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Inclusive constitution making in fragile and conflict-affected states

Support for constitution making is an important element of international engagement in countries emerging from conflict or political transition. This support often focuses on promoting inclusive constitution making, recognising that this can help establish a more inclusive state and social contract, and address exclusion-related drivers of fragility. However, such support is frequently based on an incorrect assumption that an inclusive constitution-making process leads automatically to inclusive content and outcomes.

This report examines key elements required to promote inclusion in the constitution-making process, the constitutional text, and in terms of outcomes from the new constitution. It argues that constitution making in fragile and conflict-affected states must be understood as part of wider political settlement bargaining that shapes the opportunity structures for promoting inclusion at every stage. Finally, the report examines both the important role international actors can play in supporting inclusive constitution making and the challenges they face in doing so.

The potential of inclusive constitution making

In recent years there has been increasing international support for constitution-making processes in fragile and conflict-affected states (FCAS). This has been driven by a growing recognition of the potential of constitution making (i.e. either reforming existing constitutions or drafting entirely new ones) to support transitions from conflict and fragility towards peace and stability. Constitutional change is increasingly understood as an opportunity to establish a more inclusive state and social contract and, in doing so, to address exclusion-related drivers of fragility.

Constitutions are framing legal documents that express the social contract between the state and its citizens. They generally establish the principles on which the state is organised; define the nature, characteristics and limits of the various branches of government; and establish the fundamental rights of citizens, as well as in some cases protections for minorities. Beyond state-citizen relations, constitutions can also play an important role in strengthening social cohesion. As Bell (2017) describes, constitutions have the potential to shape a wider horizontal relationship of civic trust that is necessary to minimising violent conflict.

In stable states constitutions tend to express and perpetuate a well-established political settlement and balance of power, enshrining this in law. However, as Sapiano (2015: 9) points out, "in unstable settings, constitutions must often play a more developmental role in terms of building consensus, as a form of conflict-resolution mechanism". Indeed, they can act as a quasi-peace agreement by articulating the political settlement that emerges from post-conflict bargaining processes and establishing a shared vision of how the state should be developed. For example, South Africa's 1996 Constitution created a shared vision for a future post-apartheid state and in doing so substantively changed formal political life and state-society relations. Similarly, Colombia's 1991 Constitution articulated an aspiration towards a more inclusive political

settlement, reflecting "a desire for a fundamentally new social order, establishing institutional mechanisms and principles of equality, non-discrimination and social and political justice" (Domingo et al., 2015: 22).

Post-conflict constitution making offers an important opportunity to address the drivers of conflict, particularly where these drivers have been the exclusion of certain groups from access to power and resources, or the denial of such groups' rights and aspirations. However, seizing this opportunity requires post-conflict constitution making to be inclusive in process and content. As Gluck and Brandt (2015: 12) argue,

> constitution-making processes ... provide an opportunity to address the underlying social and economic inequities that led to the need for reforms in the first place. By bringing together the disparate components of a divided society and broadening the constitutional discussion, a participatory constitution-making process can even confront deep-seated regional, ethnic, or religious issues in a way that top-down elite-driven constitutional reform may not.

However, promoting inclusive constitution making requires a careful balancing act. On the one hand, the process must reflect and uphold the narrow bargain struck between elites that emerges from peace or transition processes and which is vital for a viable peace. On the other hand, it must include broader groups of actors and sets of interests with the aim of expanding the elite bargain to one that has more widespread legitimacy. Getting this balance right is not easy. Where constitution making is too elite focused, it is unlikely to be a basis for advancing long-term peacebuilding. For example, South Sudan's 2011 Transitional Constitution was drafted without public participation by a technical review committee and the resulting text "concentrated too much power in the hands of the central government and the President" (ICJ, 2014). This helped to enable the Sudan People's Liberation Movement to fuse with the state and its elites to plunder national resources for personal enrichment and ultimately tip the country back into conflict. On the other hand, as Sapiano (2015) points out, in some cases highly participatory constitution making can destabilise political compromises, establish unrealistic expectations or include spoilers. In negotiating this balancing act, it is important to recognise that because constitution making generally follows on from peace or transitional negotiations, its transformational potential will already be circumscribed by the deals that emerged from these previous negotiations.

Constitution making can be inclusive in terms of the processes through which it is undertaken, e.g. where a wide range of groups, including the most excluded, are able to participate. It can also be inclusive in terms of the content of the text that is agreed, e.g. where this gives excluded groups greater access to power, resources and rights. Once a constitution is established, there is also the question of how provisions for inclusion are implemented and whether these result in more inclusive outcomes. International actors have tended to assume that inclusivity in constitution-making processes leads automatically to inclusivity of content, and this in turn to more inclusive outcomes. However, this is not always the case, and such a causal relationship should not be taken for granted. For example, in Nepal, a highly inclusive constitution-making process did not lead to a genuinely inclusive constitutional text. Similarly, in Afghanistan, commitments to inclusivity in the constitutional text have not led to any significant shift in the exclusionary nature of power and access to resources. Hence, inclusivity needs to be considered in terms of process, content and implementation, with a focus on understanding under what circumstances inclusion in constitution-making processes leads to inclusionary constitutional texts, and under what circumstances such texts result in inclusive outcomes.

Inclusive constitution-making processes

International support for constitution making in FCAS tends to focus heavily on supporting inclusive and participatory processes. Inclusive processes can help to ensure acceptance of and the legitimacy for the new constitution and the vision of the state that it contains. For example, inclusive constitutional process in Kenya is seen as key in producing the 72% turnout in the constitutional referendum and the 62% approval rate for the document, as well as ensuring that those who opposed the Constitution did not resort to violence, because they felt they had been heard. In contrast, the processes by which Egypt's 2012 and 2014 constitutions were developed were largely exclusionary of women, youth, minorities and oppositional voices, and involved no consultation with the public and very little with civil society. While both constitutions were approved in referendums, in each case only a small minority of eligible voters participated, and the result has been to further polarise Egypt's social and political constituencies and marginalise excluded groups, arguably contributing to rather than alleviating the country's ongoing fragility.

Inclusive processes can be achieved through the inclusion of representatives from marginalised groups in the constitution-making body, through consultations with the broader public, or ideally a combination of both. Where the main modality for inclusion is representation in the constitution-making body, this gives marginalised groups a voice at the top table, enabling them to closely follow, participate in and, potentially, influence constitution making. However, a key challenge is that those chosen to represent a given community tend to be its elite leaders, who do not necessarily speak on behalf of the broader group or understand the interests of its most excluded elements. For example, upper-class urban women associated with political parties or large civil society organisations (CSOs) are the most likely to obtain a seat at the constitution-making table, but are not always well placed to represent the interests of indigenous or rural women. Similarly, representatives of religious groups

tend to be elderly male leaders, and their understanding of the interests of younger, poorer or female community members may be limited. Given these and similar circumstances, it is critical that those beyond the "top layer" of each community are represented, in particular group members who face double marginalisation, such as women from minority communities. It is also critical that meaningful relationships of representation and accountability are fostered between elite community leaders and their grassroots populations.

Another key challenge is the ability of representatives of excluded groups to effectively translate presence into influence in constitution-making bodies. Such representatives often face major barriers in terms of limited technical and political capacity, educational and language limitations, inexperience and lack of confidence, discrimination, and a weak bargaining position in relation to dominant elites. Moreover, representatives of excluded groups tend to operate in isolation from one another, with each promoting the specific interests of their own group, although they would have greater influence if they joined together to advocate collectively for minority rights and freedoms (International IDEA, 2014). The way in which such representatives are chosen to participate in constitution-making bodies is critical for their ability to fully promote their interests. For example, Castillejo (2017) describes how in Nepal's 2008 constitutional assembly indigenous members were elected from among candidates chosen by mainstream political parties and hence were subject to these parties' whip systems and voting discipline, making it difficult for them to break party lines to promote indigenous peoples' issues or be accountable to indigenous populations. However, ethnic Madhesi representatives had their own political parties and hence greater freedom to promote their interests.

Where the main modality for inclusion is public participation, this allows for the broadest and most direct engagement with citizens, who can directly express their interests and preferences, rather than these being channelled through group leaders. Such public participation can play an important role in building legitimacy for a new constitution. Such public participation tends to take place through consultations, public hearings, and in some cases a referendum on the constitutional text. For example, the 2012-13 Tunisian constitutional process involved concerted outreach and consultation campaigns, including public meetings at constituency level; hearings with interest groups; television broadcasts of constituent assembly debates; and dialogue between constituent assembly members, citizens and CSOs around the country. Gluck and Brandt (2015: 10) describe how public and CSO inputs helped to enhance commitments to rights and freedoms in the constitutional text, and how this inclusive consultation process "helped Tunisia secure greater legitimacy and support for the constitution, steadying a democratic transition that months earlier appeared shaky".

Public participation requires significant time, planning, and resources if it is to reach out to broad sections of the population and be meaningful. Investments must be made in civic education, translation and outreach. Special mechanisms may be required to ensure that the most marginalised can have a say. For example, in Afghanistan, the constitution-making body met separately with women's groups and youth so that they could speak freely about their views and aspirations. An adequate security context is also critical, as ongoing insecurity can result in some populations or regions being unable to participate. Indeed, in some contexts where constitution making runs in parallel with ongoing conflict, such as Yemen, Libya and Somalia, significant constitution drafting has ended up being done outside the country, dramatically limiting the possibility for citizens to participate in, follow, or hold elites accountable for constitution making.

Where it is not done meaningfully, public participation risks becoming a token exercise to provide a veneer of inclusion, without feeding in any way into the constitution-making process. For example, in Iraq, the international community funded public participation in constitution making, but only in Baghdad, without accompanying civic education, and without taking into consideration the views that were collected. Equally, public participation can be a cover for a power grab. Gluck and Brandt (2015) describe how Venezuela's 1999 constitution-making process was highly participatory and involved widespread consultation with civil society, while President Chavez simultaneously undermined democratic institutions and took control of the state. Meaningful public participation requires at a minimum that the public are informed about the constitutional process, the issues at stake and the different options for constitutional content; that accessible forums are provided for all citizens to express their opinions and preferences on these factors; and – critically – that clear and transparent mechanisms are in place through which citizens' views are fed back into the deliberations of the constitution-making body, and this body is accountable to the public for addressing these views. It is in this last area where there are often the greatest gaps, because constitutional consultations can end up with information flowing from the state to citizens, but citizens' views not feeding back into decision-making processes.

Whatever processes are adopted to promote inclusion, it is critical that the constitution-making process is as transparent as possible, so that the public can understand and follow it. Such transparency provides legitimacy and increases the likelihood that the final text will be accepted by the public. Legislation establishing a roadmap for the constitution-making process and a clear mandate for constitution-making bodies can help create such transparency. Media and civil society can also play an important role in monitoring and reporting on the constitution-making process.

Inclusive constitutional content

The constitutional text sets the framework for the distribution of state power and resources and the boundaries

within which citizens can claim rights and services from the state. Hence, the priority for those interested in inclusion should be to ensure that the text adopts the broadest and strongest possible equality and rights provisions and establishes mechanisms to enforce them. This can then provide a solid basis for excluded citizens to demand concrete outcomes, resources, services or opportunities from the state.

The United Nations Development Programme describes how a good practice constitutional right to equality should include a right to the formal equality of all citizens in law; a right to substantive equality (i.e. de facto equality in the impact or outcome of laws and policies on citizens); and a positive duty on the state to realise substantive equality (UNDP, 2016). For example, the Turkish Constitution of 1986 states that "Men and women have equal rights. The State shall have the obligation to ensure that this equality exists in practice" (Turkey, 1986, art. 10(2)). Another critical element is the recognition of the supremacy of international law and international human rights treaties, which allows citizens to make claims for the realisation of these internationally mandated rights. For example, the 1991 Colombian Constitution states that "International treaties and conventions ratified by the Congress that recognize human rights ... have prevalence in the internal order" (Colombia, 1991, art. 93).

While such general provisions for equality and human rights are key, excluded groups often push for specific constitutional recognition of and protection for their communities. This has advantages and drawbacks. It can send a useful signal that such communities belong within the national identity and can recognise and seek to redress the historic discrimination that they have faced. For example, a number of Latin American constitutions include robust provisions on indigenous peoples' rights. Explicit mention of minority groups in the constitutional text can also help guard against problems in the registration of religious groups or access to citizenship documents for citizens from these communities. However, it can cause problems, because inevitably not all minority groups can be listed in the constitution and some will be left out, while those that are mentioned may face a backlash. Indeed, in many contexts general constitutional provisions on non-discrimination, freedom of religion, freedom of expression, freedom of assembly, and the design of electoral systems to ensure meaningful political representation can be just as useful as explicit protections for specifically named groups. As International IDEA (2014: 5) argues,

> Advocacy efforts for the rights of marginalized groups should adopt a broad approach to the strategy for constitutional change, focusing not only on provisions of direct import to their interests but also on a robust human rights framework, an independent judiciary and accountable government in general.

However, in contexts where in the past general constitutional equality and rights provisions have not protected minority rights, it is likely that minority groups may prioritise demands for specific protections for their own groups over demands for a more robust general human rights framework.

Constitution making can be an important opportunity to deal with regional and ethnic exclusion, which drives conflict in many contexts. In particular, greater power dispersion and regional autonomy – e.g. in the form of federalism – can be enshrined in the constitutional text. However, even where there is broad agreement among all actors on the issue of regional power dispersion, the basis on which this is done can be a source of disagreement. For example, in Nepal's constitution-making process marginalised groups demanded federal states constructed on ethnic and cultural lines, as a way of addressing the entrenched exclusion of Nepal's many non-elite ethnic groups. However, elite ethnic groups promoted – and successfully pushed through – a geographically based federalism that offered less power to minority ethnic communities and resulted in the constitution being rejected by significant parts of the population. As International IDEA (2014) points out, where ethnic minorities occupy resource-rich areas of a country, as in Iraqi Kurdistan, minority demands for power dispersion become even more pronounced, because the minority fear the exploitation of their local resources by the majority, while the majority are even less willing to relinquish control of these areas. In such contexts a constitutional resolution through power dispersion is particularly challenging.

A particular challenge is that of balancing constitutional provisions for group rights with those for individual rights, particularly where the demands of religious or ethnic minorities clash with normative rights. International IDEA (2014) describes how the South African Constitution provides an example of a workable balance, which enables religious minorities to continue their cultural practices, while protecting individual rights through the delineation of a hierarchy, whereby personal status laws must comply with the Constitution's Bill of Rights. Conversely, in drafting Somalia's 2012 Provisional Constitution, significant political compromise was required with powerful Islamic groups that controlled a range of important institutions across the country. As Sapiano (2015) describes, this resulted in contradictory principles between Islamic and liberal constitutional provisions, especially regarding human rights.

Where constitutions have a strongly religious tone, as in many Islamic countries, there are particular risks in terms of the inclusion and protection of religious minorities and other marginalised groups such as women. The use of sharia as the basis for a constitution means that the state can restrict citizens' rights based on a given interpretation of religious law. For example, Castillejo (2012) describes how in the Republic of Sudan, restrictions on women's rights are not simply a religious agenda, but are closely related to the consolidation of power by the ruling regime, which has strengthened sharia as the main source of law and uses a conservative interpretation of Islam to justify political repression. Similarly, constitutional prohibitions of blasphemy can become a

tool of political oppression against those who threaten the power of elites. Balancing religious commitments with strong equality provisions can help overcome these risks.

Constitutional texts can provide for temporary special measures to overcome the legacy of discrimination and exclusion. These can be specific, such as in the Constitution of Rwanda, which states that "The State of Rwanda commits itself that women are granted at least 30 per cent of posts in decision making organs" (Rwanda, 2003: art. 9(4)). They can also be a broader and more general commitment, such as the Ethiopian Constitution, which states that "affirmative measures [shall] provide special attention to women so as to enable them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions" (Ethiopia, 1994: art. 35(3)). Such general commitments, while potentially encompassing more areas of public life, run greater risk of not being implemented. While quotas and other special measures have their limitations and have often not translated into more inclusive policymaking, they can undoubtedly play a role in overcoming some of the barriers that disadvantaged groups face in accessing opportunities in FCAS.

Oversight, implementation and inclusive outcomes

Constitution making in FCAS can involve a radical rewriting of the formal rules, creating a large gap between the new – and ideally more inclusive – constitutional order and the reality of existing laws and institutions. The establishment of effective implementation, oversight and redress mechanisms, ideally mandated in the constitution, is critical to ensuring that this gap is closed, that institutions and rules at all levels are brought into line with new constitutional commitments, and that this results in tangible outcomes in terms of inclusion. In many FCAS, the implementation of constitutional provisions for inclusion and equality will be resisted at multiple levels by a range of actors – from national-level political parties to customary authorities or local service providers – who may see these provisions as threatening their interests or undermining "traditional" values.

Despite its importance, the implementation stage is often not sufficiently prioritised by international actors, who frequently see the promulgation of the constitution as the "end point" of constitution making. However, ensuring that commitments to inclusion are realised requires ongoing investment in a broad range of implementation strategies. International IDEA (2011: 18) calls for a greater international "focus on the implementation of new constitutions … with an emphasis on capacity building of new democratic institutions".

A strong constitutional or apex court can play a critical role in ensuring that constitutional commitments to inclusion are implemented. In post-conflict or post-transition contexts these courts tend to have a sensitive political role, policing the new political settlement, addressing tensions and ambiguities within it, and broadening out this settlement through judicial rulings. Indeed, Sapiano (2015) argues that in such contexts courts often actively contribute to constructing the political settlement and constitutional order through "peace jurisprudence" rather than just enforcing the established order, as in more stable contexts. Colombia's Constitutional Court provides a positive example of this. Domingo et al. (2015: 23) argue that the establishment of this court created a "novel structure for progressive groups and oppositional actors to give visibility to social and conflict related injustices", allowing women, internally displaced persons, and other marginalised actors to use legal mobilisation and litigation to secure and advance their rights.

Fostering an independent and competent judiciary is critical for ensuring an effective constitutional court that can enforce and extend constitutional commitments to rights and inclusion. It is important that women and minorities are represented in this judiciary in order to increase its legitimacy. For example, in Kenya, there have been efforts to increase the number of Muslims in senior judicial positions. Equally, fostering a competent legal professional community that can develop strategic litigation to enforce constitutional rights is important. While this judicial element is key to effective constitutional implementation, international actors working on constitution making and those working on justice systems in FCAS tend to be siloed, with little interaction between them.

Beyond the judiciary, it is important that the constitution establishes other robust oversight and accountability mechanisms such as a national human rights institution, a national gender equality institution or an ombudsman. These mechanisms should have issues of inclusion in their mandates, include representatives of marginalised groups, and have mechanisms to consult with marginalised communities. For example, in response to the Arab Spring, Morocco's 2011 constitutional reform gave the National Human Rights Commission (NHRC) constitutional status, independence and a judicial mandate to monitor the observance of human rights. It also provided for the creation of a specific authority to promote equality and fight all forms of discrimination, which the NHRC was to establish.

It is important to note that in many FCAS a range of structural barriers prevent marginalised groups, such as women or ethnic minorities, from accessing their constitutional rights or seeking redress when these are denied, e.g. by making a complaint to an ombudsman. These include deep-seated discriminatory norms and practices, insecurity and the threat of violence, education and language barriers, lack of awareness or confidence, financial costs, and the ability to spare the necessary time or to travel away from their homes. Addressing these structural barriers is critical if an inclusive constitution is to translate into inclusive outcomes.

The politics of constitution making

Constitution making in FCAS must be understood as a part of wider political settlement bargaining in these contexts. Effective support for inclusive constitution making must therefore be based on an understanding of how each step of the constitution-making process relates to broader power struggles and negotiations over the political settlement.

This includes examining how claims for inclusion relate to elite interests and therefore whether elites are likely to frustrate or support them. For example, in Burundi, despite constitutional commitments to equality, women's demands for equal inheritance rights were strongly resisted by the government and political elite because they threatened power structures based on exclusionary patterns of land access. Effective support for inclusive constitution making also includes understanding how excluded groups' rights have been caught up in broader struggles. For example, in Afghanistan, for many years women's rights have been caught up in contests between various political forces and their international backers – from the Soviet-backed regime to the Taliban – and continue to "occupy a highly politicized and sensitive place in the struggles between contending political factions" (Kandiyoti, 2005: vii). Equally, it is important to understand how excluded groups seek to position their demands within the broader political economy of constitutional reform, e.g. by situating these demands within particular political or cultural discourses. For example, in Morocco in 2011 women situated their claims for stronger constitutional rights within broader demands for democratisation that emerged from the Arab Spring, taking advantage of the fact that the Moroccan state was under pressure to offer some political opening and economic liberalisation in response to the rise of political Islam and external pressures from Morocco's Western allies.

Critically, it is important to understand the tensions between a constitution as a product of a narrow elite deal, frequently made to end fighting, and a constitution as expressing normative ambitions and the interests of the wider population. As Bell (2017: 14) argues, "transitional constitution-making practices all need to be understood against the background politics of transitional struggles of competing groups to 'own' the state and a countervailing impulse towards a more open rule-based political order".

Understanding the politics of constitution making helps to understand the gap between constitutional rules and realities observed in many FCAS. This gap can be due to the constitution-making process becoming detached from the realities of peace-making and political settlement negotiations, e.g. where internationally backed constitutional processes have taken place outside the country in question and are therefore significantly disconnected from the ongoing local power struggles and dynamics of conflict. It can also be because changes to formal rules in the constitution are not matched by a shift in the underlying informal institutions and rules, which are often very powerful in FCAS. For example, a number of Central American countries have progressive constitutions, as well as laws and institutions to promote inclusion, while in practice informal patterns of elite capture of power and resources, and ethnic- and gender-based exclusion continue. Bell (2017: 18) argues that international actors have

> failed to sufficiently understand local political bargaining processes. Where they once believed peaceful liberal democracy was taking hold, they now see complex and contingent local bargains over access to power. These bargains often frustrate and even subvert the … political and legal institutions in which international actors placed their faith.

The role of international actors

Support for constitution making has become a common element of international engagement in FCAS, especially following conflict or political transition. In particular, there has been growing international emphasis on promoting inclusion in constitution making as a way of addressing exclusion-related drivers of conflict and fragility and supporting peacebuilding. As International IDEA (2011: 10) describes, "Post-1990, the major force behind constitution building, and in particular its internationalization, was the conflict dimension …. Constitution building processes in that era were designed with conflict transformation and peace building objectives as their primary goals".

International actors can play many roles in support of constitution making in FCAS. They can provide neutral facilitation of dialogue between different interest groups. For example, during the Kenyan constitutional process international experts from South Africa, Uganda and Ghana provided an objective voice in the drafting panel. International actors can also provide funding to ensure that constitution-making processes – and particularly the elements of these processes that seek to promote inclusion, such as public consultation or the inclusion of representatives from marginalised groups – are adequately financed.

International actors can offer valuable technical support, e.g. on guiding principles, norms and values in the constitution-making process, or on the structure of constitution-making bodies. They can promote the meaningful inclusion of representatives of excluded communities within constitution-making bodies. Critically, they can also help to build the capacity of such representatives to effectively advocate for their communities' interests, support these representatives to be accountable to the whole of their respective communities, and encourage them to collaborate with the representatives of other marginalised groups for greater collective impact.

Where public participation and consultation are undertaken, international actors can support the outreach and civic education activities required to enable the meaningful

participation of all citizens, including the most marginalised. They can also support the lobbying activities of CSOs and community groups representing the interests of excluded communities, and link these organisations to decision-making processes. However, in doing so it is important that international actors reach out beyond capital- and elite-based CSOs, and ask whose interests a given CSO or community group actually represents, recognising that in FCAS, civil society is often divided along broader social and political cleavages and the inclusion of CSOs does not in itself guarantee the inclusion of marginalised interests. In addition, international actors can play an important role in supporting the media and civil society to raise public awareness of the issues at stake in the constitution-making process and help citizens to follow and engage with this process. Indeed, such transparency is critical for legitimacy, and even where the constitutional process is not very participatory, international actors can support information sharing with the public.

Finally, international actors can provide those involved in constitution making with access to lessons and experiences from around the world on relevant issues, such as federalism, quotas, or the balancing of group and individual rights. In particular, they can facilitate south-south learning on how other FCAS have undertaken constitution making and have addressed issues of inclusion in processes, content and implementation. As the pool of FCAS experienced in constitution making grows, so does the potential for valuable south-south learning.

Challenges facing international actors

While there is no doubt that they can play a useful role, international actors supporting constitution making also face a number of challenges. A key one, as discussed above, is understanding the complexity of the political settlement bargaining process, the positions and interests of the various actors involved, and how this shapes the potential for inclusive constitution making. There is substantial evidence that international actors in FCAS often fail to understand local political dynamics. Indeed, a recent study found that

> high staff turnover, risk aversion, poor local language skills, short-termism, inter-donor incoherence, a lack of focus on learning and institutional incentives sharply reduce donor ability to understand and act upon the complexity of the inclusiveness and legitimacy of domestic politics in fragile societies (Van Veen & Dudouet, 2017: iii).

This is problematic, as Bell (2017: 28) argues, because "Without a good understanding of the contingencies of the underlying political settlement and its very partial nature, any attempt to support constitutional development is likely to be outwitted by local elite gameplaying". Strong political analysis and politically informed and adaptive programming are required in order to understand and respond to the shifting opportunity structures for inclusive constitution making.

Another significant challenge facing international actors in many contexts is building trust and convincing local actors of the international community's impartiality and objectivity. A long-term presence, engagement with the widest possible set of stakeholders, and a focus on relationship building can help with this. Similarly, international actors face the challenge of remaining non-prescriptive and respecting the sovereignty of the constitution-making process, while at same time advancing an internationally accepted normative agenda on rights and inclusion. This is not an easy balance to achieve, especially when elites are hostile to inclusion agendas. In such cases, international actors can focus on informing excluded groups about their rights within international frameworks and about relevant lessons from other contexts, which can help such groups develop their own locally owned demands for inclusion. Critically, where an international actor is seen as pushing its own agenda, this can undermine the legitimacy and wider value of international assistance. For example, International IDEA (2014) describes how during the Kenyan constitutional process Britain undermined its own legitimacy by appearing to press for a formula that would protect the interests of people whose acquisition of land owed something to their colonial connections or special relations with Britain.

Finally, international peace and development actors tend to work on relatively short-term programming cycles and are often under pressure to achieve rapid results. This means that their time frames frequently do not fit well with the long-term and gradual nature of political settlement negotiations, of which the actual constitution-drafting process is just one element. International IDEA (2011: 11) argues that international actors should not set an artificial time boundary for when the constitution-making process is complete and international support can be withdrawn, arguing that "any assumption that a referendum followed by the enactment of a constitution marks a conclusive transformation of conflict into a political contest within rules misunderstands the nature and difficulties of transitions". Instead, as discussed above, ongoing support is required for meaningful implementation. International IDEA (2011: 11) suggests that a reasonable exit point should be "a period of at least one further general election and reconstituted government after the coming into force of the new constitution".

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