

# LESSONS LEARNED FROM CONSTITUTION-MAKING: PROCESSES WITH BROAD BASED PUBLIC PARTICIPATION

## SUMMARY

The election of the Constituent Assembly in Tunisia is a milestone on the path towards a stable, peaceful and democratic future.<sup>1</sup> Now one of the most important challenges is to ensure that the people of Tunisia can adequately participate in the constitution-making process. The democratic revolution that unified Tunisians should not be translated into a technocratic process with little public involvement and understanding.

Although there are various approaches to participatory constitution-making, past decades have seen a clear trend towards broad public participation in constitutional reform all over the world. Such public participation entails the direct involvement of citizens in constitution-making, giving them a chance to influence decision-makers and the outcome of the process.

This trend is supported by international law, notably the International Covenant on Civil and Political Rights (ICCPR). The ICCPR establishes minimum obligations for participation in public affairs that are also applicable to constitution-making processes and give citizens an individual right to participate in constitution-making. While this right may be subject to conditions, namely whether citizens participate directly or through representatives, it must not be restricted in unreasonable or discriminatory ways.

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In addition to these legal requirements, broad public consultation has substantial political and practical benefits. It can support national unity, increase public understanding of the constitution, strengthen its legitimacy and acceptance, broaden the drafters' information base, foster innovative solutions and contribute to sustainable ownership for the new constitution. Overall, successful consultations can help create a positive political culture.

Successful participation depends on a number of factors. These include endorsement by all political actors, active support by the authorities, including the Constituent Assembly, a realistic timetable and a well-planned, transparent and rule-based process. Safeguards must be put in place to shield the process from being monopolised by populist movements, influential individuals or lobby groups, and partisan politics. Such measures help preserve the consensus-building opportunity that a participatory process of constitution-making offers.

These findings are illustrated by three case studies on participatory constitution-making: South Africa, Kenya and Iraq. These examples represent diverging approaches to participation and varying degrees of success and thus offer a number of lessons learned for the constitution-making process in Tunisia.

One of the primary lessons learned from these examples is that direct public participation mechanisms should be designed to complement the official process and remedy its potential weaknesses, in particular representational deficits: in transition periods, it is not unusual that a significant number of votes are lost because they go to small parties or candidates who do not make it into the Assembly. This is true for young democracies without an established political party system such as Tunisia.

Therefore it would be useful for the Constituent Assembly of Tunisia to consider:

- devoting one of its first sessions to a debate about the type, degree and modalities of public participation it deems most adequate in the current situation
- enacting suitable legal rules and procedures in order to guarantee agreed levels of consultation
- conducting public sessions and hearings, and publishing up-to-date reports on its deliberations
- establishing an outreach programme and working closely with media and civil society organisations to inform and educate citizens about its work.

The media should report on the process intensely and responsibly.

## 1. INTRODUCTION

There are different schools of thought on how to structure constitution-making. They range from a mainly expert-based drafting process or drafting by elected representatives, to a high degree of direct public participation by ordinary citizens at all different stages in the constitution-making process. These approaches are not necessarily mutually exclusive, but can be combined to complement each other and remedy respective weaknesses.

On the least inclusive end of this spectrum are largely expert-dominated procedures, with no direct involvement of citizens or civil society groups. This approach emphasises technical expertise in finding good drafting solutions and puts the focus on indirect participation, in as much as the experts are themselves appointed by elected representatives. If not complemented by other forms of participation, this process risks becoming overly legalistic, elitist and exclusive.

An alternative is that the elected representatives themselves form a drafting committee. Such an approach can achieve inclusiveness through political representation. It tends to give more influence to political parties and is therefore more promising if these parties genuinely represent the whole population, are responsive to individuals' concerns and allow for serious dialogue with institutionalised civil society actors, such as non-governmental organisations (NGOs) or trade unions.

Finally, a possibly more inclusive degree of participation can be achieved if the Constituent Assembly is directly elected by the people. However, advocates for direct participation will not be satisfied with participation being limited to the election of a constitution-drafting body. It rather puts the emphasis on comprehensive and permanent direct involvement of citizens and aims at giving them a chance to directly influence the thinking of decision-makers and the outcome of the process. Different types of direct participation are possible and have played an important role at all stages of the constitution-making process in many countries throughout the world.

In this context, it is important to ask *who* should participate and *how* should they participate? Apart from the general public (understood as the sum of citizens), a variety of other actors can be relevant: civil society organisations, NGOs, business lobbyists, professional groups, religious leaders, the institutionalised traditional media, as well as individuals becoming increasingly well organised through social networks or internet blogs. Unsurprisingly, the toolbox of potential methods and procedures for public participation is large. However, it can be categorised in terms of formal or informal modes of participation.

Formal, and often legally-prescribed, methods of public participation can widely differ in type or degree. These methods include, for example, workshops, public hearings and conferences, or the evaluation of submissions and petitions, as experience in South Africa and Kenya demonstrate.

Informal means consist of debates through the media and on internet blogs, NGO research on constitutional issues, the mobilisation of social movements and lobbying *vis-à-vis* decision-makers. The constitutional assembly and other public bodies can support public dialogue on constitutional issues by protecting free speech, committing to a high degree of transparency, actively contributing to civic education and providing debate platforms, such as internet blogs, for the ongoing exchange of ideas.

## 2. PUBLIC PARTICIPATION IN CONSTITUTION-MAKING: INTERNATIONAL OBLIGATIONS

International law establishes minimum obligations for participation in public affairs that are also applicable to constitution-making processes. Such obligations are spelled out in the International Covenant on Civil and Political Rights (ICCPR), to which Tunisia is a party.<sup>2</sup>

The right of self-determination enshrined in article 1(1) of the ICCPR includes the collective right to choose the form of the constitution or government. As regards individual participation rights, article 25 of the ICCPR requires that “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives...”

According to General Comment 25 of the UN Human Rights Committee, paragraph 6, the conduct of public affairs encompasses constitution-making processes.<sup>3</sup> In the case of *Marshall v. Canada*, the UN Human Rights Committee concluded that constitutional conferences constituted the ‘conduct of public affairs’ in the spirit of article 25 (a) of the ICCPR.<sup>4</sup> This was confirmed in the concluding observations to the 2005 state report on Bosnia and Herzegovina, where the UN Human Rights Committee recommended that Bosnia “should reopen talks on the constitutional reform in a transparent process and on a wide participatory basis”.<sup>5</sup> Consequently, every citizen has an individual subjective right<sup>6</sup> to participate in constitution-making processes. This does not mean that individual citizens have an unconditional right to

choose the modalities of such participation. Instead, it is for the legal and constitutional system of the respective state to determine whether citizens should participate directly or indirectly through elected representatives.<sup>7</sup>

However, according to article 25 of the ICCPR, these modalities must not place restrictions on participation that are either unreasonable or discriminatory. Thus, any condition placed upon the exercise of this right must be justified by objective and reasonable criteria. In addition, paragraphs 4 and 8 of General Comment 25 explicitly state that citizens take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives, an activity which is in turn protected by other human rights, such as the freedom of speech. Finally, the UN Secretary General and a range of commentators increasingly advocate more direct participation in constitution-making in order to allow citizens to effectively influence the thinking of decision-makers.<sup>8</sup>

The trend toward a more expansive reading of international legal obligations suggests that the constitution-making process should combine indirect participation through freely elected representatives with forms of direct participation, such as public consultations.

## 3. THE BENEFITS OF BROAD CONSULTATION

Public participation in constitution-making, if thoughtfully planned and properly carried out, offers substantial benefits. A process of broad public participation is particularly suited to meet the challenges in states that have lacked the chance to build up a system of representation through long established, inclusive and democratically representative political parties and interest groups, such as trade unions, professional associations or civil society organisations.

### NATIONAL UNITY

Broad consultation can strengthen national unity and thereby contribute to political stability. Particularly in transitional contexts, public participation and broad consultation mechanisms can play a major role in building democratic institutions based on the rule of law and respect for human rights. An open and inclusive participation process can help reconcile conflicting groups and sensitise people to diverse viewpoints. This is especially important for groups which have been marginalised in a pre-democratic order. Ideally, the

<sup>2</sup> For the full text of the ICCPR, see: <http://www2.ohchr.org/english/law/ccpr.htm>. Subsequent references in the text to the ICCPR are drawn from this source.

<sup>3</sup> For the full text of General Comment 25, see: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument). All subsequent references to General Comment 25 are drawn from this source.

<sup>4</sup> UN Human Rights Committee, *Donald Marshall v. Canada*, Communication No. 205/1986, UN Doc. C/43/D/205/1986 (1991), paragraph 5.3. See: <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/6dc358635454e5fac12569de00492e1b?Opendocument>. All subsequent references in the text to this document are drawn from this source.

<sup>5</sup> C/43/D/205/1986, paragraph 8.

<sup>6</sup> The term ‘subjective rights’ refers to the relationship between legal subjects. This comprises both a right and an obligation, such that a legal subject’s right exists against all other legal subjects, who are obliged to respect it.

<sup>7</sup> UN Human Rights Committee, *Donald Marshall v. Canada*, Communication No. 205/1986, UN Doc. C/43/D/205/1986 (1991), paragraphs 5.4 and 5.5.

<sup>8</sup> *United Nations Assistance to Constitution-making Processes*, Guidance Note of the UN Secretary General (April 2009); see: [http://www.unrol.org/files/Guidance\\_Note\\_United\\_Nations\\_Assistance\\_to\\_Constitution-making\\_Processes\\_FINAL.pdf](http://www.unrol.org/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf) and “Expanding Participation in Constitution Making – Challenges and Opportunities”, Angela M. Banks (2008) in *William and Mary Law Journal*, Vol.49, No.4, page 1055; see: <http://scholarship.law.wm.edu/wmlr/vol49/iss4/2/>.

consultative process allows for an exchange of ideas, where the most consensual argument prevails after criticism and disagreement have been taken into consideration.

## LEGITIMACY AND ACCEPTANCE

A successful participatory process is a cornerstone for the legitimacy, acceptance - and hence stability - of the new constitutional order. It cannot only form the basis for the normative legitimacy of the constitution, but also increases the social acceptance of the entire legal order. Provided that the result reflects a broad consensus, which should be the aim of public consultations, it can significantly reduce the demand for renegotiation or the resistance of groups which claim that their interests have been neglected and thus refuse to accept the constitution.

A constitution passed after a comprehensive consultative procedure can rightly evoke feelings of ownership. People who fought and argued for their constitution often feel more responsible to defend it and to advocate for its effective implementation. This is especially important in a post-revolutionary context, where people have demonstrated for their right to self-determination. Adequate participation in the constitution-making process is the next logical step, increasing the chance of creating a genuinely legitimate and widely accepted new constitutional order.

## INCLUSIVENESS

Even if a parliament or constitutional assembly is directly elected, many individuals or groups are not represented. First, as was the case in Tunisia, many adult Tunisians did not even register to vote. Second, many votes went to parties that did not win seats in the Constituent Assembly of Tunisia. This is not unusual and does not undermine the quality of the elections. Especially in transitional states without a consolidated party system, but rather with a multitude of small parties, it is not surprising that many votes are lost. Consequently, people who gave their vote to one of these parties might not feel adequately represented. Such sentiments can be compensated for through a more inclusive constitution-making process. Third, if the only form of public participation is the election of a parliament or constitutional assembly, there is always a risk that certain groups might be disenfranchised, in particular where lobbying and direct access to power circles is limited to the most influential individuals and organisations. Offering further opportunities to contribute via direct public participation can address such risks.

## INFORMATION AND INNOVATION

Another essential benefit is the informative and innovative potential of public participation. Popular participation can provide members of the Constituent Assembly with important information and different viewpoints, infuse new ideas into the process, and help identify divisive issues or blind spots.

Participation thus has a double effect. On the one hand, it helps to overcome a lack of information, which is a systemic problem with most political decision-making processes. On the other, participation is useful for depicting a more detailed picture of what is of public interest and concern, and can thus serve as a counterbalance to an otherwise often expert- and elite-driven process.

## CONSTITUTIONAL AWARENESS AND CIVIC EDUCATION

Constitutional awareness raising and civic education programmes are not only essential requirements for informed participation, but also provide long-term benefits for the acceptance and implementation of the political order. A good constitution requires much more than a balanced text produced through a participatory process; it must be made known and understood, applied and protected, and challenged and defended over time. All branches of government and civil society can play a prominent role in this regard, which can contribute to a high degree of sustainable ownership for the constitution.

Civic education also helps inform people about the scope and limitations of their constitutional rights, thereby preventing exaggerated expectations. Social or economic rights, for example, such as the right to health or to adequate housing, partly depend on public financial resources. Whether and to what extent these rights can be realised in the short run is one of the issues that could play a role during debates.

## 4. REQUIREMENTS FOR SUCCESSFUL PUBLIC PARTICIPATION

In order to fully realise the potential of broad participation, it is necessary to address criticisms of this approach to meet certain requirements safeguarding the inclusiveness of public participation itself.

### TRANSPARENCY AND ACCOUNTABILITY TO AVOID BACKLASH

There is always a risk that the public feels that the Constituent Assembly neglects its opinions and submissions. To avoid such scenarios, the Constituent Assembly should guarantee a high degree of transparency. Preferably during its first sessions, it should also work out how public input will be analysed, recorded and processed. Because the number of consultations or submissions to the Constituent Assembly is

difficult to predict at present, sufficient time and resources need to be allocated for analysis.<sup>9</sup>

The Constituent Assembly should also stress from the beginning that not every single voice can find its way into the final constitution. Even though all public contributions should be considered, not all suggestions can be implemented because constitution-making, by nature, is a democratic compromise. In addition, certain ideas might contradict democratic standards, human rights of minorities or international obligations.<sup>10</sup> Making such limitations of consultation clear from the start of the process can help alleviate potential disappointment and frustration.

## POPULIST MOVEMENTS, PARTISAN INTERESTS AND THE POLARISATION OF CONFLICTS

Careful planning and safeguards can prevent the risk of individual groups monopolising the participation process. This risk is heightened when cleavages run along ethnic and religious lines, or between secular and religious communities. In this case, public debate might become highly polarised, which in turn can result in mass mobilisation and the revival of old tensions. This could severely impair the prospects for consensus and the negotiation process could end in deadlock. The most important goal should be to find national consensus by bringing a wide range of different groups together for a constructive public dialogue.

In order to avoid polarisation and potential deadlock in Tunisia, the members of the Constituent Assembly should act as role models and suppress partisan interests in favour of the overarching goal to write a new national constitution. The consultations should focus on content and should not be dominated by questions from one group or a single political party.

## PLANNING AND PREPARATIONS

Critics of broad consultation often point out that public participation programmes tend to prolong or extend the constitution-making process. Broad consultation may even run the risk of undermining the legitimacy of the constitution-making process, as some weak and disenfranchised groups might be less able to use the opportunities afforded by consultations than others. It is the case that participation does not always provide for equal opportunities, and may give an advantage to people with public speaking or leadership

skills, or to well organised and financially strong interest groups. Some of the mechanisms for public consultation might exclude certain groups of society.

However, such problems can be avoided. In order to fully exploit the potential of public participation, careful planning and preparations are necessary. Those responsible for the preparation and structuring of the participation process must consider the respective cultural and societal circumstances. There is no blueprint for successful public participation programmes, but careful planning at the early stages of constitution-making can help to avoid exclusion or marginalisation.

Some aspects to be considered are as follows:

- The public should be informed about the constitutional process in general and ways to participate in particular. The media, civil society organisations and politicians at all levels should be involved and civic education programmes should be designed so as to reach all parts of society. Print media, radio, television and the internet are as important as booklets printed and distributed to all parts of the country in order to inform the public about the ongoing constitutional debate.
- Special attention should be paid to citizens with little education, illiterate people and to people living in geographically marginalised regions in order to ensure a fully inclusive process. This requires forms of information and outreach adapted to the needs of marginalised groups; for instance, South Africa successfully used images and cartoons.
- Depending on the consultative mechanisms that are chosen, further decisions must be taken. For example, the number and locations of public meetings, who will conduct meetings (ideally members of the Constituent Assembly) and in which way they are trained for this task are issues that need to be addressed.

## 5. CASE STUDIES

The following case studies analyse some mechanisms of public participation used in other contexts and help identify risks, as well as potential lessons learned for Tunisia. The cases of South Africa, Iraq and Kenya were chosen because these three examples display a variety of methods and are perceived as having different degrees of success with regard to public participation.

When analysing case studies and drafting a policy on public participation, it is useful to remember that participation can essentially take place at three different stages of the process: the period before the constitutional assembly convenes (stage one); the drafting process itself (stage two); and the phase between the presentation of a draft constitution and the final decision (stage three). This is regardless of whether the constitution will be adopted by the Constituent Assembly or through a referendum.

<sup>9</sup> In Rwanda in 2003, only 7% of 50,000 questionnaires were analysed, and in Nepal in 2009, each member of the constitution-making body was given about 1,000 submissions for analysis because no plan for the processing had been made beforehand. Michele Brandt, Jill Cottrell, Yash Ghai and Anthony Regan (2011), *Constitution-making in Reform – Options for the Process*, pages 121 and 141. See: <http://www.interpeace.org/index.php/constitution-making-for-peace/the-constitution-making-handbook>. All Subsequent references to this text are drawn from this source.

<sup>10</sup> In South Africa in 1996 for example, an overwhelming majority of the public supported the introduction of the death penalty, but the Constituent Assembly denied this demand after consideration of international obligations (*ibid*, page 116).

## SOUTH AFRICA

The South African process of constitution-making is widely regarded as a positive example of broad public participation. At the beginning of the transition ending apartheid, dialogue about an interim government and constitutional reform was dominated by political parties. For most of this first stage of the process, civil society was excluded from participation.

After the political parties had agreed on an interim constitution, elections for the Constituent Assembly were held in April 1994. The Constituent Assembly initiated a broad participatory process for the second stage of the process (drafting the constitution), which adhered to the three principles of inclusivity, accessibility and transparency.

The first step in this participatory process was a widespread education campaign to inform the public about constitutional issues in general, fundamental rights and their right to participate. The campaign used newspapers (including a biweekly assembly newspaper with a circulation of 160,000), billboards, radio and television, a telephone hotline and the internet. Citizens were expressly invited to present submissions and more than 1,000 educational workshops were held all over the country over a period of 12 months.<sup>11</sup>

One core element of the consultative process were public meetings that gave members of the Constituent Assembly the opportunity to present their work and enabled participants to make their voices heard. All contributions and suggestions of these meetings were recorded and transcribed. In addition, meetings were held on specific subjects, such as the bill of rights, the judiciary and the administration, where about 600 civil society organisations participated.

Overall, direct interaction took place between members of the Constituent Assembly and more than 117,000 people.<sup>12</sup> Another cornerstone of the process was the Constituent Assembly radio programme, which broadcast in eight languages and reached approximately 10 million people per week—one quarter of the population.

In total, citizens presented 13,443 substantive submissions (with 90% coming from individuals)<sup>13</sup> and over 2 million people signed petitions on various issues.<sup>14</sup> Submissions were processed by the secretariat of the Constituent Assembly and summarised by the technical groups of the various thematic committees in order to make them more accessible. Special consideration was given to submissions by organisations or groups with specialised knowledge on contentious issues.

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<sup>11</sup> *Ibid*, page 93.

<sup>12</sup> Hassen Ebrahim (1999), *Constitution-Making in South Africa – A Case Study*, House of Commons, page 16, footnote 23. All subsequent references to this text are drawn from this source.

<sup>13</sup> Catherine Barnes and Eldred De Klerk (2002), *South Africa's Multi-Party Constitutional Negotiation Process*. See: <http://www.c-r.org/our-work/accord/public-participation/southafrica-multiparty-process.php>. All subsequent references to this text are drawn from this source.

<sup>14</sup> Brandt, et. al. (2011), page 140.

During the third stage of the process (after the publication of the draft constitution), the public again was invited to participate and submit their views on specific issues regarding the draft text. The submissions were condensed and attached to the respective articles for consideration by the members of the Constituent Assembly. With this new input, the final negotiation process began. This part of the process was criticised by some observers who lamented that deals on deadlocked issues were struck behind closed doors during bi- or multilateral party meetings.

While some groups felt excluded from the constitution-making process, the majority of the population had a positive impression and was satisfied with the level of consultation.<sup>15</sup> The Constituent Assembly passed the final text of the constitution with a majority of 85%,<sup>16</sup> obtaining the required two-thirds majority. Seven million copies in South Africa's 11 official languages were distributed, accompanied by illustrations and cartoons for the illiterate.

The comprehensive civic education efforts and the proactive approach of meeting with citizens were crucial for the success of the participation process. South Africa had no tradition of fundamental rights or inclusive constitutionalism and a large percentage of the population lived in rural areas without access to most media. A preliminary poll showed that the Constituent Assembly's education campaign reached 73% of all adult South Africans<sup>17</sup> and that the level of knowledge about the constitution was fairly high. The survey further indicated a strong sense of ownership, thus rendering the participation process a success.

## IRAQ

The making of the 2005 Iraqi constitution is an example of constitution drafting in a difficult context characterised by a deeply divided society, a perilous security situation, strong external influence and significant time pressure. These circumstances severely restricted public participation in constitution-making.

During the occupation period in 2003 and 2004, transitional authorities established an excessively tight timetable for the constitution-making process. The process began with elections to the National Assembly on 30 January 2005 and ended with the constitutional referendum held on 15 October 2005.

The National Assembly spent the first three months on the selection of a Constitutional Committee, initially composed of 55 Assembly members but later complemented by 15 representatives of the Sunni Arab population, which had largely boycotted the elections. The actual drafting process in

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<sup>15</sup> Barnes and De Klerk (2002).

<sup>16</sup> Hassen Ebrahim (1999), *The Soul of a Nation – Constitution-Making in South Africa*. See: <http://v1.sahistory.org.za/pages/library-resources/onlinebook/soul-of-nation-constitution/soul-of-nation-index.htm>. All subsequent references to this text are drawn from this source.

<sup>17</sup> Ebrahim (1999), page 24, footnote 42.

the Constitutional Committee took some three months. Then, a Leadership Council composed of senior Iraqi politicians took over and entered into protracted negotiations, which lasted until two days before the referendum.

Indirect popular participation occurred through the National Assembly elections and separate elections of the Sunni members for the Constitutional Committee. However, this indirect form of participation was compromised by boycotts and strong influence from the Leadership Council and external advisors, notably from the UN and the US embassy. Direct popular participation was largely limited to the brief drafting period in the Constitutional Committee. In this phase, alongside consultation with outside experts, in particular UN advisors, the Constitutional Committee held some public conferences, including one with Shiite clerics and their students, whose voices were already heavily represented in Iraq's governing coalition. A committee was set up to encourage national dialogue on the drafting, and some civil society organisations, such as women's associations, conducted constitutional discussions on their own initiative.

The problem was that these steps were taken on an *ad hoc* basis as the drafting process was moving forward, leaving little time for thorough discussions and interaction with the Constitutional Committee. Media coverage and public debate was rather general, and only when the Constitutional Committee provided more detailed draft texts did a substantive discussion evolve. However, no procedure existed to actually incorporate the opinions and viewpoints of the public in the deliberations and drafting of the constitution.

## KENYA

The path towards a new Kenyan constitution passed two milestones: the failed 2005 draft and the successful 2010 constitution. After Kenya had been a one-party state for many years, political pressure for democratisation had constantly been growing since the early 1990s. However, the first attempt at a comprehensive reform process did not start until about a decade ago.

The legal basis mandating the reform process, the Constitution of Kenya Review Act, explicitly prescribed specific modalities and detailed instruments of broad public participation.<sup>18</sup> After broad consultation processes, focusing both on the specific issues to be put on the agenda and the specific substantive content of the constitution before drafting, the Constitution of Kenya Review Commission and

the National Constitutional Conference,<sup>19</sup> which was convened for broad discussion and debate, presented the Bomas draft constitution<sup>20</sup> in spring 2004. This draft was intensively debated for about one year, but was never enacted by the parliament or presented for a referendum.

One of the most contentious issues in the 2004 draft related to executive power. For fear of a strong and non-accountable president, the Bomas draft established a system of power-sharing between the president and an executive prime minister elected by parliament. This draft, however, was later amended by the Kenyan parliament and provided for a weak prime minister appointed by and reporting to the president (draft of 2005). The opposition party and parts of the governing coalition heavily criticised these amendments. The ensuing political power struggle and the fact that the amended draft of 2005 did not sufficiently reflect the results of the participatory Bomas draft may have contributed to the failure of the constitutional draft in a referendum in 2005, with 57 % of the vote against it.

Following the post-election violence in 2008, the agreement to settle the conflict also provided for constitutional reform.<sup>21</sup> A Committee of Experts on Constitutional Review (CoE) was established and charged with drafting a new constitution. The CoE had nine members—six Kenyans and three others from Zambia, South Africa and Uganda. One of the guiding principles for the drafting process was that the Commission and other public bodies 'ensure that the review process provides the people of Kenya with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to review and replace the Constitution'.<sup>22</sup>

Civic education programmes and public participation were part of the CoE's efforts to ensure an inclusive process. However, in contrast to 2005, public consultation on the content of the constitution did not play a prominent role before and during the drafting process. Instead, participation and outreach programmes in the form of regional public hearings, along with sectoral<sup>23</sup> and thematic consultations, mainly took place after the first draft had been presented (at stage three of the process), asking people to suggest changes to the draft constitution.

<sup>19</sup> The members of the Constitution of Kenya Review Commission were nominated by parliament and appointed by the president. The 629 members of the National Constitutional Conference included all members of parliament and several representatives from each district. About one third of the representatives also came from civil society organisations. The chair of the Commission chose a small number of members to ensure that important, but under-represented groups were properly represented. See: the Constitution of Kenya Review Act, paragraphs 6 through 8 and paragraph 27 (2); Brandt, et. al. (2011), page 340; and Alicia Bannon, "Designing a Constitution-Drafting Process: Lessons from Kenya" in *The Yale Law Journal*, Vol. 116, No. 8 (June 2007), pp. 1824-1872.

<sup>20</sup> Named after the place where the conference convened, at the Bomas of Kenya.

<sup>21</sup> The legal basis was the Constitution of Kenya (Amendment) Bill (2008) and the Constitution of Kenya Review Act (2008).

<sup>22</sup> Constitution of Kenya Review Act (2008), paragraph 6(d)(i).

<sup>23</sup> Meetings with sectoral groups are generally held to better understand the concerns and views of these groups; e.g., women, business leaders, youth, nomads, and so on. Thematic meetings focus on specific contents; e.g., judiciary, human rights, federalism, etc. See: Brandt, et. al. (2011), pages 131 and 135.

<sup>18</sup> The Constitution of Kenya Review Act, as amended in 2001, provided for a comprehensive constitutional reform. The act empowered the Constitution of Kenya Review Commission to 'conduct and facilitate civic education in order to stimulate public discussion and awareness on constitutional issues', and to 'collect and collate the views of the people of Kenya' by *inter alia* visiting every constituency. Also see: Preston Chitere, et. al. (2006), *Kenya Constitutional Documents: A Comparative Analysis*. See: <http://www.cmi.no/publications/search/?q=kenya&pubtype=&year=2006&ok=Search>.

After the public had been consulted, the draft was revised and went to the competent parliamentary committee and, later, to parliament. It was adopted by a referendum in 2010 with a high approval rate of more than 67%.

## 6. POTENTIAL LESSONS LEARNED FOR TUNISIA

There is no one-size-fits-all approach to constitution-making. As these case studies show, the type, form and degree of public participation depend on the social, political and cultural context. Yet there are some general indications as to what worked in practice and what had a detrimental effect.

First, the case studies indicate that an important element of a successful drafting process is serious consideration of the input provided by public participation, combined with the willingness to find a balanced solution respecting the will of the majority, as well as concerns expressed by potentially disenfranchised or marginalised groups. The case studies underline the paramount importance of the political will to seriously engage in a public participation process and to genuinely deal with the views that are expressed. A lack of political will can have a negative impact on the success of the constitution, as might be indicated by the protracted period of civil strife and violence in Iraq despite its new constitution.

Furthermore, all of these examples illustrate that *good planning* is necessary to ensure that participatory procedures do not run the risk of becoming victims of their own success. A system must be put in place in order to process and analyse thousands or tens of thousands of submissions, as was the case in South Africa. Asking the public's opinions only to ignore it afterwards may cause deep frustration. The Iraqi example shows that soliciting public opinion is insufficient in the absence of a procedure to actually incorporate these opinions in the deliberations and drafting process. As the situation in Iraq demonstrates, the lack of a *realistic timetable* not allowing enough time for sufficient debate on the draft is a real problem.

Moreover, both South Africa and Kenya stress the importance of *civic education and public outreach* for fruitful and informed participation. As the examples from Kenya and Iraq show, public participation in the final stage, between the presentation of a draft and its adoption, requires particular attention and a high level of *openness and involvement of the media*. The debate should not be dominated by uncompromising partisan interest, as happened in Kenya in 2005. This indicates, however, that the influence of powerful actors, such as political leaders, must be carefully considered from the very beginning of the process.

Finally, the willingness of the constitutional assembly and other relevant state bodies to *actively support and endorse* a process of broad public participation is crucial. They can do so by enacting rules on transparency, guaranteeing public debates will be held and maintaining close contact with the media, but also by outreach programmes and civic education.

## 7. CONCLUSION

Broad public participation in the constitution-making process, if managed wisely, is an important prerequisite for stability, national unity and constitutional legitimacy. Tunisia now has the opportunity to lay the constitutional foundation for long-term democratic stability.

The following recommendations can help ensure that Tunisians gain the greatest benefit from this opportunity.

The Constituent Assembly of Tunisia should:

- Devote one of its first sessions to discussion of direct public participation in the drafting process.
- Pass legislation that establishes an obligation to consult the public and enact suitable mechanisms, including rules and procedures for public participation.
- Hold public consultations in all parts of the country.
- Establish a formal and transparent procedure on how to receive, analyse and process written submissions and petitions.
- Establish a procedure to effectively integrate the submissions and meeting results into the deliberations.
- Ensure transparency and inclusiveness by publishing records on how public input was addressed and, for example, by publishing parts of the draft as soon as possible, preferably according to a pre-determined schedule.
- Plan civic education and outreach programmes, such as public hearings, especially with potentially disenfranchised and marginalised groups. It is important to make sure that all people in all areas of the country can adequately participate.
- Run a comprehensive public information campaign using the entire spectrum of the media. The campaign should focus on the constitution in general, the work of the Constituent Assembly, and the opportunities for the public and individual citizens to directly participate in the process. The campaign should also present the limitations of public participation in order to avoid disappointment and frustration.

The media and civil society organisations ought to:

- Report substantively and comprehensively on the process and thus contribute to nation-wide civic education.
- Serve as intermediaries between the Constituent Assembly and the population in order to allow for broad public dialogue and to make people's voices heard by the members of the Constituent Assembly.
- Critically observe and comment on the constitution-making process.

## ABOUT DEMOCRACY REPORTING INTERNATIONAL

Democracy Reporting International (DRI) is a non-partisan, independent, not-for-profit organisation registered in Berlin, Germany. DRI promotes political participation of citizens, accountability of state and the development of democratic institutions world-wide. DRI helps find local ways of promoting the universal right of citizens to participate in the political life of their country, as enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

At the end of February 2011, DRI began a programme in Tunisia. The goal of this programme is to assist a wide range of local civil society organisations to become strong, independent institutions that can serve as watchdogs for Tunisia's democratisation process. The programme also seeks to enhance public understanding of and encourage greater demand for genuine democracy.

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For more information please see:  
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