earlier, disagreements over rules of engagement and even the sequencing of events in the transition phase – such as the tension on which between constitutional reforms and elections should come first – may become obstacles that can delay or derail the process. Such tensions may easily be addressed by reference to the goals and principles of the process where parties have previously agreed on them. This process itself raises a number of important questions, such as what is the appropriate procedure for achieving this objective? What should be the place of existing (and may be conflicting) local customs, traditions and cultures- on the one hand, and on the other,

international standards in informing the setting of goals and principles? How should potential conflicts between the two be resolved? How does one ensure that the goals and principles have been achieved and what, if any, is the validation process?

– *Interim Arrangements*

14. In the early stages, practitioners may, in some cases, also have to grapple with the issue of whether or not to put in place interim arrangements. Ghai has outlined a number of factors that can justify the establishment of interim structures: establishing and keeping a level playing field, building trust among former foes and ensuring that the constitution building process unfolds smoothly, ensuring some stability during what could otherwise be a period of turmoil; filling the vacuum created by the absence of state institutions or a system of government as a result of their losing legitimacy under the old constitution (Cambodia and South Africa); integrating in structures of the state groups who have previously been excluded or chose to stay away from governance processes, and legitimising the role of the international community whose involvement may be so extensive that its representatives need to be brought into the system of government for a transitory period (Cambodia, East Timor, Bosnia, Namibia and Iraq). Interim arrangements also allow parties more space and time for establishing a comprehensive, participatory and deliberative process. Where constitution builders have made the decision to establish interim arrangements, other questions need to be addressed to ensure a functional transition. What should be the procedure for establishing interim arrangements? For how long should the arrangements be in place (duration)? What kind of institutions should be created under these arrangements? What should be the exact role of institutions and authorities established under the interim arrangements? What safeguards should be put in place to ensure that interim authorities and institutions do not themselves become obstacles to the constitution building process?

Institutions and Procedures for Constitution building

15. Having addressed the preliminary issues that may prevent or slow down the kick-starting of the process, an important element that needs to be addressed are the institutions involved as well as the procedure and time lines for the constitution building process. This is usually determined by the legislature or the executive in variable formats. In the two Kenyan processes of 2000 -2004 and 2009, for instance, this was laid down in detailed acts of parliament – the Constitution of Kenya Review Act (2002) and the Constitution of Kenya (Amendment) Act of 2008. In the case of South

Africa and Iraq, these were the interim constitutions. In Afghanistan and Cambodia, these were laid down in two international instruments – the Bonn Agreement (2001) and the Paris Agreement (1991), while in the case of Rwanda and Burundi; these were laid down in the Arusha Accords. The importance of formal documents enshrining roles, timelines and procedures is that they contribute to the legitimacy of the process by providing the legal framework and articulating on the guiding principles of the constitution building process.

- *Deciding the appropriate institution or body for the constitution making process*

16. What is the proper institution for operationalising the constitution building process? This is one of the fundamental questions practitioners have to address. There is no one answer to this question, there being, after all, no “one size fits all” approach to constitution building. Constitution builders will have to look into different factors to determine this question; including local context (legal traditions, historic cultures and customs), as well as references to international practice. Three broad categories of institutions can be identified.
17. The first are institutions that are established exclusively for the purpose of the constitution building process. *Constitutional commissions* – used, for instance, in the Philippines (1987), Benin (1990), Uganda (1995), Kenya (2000-2004 and 2009), Afghanistan (2003), Ghana (2010) – typically fall under the first category. The second are institutions created or existing for both process of constitution building and other purposes. These include some *constituent assemblies* that also function as the legislative body, or *parliaments* that are also endowed with constituent power. South Africa, Nepal, India, Iraq present examples of the second category. In the third category, the responsibility might be shared between one constitution making body (*constitutional commission, national conference or constituent assembly*) created specifically for that purpose, and another ordinarily existing institution such as the *parliament*. Kenya’s 2000-2004 and 2009 processes illustrate this scenario.
18. Notwithstanding the apparently varied options, there can be no guarantee of a safe choice. Creating exclusivity in the choice of constitution building institution may put the body with constituent power in conflict with other representative institutions without constituent power. Nigeria and Uganda, for instance, represent cases where parliament (which lacked constituent power in each case) constrained the ability of bodies with constituent authority to function. Conversely, vesting one institution with both constituent and legislative authority may create room for conflicts of interest

or strain its capacity which impairs the constitution building process. This may partly explain why Nepal's constitution making process remains protracted three years beyond the original deadline. Likewise, sharing the constitution building authority, as under the third category, between an ordinary legislative body such as a parliament and a specially established constitution making institution(constituent assembly, national conference), also creates room for conflict that may be harmful to the process, especially when the consent of both institutions are crucial for passing key decisions. Kenya's aborted process of 2000-2004 illustrates this challenge. Giving these options and potential complications, what should be the criterion for making the appropriate choice(s) for a constitution building body and assignation of roles? What conditions are necessary to prevent and /or resolve obstacles and challenges to the process, regardless of the institutional options made?

- *Membership*

19. One consequence of emerging international norms that lay emphasis on national ownership, popular participation and inclusion in contemporary processes of constitution building is the expectation that conditions are made to allow for maximum broad-based participation and representation of all stakeholders in the constitution building institution. What should be the basis for this representation? Two broad options can be identified- one based on appointment, and the other based on general elections. The first has mostly been used in context where constitutional commissions have exclusivity over the process (recent processes in Egypt, Morocco), or share responsibility with other institutions (Kenya, Uganda, Benin). It has the advantage of expediency which might be relevant sometimes in cases where there is a total breakdown of state institutions and interim measures are necessary to maintain stability and prevent further disintegration of the state. However, where the basis for representation is by appointment, a common challenge it often presents is the arbitrariness that might govern the appointment process, resulting in unrepresentative institutions. In this context, who should have the authority to appoint and what should be the basis of that authority? What safeguards are needed to ensure that the authority is not abused? The second method, consisting of general elections, is mostly used in contexts where constituent assemblies are selected as the appropriate choice of institution for the constitution building process. It has the comparative advantage of being more inclusive and representative than the former given the role of citizens in directly voting for their representatives to the assembly.

20. However, where representation is to be based on elections, other questions arise that must be resolved. There is need for election procedures that would ensure full representation and inclusion of all views in the elected institution. Which among different possible electoral systems is most likely to produce this result? A second issue concerns the criteria for determining eligibility of candidates – can citizens compete as independent candidates or must they stand under the auspices of a political party? There are practical reasons for asking these questions. Consider the question of which electoral system to use. Proportional representation, as Ghai has pointed out, is often preferred over others (like first-past-the-post/majoritarian) as it produces a greater degree of convergence between the preference of voters and the representation in the assembly. Yet, this very factor may create a coalition system of parties with insufficient common grounds in terms of policies and support base. Such an outcome increases prospects for gridlock and inability of the institution to function well. The first-past-the-post system, on the other hand tends to produce more stable deliberative institutions because it usually yields a clear majority. This may, however, result in majoritarian politics and lead to the underrepresentation of other social and economic interests, increasing polarization (Iraq).
21. Given the opportunities and challenges associated with each system, what considerations must be factored into the process of making the choice for appropriate electoral system to govern the elections for the constitution making body? Likewise, a system that only allows candidates to run under the auspices of a political party (which might not necessarily represent the people nor accountable to them), ensures some discipline since they are subject to party whip, but effectively takes away the independence of the member. By contrast, independent candidates, though prone to filibustering and difficult to discipline, are more likely to represent the interest and views of the general populace, without fear or favour. How can these tensions be resolved and what conditions must be factored into resolving them?

Inside the constitution building institution: the politics of negotiation and drafting

22. As pointed out earlier, contemporary constitution building processes are increasingly involving divergent groups competing for recognition and protection of sometimes, opposing interests. This fact inevitably, creates room for conflicts and tensions resulting in deadlock that may delay or derail the process. It is necessary to consider mechanisms and channels for breaking such deadlocks when they happen. What are the various options for deadlock breaking?

- *Deadlock breaking*

23. Many options have been used in different contexts. Examples include the use of *expert panels*, *technical committees* (South Africa), *eminent personalities* with strong negotiation skills who can rise above the fray and serve as model for others (Sudan, Fiji, and South Africa), *referendums* (Uganda, South Africa, Georgia) use of *arbitration* and/or *mediation panels* (Burundi), as well as *judicial institutions* (South Africa, Kenya) and *reference to previously collected public submissions*, (Uganda). While each of these options increases the prospects for agreement, they all present a number of challenges for designers. For instance, deadlock breaking within the constitution building institution by reference to referenda can be both time consuming and expensive. Likewise, resorting to judicial institutions, though useful for resolving technical legal questions, can exacerbate, rather than resolve the conflict. The case of Timothy Njoya v CKRC and the National Constitutional Conference, which effectively brought Kenya's 2000-2004 process to a premature end well illustrates this.

24. Further, the use of judicial, arbitration or mediation institutions may only be effective in contexts where people have a culture of trust in the institutions and those sitting on them. Where members of these third party institutions are themselves nationals, there is a risk of their politicisation is real given their own interests in the choices being made? In such contexts, is it more practical to use external (international) third party institutions? Where it may be considered to be more practical to use external third parties, how does one ensure that this does not conflict with national ownership requirements? Finally, in seeking to break a deadlock, eminent personalities may risk becoming to involve in the specific disagreement that their continuous usefulness as deadlock breakers may be brought to question. In such circumstances, what is the appropriate choice for deadlock breaking mechanisms? What procedures should govern the making of these choices? How useful (or not) is it to have less or more than one mechanism for deadlock breaking?

V PUBLIC PARTICIPATION

25. Anchored in the doctrines of self determination and popular sovereignty, the requirement for public participation has become a peremptory principle of international law. Articles 21 and 25 of the UN Declaration on Human Rights (1948) and the International Convention on Civil and Political

Rights(1977), respectively recognise the right of citizens to participate in the business of 'government' and 'public affairs' either directly or through freely chosen representatives. The Human Rights Committee (in a case by a Canadian indigenous community - the Mikmaq - against the government of Canada for excluding them from a series of constitutional conferences) has held that 'public affairs' included constitutional reform processes.

26. Many reasons have been advanced to support this position. Often cited by proponents is the view that participation creates a sense of *ownership* which facilitates *acceptability*, reinforces the *legitimacy* of the document and increases the prospects of its *durability* – although it is not entirely clear what each of these terms mean. For instance, legitimacy, acceptability and ownership is sometimes used in reference only to the majority. Can a constitution, even if endorsed by a majority of voters endorsed in a referendum, be said to be nationally owned, accepted and legitimate in spite of the position of a minority who voted against it? Nevertheless, the South African experience is frequently used to bolster these arguments by participation proponents
27. Ghai has argued that this view of participation is an overly romantic picture, if not an exaggeration of the benefits it can confer. Japan, Spain, Germany, USA and many European countries present examples of successful and stable constitutions drafted through processes that were specifically designed to limit public participation and transparency. By contrast, there are many instances of participation that resulted in constitutions that were short-lived (Thailand), never implemented (Eritrea), quickly modified (Uganda) or frustrated in key respects (Ethiopia). Further, participation, if forced on state institutions might even result in the outcomes being manipulated, suppressed, or analysed with bias. Iraq, Afghanistan and Uganda all provide instances of this.
28. Furthermore, participation, while creating room for the interaction of different social forces to constructively engage and interrogate the key assumptions of the different stakeholders, also opens the door for spoilers whose sole purpose in participating may be to sabotage the process. Contrary to what may be expected or people may want to believe, not all actors in processes of democratic transitions are interested in genuine change. In designing contemporary processes therefore, the question should be less about whether and why there should be public participation but more about how public participation can be organised to generate effective and genuine democratic outcomes. This requires a realistic assessment of the challenges and obstacles to designing participation -who

within this broad notion of 'public' has legitimate interests and should therefore participate, (actors)? How should they participate, (forms)? When should they participate (at what stage in the process)?

- *The Who Question*

29. Consider the *who* (actors) enquiry, for instance, members of the public – although exceptions are not uncommon - do not generally participate as individuals. People tend to aggregate opinions and coalesce around groups that advocate the same views as them to strengthen their bargaining position. Ghai has disaggregated these groups into five main forms - *political parties* (the traditional vehicle for public participation and representation); *civil society* (usually a constellation of different nongovernmental groups); *religious groups*, *women groups*, *expert groups* and the *international community*. Others may also include *armed factions* and *warring militias*, depending on whether the process is emerging out of a conflict transformation context (Nepal, Colombia). Disaggregating the notion of 'public' in this way can be helpful in two ways. It makes it easier to recognize the interests various groups are likely to represent, determine their legitimacy which in turn helps in interrogating their motives in participating. It was hinted earlier that not all groups or members of the public participate for noble reasons. It is in this connection that the legitimacy of political parties has sometimes been questioned as they are in some cases considered to be antagonistic to popular interest. This trend was apparent in Kenya during the 2000-2004 process.

30. With regard to civil society, they can be very active (as the Kenyan [2000-2004], the Philippines [1987], and Thailand [1997] experiences show - amongst others), in driving change, in mobilising ordinary people to take active interest in the process by educating them, and broadening the reform agenda by bringing to the fore issues of only marginal significance to politicians. Yet, they can also be prone to opportunism, or may become deeply partisan, politicising the community in unconstructive ways (Kenya 2000-2004). Likewise, the international community, while bringing in expertise and funding maybe driven by the desire to promote foreign agendas, than any need to see real change in the society. In this context, how does one objectively determine – for purposes of legitimate public participation – who is a critical actor?

- *The How Question –Forms of public participation*

31. Citizen engagement in the constitution building process can take many forms, such as proposing *constitutional initiatives*; *lobbying* for reforms through elected representatives, political caucuses, action groups; *interaction* and *deliberation* in peoples' assemblies, constituency fora or turning out to exercise their civic duties to vote in elections. In fact *voting* in elections for the constitution building institutions or in constitutional referenda has been the traditional method for public participation in constitution building processes. Another important form of participation (increasingly demanded by civil society) is for involvement defining the agenda, formulating guiding principles and decision making. Each of these forms of participation, however come with challenges that can impair the process and its outcomes. Participation by voting in elections for instance exposes the public to manipulation by politicians and different interest groups, especially if people – and this is more often the case – do not fully understand the complex constitutional choices they are being asked to vote on. Voting in elections, especially in conflict-affected contexts, also increases the risk of a relapse into conflict or stalemate in the constitution building process. Likewise participation through local constituency fora or other deliberative assemblies may be a futile exercise, for as indicated earlier; the principals may ultimately ignore or manipulate the results of these processes. Because it is impractical to involve every member of the public in the process of decision making, they have to be represented by various interest groups like political parties and civil society. But as seen earlier, these groups are not always working for the general interest.

- *The When Question – Stages of Participation*

32. Although public participation is generally recognised as desirable in contemporary constitution building processes, one important reality is that the engagement skills, interests and effectiveness of members of the public may vary within different times in the process. What then should be the stages of participation? An easy way to answer the 'when' question is to consider it in the light of the different stages or phases of a constitution building process. Three broad phases are generally identified. The first is the preparatory phase, during which guidelines and parameters for the process are worked out. Second is the negotiation and drafting stage, when the key constitutional issues and choices are negotiated, finessed and framed in writing. Finally, there is the adoption and promulgation stage, which brings the constitution to life and gives it legal effect. Breaking down the question of stages of participation in this way can be useful in decision analysis, for instance, in determining who best plays or should play what role at each of the different stages in the process

(level and scope of participation), giving the potentially different levels of skills and interest, as well as how they should be engaged.

VI CONCLUSION

33. This paper demonstrates that beyond desirable normative considerations, the actual process of framing the right design process for constitution building in general is a complex endeavour involving numerous questions that need to be interrogated objectively, taking into account many different factors. In transitional contexts (a classification which fits many of the countries affected by the Arab Spring), emerging from conflict with a total or complete absence of trust among the stakeholders – as in Egypt and Tunisia - this need becomes even more pressing. As shown in the case of participation and inclusion, for instance, there are many challenges and obstacles to effectively actualising this, notwithstanding its desirability, which if not properly addressed, will defeat the entire democratic process and prevent any outcomes (including the constitution) from taking root. It is therefore recommended, for practitioners and designers to engage the process of constitution building with an open spirit - problematising all the different choices and options available, to understand their real meaning and impact with particular regard to the local context. For instance, under what conditions is participation valuable? What are the most effective ways to promote it? How do we hedge the process from spoilers who have no genuine interest in democratic change? How do we even determine who is a spoiler and who is not? Far from attempting to provide definitive answers to these questions, this paper has tried to flag and further problematize some of the key assumptions about democratic constitution building that practitioners should pay attention when aiming to carve out enduring and workable constitutional frameworks, especially in the current transitional contexts of North Africa and the Middle East.

FURTHER READING

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