

## MAPPING THE CONSTITUTIONAL PROCESS

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### Abstract

It is generally accepted that process bears on constitutional outcomes, and drafters increasingly desire to divine predictive guidelines from comparison—a ‘roadmap to success’—drawn from the experience of others. Developing a methodology for such a comparison is difficult, and the appearance of a pre-written ‘recipe for success’ conceals obvious pitfalls. In particular, there is an inherent tension between comprehensiveness and granularity, in that the more jurisdictions studied the less country-specific details can be included. This paper sketches the findings of a chart prepared for the Libyan Constitutional Drafting Assembly (‘CDA’) in June 2014, which compares eighteen contemporary and historical constitutional drafting processes to aid the CDA in setting its own procedure under the terms of the Libyan Constitutional Declaration (2011). The methodology presented here breaks the constitution-making process into four ‘phases’, which together encompass 35 distinctive elements of process design, ranging from the mundane (e.g. appointment of a secretariat) to the complex (e.g. public participation programmes). These are analysed temporally to draw some preliminary conclusions about process design with the aim of identifying guidelines that lead to successful constitutional outcomes. As more countries enter one or the other phase of constitutional transition, developing a more rigorous methodology for comparative study would seem imperative.

### Keywords

Constitutional Drafting, Comparative Constitutionalism, Constitutional History, Libya Constitution, Constitutional Process

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## 1 Introduction

On 4 June 2014, the United Nations Support Mission in Libya (UNSMIL) provided the Constitution Drafting Assembly (CDA) with USB drives for each of its members containing a handful of documents for use in making decisions about Libya’s new constitution and writing process. One of the documents

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was a comparison chart of eighteen different post-conflict constitution-writing processes from historical and contemporary comparative practice.<sup>1</sup>

At the time the CDA received these documents, they were expected to request an extension of the four-month timeline stipulated in the Libyan Constitutional Declaration.<sup>2</sup> The comparison chart was designed to inform this and other decisions regarding the CDA's own procedure—including elements such as how and when to include public input, the use of international and local experts, and committee versus plenary work. As of this writing, although the CDA has determined that, as an autonomously-elected body, such a request was unnecessary, they have decided to extend their own timeline to March 2015, allowing a year from convening to public referendum. The decision to extend this timeline (although not necessarily the means) may be an outcome informed by the research presented in the comparison chart.

Commissioned by Tripoli-based Rashad Consulting and funded by the United Nations Development Programme's Libya Mission, the chart distills over 180 pages of eighteen cross-referenced country studies down to their procedural components. The result is that facts, timelines, and dates from a large body of material are presented in a format that any person with a secondary education (such as that required of CDA members<sup>3</sup>) might read and understand.

The chart is the first of its kind. As such, its presentation to the Libyan Constitution Drafting Assembly is likely the first time a constitution drafting body has been provided the means to easily compare practical aspects of constitutional process from a range of examples to inform their own. Until now, case studies have been the main source of guidance for constitutional assemblies in their analogical reasoning. A comprehensive comparative analysis is superior to country-by-country case studies as it compares 'parameters' of the drafting process in a systematic manner. The downside is that the appearance of a pre-written 'recipe for success' conceals obvious pitfalls. This paper attempts to be as comprehensive as possible while avoiding the risks by sketching the findings of the chart, suggesting an approach to using them in practice, and fleshing them out with some observations for their application. Rather than being an exhaustive pronouncement, it is hoped that this paper will stimulate discussion and debate about how best to compare and present cross-jurisdictional experiences within

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<sup>1</sup> The full chart, only portions of which are presented here, is accessible at: <[http://media.wix.com/ugd/fa311e\\_cc038eafa08d459abbd6b57e462e8337.xls?dn=%22UNDP-LCC%20Comparison%20Chart%201APR2014.xls%22](http://media.wix.com/ugd/fa311e_cc038eafa08d459abbd6b57e462e8337.xls?dn=%22UNDP-LCC%20Comparison%20Chart%201APR2014.xls%22)> (accessed 12.11.2014).

<sup>2</sup> Constitutional Declaration (2011), Amend. 1 (9 April 2013) § 3.3.

<sup>3</sup> GNC Law 17, Art. 9.2 (16 July 2013).

constitutional transitions. Developing such a methodology is especially crucial at this time as a large number of jurisdictions, particularly in the Middle East and North Africa region, find themselves at various stages of transition.

None of the findings discussed here will be entirely unfamiliar to practitioners or academics. A swath of research and information was taken from the country studies compiled in the United States Institute for Peace's (USIP) *Framing the State in Times of Transition* (2010) and Interpeace's *Constitution-making and Reform: Options for the Process* (2011). The comparison chart and its underlying research, however, go beyond these seminal studies, encompassing information contained in all available English-language general and country-specific constitution-writing research and reports. Its findings support, but also qualify, some prevailing opinions, and suggest new connections in constitutional process that might result in constitutional success.

'Constitutional process' is defined here as the manner in which a constitution is written (thereby excluding the unwritten variety), from the instigation of a plan through to enactment and implementation. It excludes substantive aspects of constitutional design, or what is contained in a constitution's texts. Until recently, constitutional process has been a 'blank spot' within comparative constitutional study.<sup>4</sup> This has been filled in part by the works of USIP and Interpeace. The recent focus on the topic, and the impetus for this study, is the notion that *process matters* in its ability to legitimise or delegitimise a constitution. Indeed, one of the most important findings of this study is that abiding by the constitution-making plan itself correlates strongly with a successful constitutional outcome. If drafters can abide by their own rules—what in a sense becomes a 'proto-constitution'—then the political community more broadly tends to view the drafting process as legitimate, and is more likely to accept the meta-rules established in the fully-formed constitution.

While the study permits some unique and revealing observations of constitutional processes, its ambitions are limited. First, language barriers and resource constraints necessarily reduced its scope. Secondly, many recorded factors implicitly require qualitative assessment. Efforts were made to base any such qualitative assessments on objective factors, but some subjectivity could not be avoided. Thirdly, while eighteen processes represent a reasonable cross-section of comparative and historical constitution-writing experience, several notable 20th century processes are missing. Fourthly, the limited sample size and methodological constraints mean that this study should not be considered as

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<sup>4</sup> J Elster, 'Ways of Constitution Making,' in A Hadenius (ed), *Democracy's Victory & Crisis* (1994) 137.

a 'statistical' or 'quantitative' analysis. It is presented as a rather large and carefully nuanced comparative case study. The more systematic and comprehensive a case study becomes, the more it tends to the 'quantitative' side, with a resultant loss of nuance and granularity. This warns against treating the chart as a 'quantitative' study, in the sense of attempting to apply the procedural 'parameters' it presents in a prescriptive fashion without proper comparison and, above all, familiarity with the jurisdiction under study.

The purpose of this article is to first, discuss those aspects of constitutional process that seem to have the most practical bearing on constitutional outcomes; second, to describe the parameters of constitutional process, how they interact with one another, their usefulness as predictive factors of ultimate success, and how they might interoperate with country-specific factors not recorded in the chart when applying the study's findings.

## 2 Developing a Methodology for Mapping Constitutional Process

Eighteen different constitutional processes were studied from sixteen different countries.<sup>5</sup> The constitutional processes under study included, in country alphabetical order, Afghanistan (2004), Bosnia (1995), Cambodia (1993), Egypt (2012), Egypt (2014), Eritrea (1997), Hungary (1991), Iceland (pending), Iraq (2005), Kenya (2005), Kenya (2010), Morocco (2011), Nepal (pending), Norway (1814), Poland (1997), South Africa (1996), Tunisia (2014), and the United States (1789).<sup>6</sup>

These processes were chosen in part for their relevance to Libya, in part for their recency, and in part for their importance to the meta-study of *process*. Because of its legacy of authoritarian government, the post-Soviet constitutional experiences of Poland and Hungary are of comparative interest to the Libyan case, as well as its Arab Spring North African neighbours Egypt, Tunisia, and Morocco. Recent or on-going processes are also included, mostly from neighbouring regions. All of these are post-conflict processes—with the exception of Iceland, which followed an economic crisis—and thus most operated in a constitutional vacuum or created a constitution anew. South Africa's inclusion is justified from a process perspective because it marked a radical transition from the old regime,

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<sup>5</sup> Kenya 2005 and 2010 and Egypt 2012 and 2014 are each treated separately.

<sup>6</sup> For those familiar with comparative substantive constitutional study, the selection of countries and their processes may seem inadequate, especially in the omission of the German Basic Law (1949) and Japanese Constitution (1947).

and is widely considered to have been 'successful'. Two historical processes, the United States and Norway, were included in the initial study because their processes bear striking resemblances to South Africa's, and because they are generally regarded as 'successful' given their longevity, stability, and ability to adapt over time.

For these eighteen processes, the study identified thirty-five aspects of constitution-making, divided into four phases. Phase I comprises 'Preliminary decision-making regarding Constitutional Procedure' to 'Election or Appointment of a Constitution-writing Body'. Phase II comprises 'Convening the Constitution-writing Body' to 'Preliminary Draft'. Phase III comprises 'Completed Preliminary Draft' to 'Final Draft'. Phase IV comprises 'Final Constitution' to 'Implementation and Beyond'. The chart noted the presence, timing, and, where appropriate, the quality of thirty-five features within these four Phases, ranging from the routine (such as the establishment of a secretariat and the adoption of rules of parliamentary procedure) to complex factors (such as public participation within the various phases, transparency, and ultimately, '*post-hoc* success').

Phase I covers the preliminary process, from the creation of a plan to write a constitution through to elections or the appointment of a constitution-drafting body. The first element recorded within Phase I included the time frame and process for deciding on a constitution-writing plan and guiding principles. This 'prelude' is not included in the time measurement of 'Phase I' or the country's overall 'constitutional process' for two reasons. First, the study took a legalistic definition, setting the clock running from the formal agreement by those in power to a process for writing the constitution. Secondly, for some countries—such as South Africa, Kenya, and the United States—this prelude required much longer than the formal process recorded here, and would have made the study impossible by multiplying the number of elements to be recorded. That the three countries listed all had successful constitutional processes suggests one hypothesis for further investigation, that a longer *pre*-process possibly results in a healthier formal process—both resulting in a more 'successful' constitution when measured by indicators such as longevity and stability. Such a conclusion would merit its own comparative study. The elements studied within Phase I included drafting an electoral law, pre-election civic education (as it related to the special instance of electing a constitution-drafting body), pre-election public consultation (on the constitution itself), elections, and appointment of a constitution-writing body. The last two items were generally mutually exclusive.

Phase II covers the convening of the constitution-drafting body through to

the production of a first draft. Unlike the other Phases, the end of Phase I was not necessarily the start of Phase II. Recorded elements in Phase II include establishing a secretariat; promulgating rules of parliamentary procedure for the drafting body; formulating committees; adopting a program or agenda for substantive issues; drafter education and capacity-building; the role of local experts; the role of international experts, powers, and influences; pre-draft civic education; pre-draft public consultation; incorporating public input; transparency; plenary discussions; technical drafting; and production of preliminary drafts.

Phase III covers the process from first to final draft. Elements include establishing a program for public consultation, post-draft publication, post-draft civic education, post-draft public consultation, incorporating post-draft public input, plenary and committee debate, and production of a final constitution.

Phase IV covers formal constitutional procedures from promulgation of a constitutional text to its implementation. Specific aspects include promulgation, or when the constitution becomes law; approval by the legislature; certification by the relevant superior judicial body; civic education on the final constitution; staging a referendum; rejection, including re-drafting and a second referendum; and when the constitution comes into effect. Finally, the last recorded element was '*post-hoc* success,' discussed below.

Some loss of resolution was required to fit sometimes vastly different processes into one scheme for the purposes of comparison. The last phase, in particular, followed a less sequential timeframe than other phases, especially as jurisdictions differed widely in what was required to implement the constitution. All elements represent choices that must be made either by those establishing a constitution-writing plan at the time the plan is made or, if that plan is left incomplete, (as under Libya's Constitutional Declaration, for example), throughout the process by the various parties involved in the constitutional transition. In Libya, this has involved the Transitional National Council, two legislatures, the Supreme Court, and the Constitution Drafting Assembly itself. The inclusion of each element in the comparison chart identifies the range of choices available to these decision-makers, and provides comparative information about how other countries in transition have decided to handle these choices.

Each element under study was measured by its presence and duration. If a time quality is identified, its presence may be assumed. If that element was not present in the process, its absence is marked by N/A, or not applicable. In rare cases—especially where it relates to how often the constitution-writing body engaged in plenary discussions and when it developed its rules of parliamentary

procedure and formed a secretariat and committees—precise information on that element is either difficult to find or beyond the limits of the study. In the former instance, dates and times are approximated as well as possible (indicated by a carrot sign), or descriptives such as “immediately” or “throughout” are used. In the latter case, which occurred only four times in measuring the frequency of plenary discussions, ‘unavailable’ is recorded. Where possible, N/A or ‘unavailable’ is accompanied within the chart by relevant contextual information.

Many elements within the chart are also measured by their quality. These elements included civic education, public participation, incorporation of public participation, constitution-maker education/capacity building, transparency, the role and influence of experts, foreign influence, and post-hoc success. Civic education and public participation are quantified and valued at each stage of the process. This is done to measure and cross-correlate these elements from several different angles. In this way, we can analyse at which stage countries engaged in each (or both) activities, and which stage each (or both) of the activities was most effective. ‘Civic education’ is defined as information shared with the public about the constitutional process or constitutionalism generally. The one exception to this definition is in the ‘prelude’ stage, when civic education relates to information given to the public regarding the special implications of electing a constitutional assembly, if applicable. ‘Public participation’ is defined as the public’s ability to express its views in a format people believe could influence the constitution’s substantive content. The qualitative assessment of both elements involves some judgment in measuring the presence and effect of several objective factors. For civic education, these factors include whether educational materials were provided by official (e.g. governmental or constitutional bodies) or unofficial sources (including international non-governmental organisations and civil society organisations), the circulation of these materials and actual reach and awareness of them, and the specificity of the materials in educating the public about discrete aspects of constitutional content or events. For public participation, factors include whether means of public communiqués relating to the constitution and its writing process were conducted by official or unofficial sources, how deeply means of public feedback penetrated urban and rural areas and the country as a whole, and whether the feedback mechanisms allowed meaningful participation (e.g., whether it was preceded by quality civic education and related to specific elements of constitutional content and process in a manner well-timed for incorporation into the constitution or its process). Whether public participation was incorporated was also measured qualitatively for Phases

I through III. To judge this element, the timing of public participation, formal mechanisms for evaluating it, and how public feedback manifested itself in the constitution are all considered.

Constitution-maker education or capacity building is also evaluated qualitatively, based on whether and to what extent drafters were already educated in constitutional matters, whether any training programs were conducted, and (if so) their length. The quality of transparency is measured by the availability of official minutes, meetings, and general information to the press and the public. For local and international expert influence, the number of domestic and outside experts, their relationship with the drafting body (whether internal or external and the degree of influence wielded by them), and their role in actual drafting if any is evaluated. The role of international powers is evaluated on the basis of the role and influence of foreign nations or multi-national organisations such as the United Nations or the European Union. The role of international influence was determined by the constitution-drafting body's consideration and impact of comparative practices and constitutional philosophies; for the two historical processes under review, international influence served the role that international experts usually play today, but some contemporary processes such as Kenya, while involving international experts, also amassed a library of comparative practices for drafters to reference.

Elements measured qualitatively were rated on a scale of 'poor, moderate, or strong' or, for the role of local and international experts, powers, and influences, on a scale of 'weak, moderate, or strong'. It should be noted that these simplified scales do not include a nullity measure. Thus, when transparency is measured as 'poor,' it usually means meetings were completely closed. Assessing the quality of each of these elements merits its own study under a more sophisticated methodology.

'Constitutional success' is inherently difficult to define in an objective manner, and presents the major methodological challenge. The factors ultimately considered in the study's definition of 'constitutional success' as an outcome include the following: 1) whether the constitution was accepted contemporaneously to its enactment, measured by referendum voter turn out and success rates; 2) whether it was accepted over time, measured by a) violence levels, b) corruption levels, and c) adherence by governmental bodies to constitutional strictures; 3) the frequency and extent of formal amendments that would amount to wholesale rejection of the fundamental constitution; and 4) the constitution's longevity. The last element is considered important and relevant to success because, despite jurisdictions that permit judicial review and constitutional amendment, longevity

of the original document allows laws developed under the constitution to remain in force and enhances the legal and economic stability of the country overall.

‘Success’ does *not* measure the prosaic beauty of the constitution’s text, its coherence, or other substantive values such as realisation of the drafters’ objectives. Although constitutional success is also measured on our scale of ‘poor, moderate, strong’, processes that have been completed too recently (such as Egypt’s 2014 and Tunisia’s 2013 constitutions) or which remain incomplete (Eritrea, Iceland, Kenya 2005, and Nepal) are marked ‘TBD’ (to be determined) or ‘unsuccessful constitutional process,’ respectively.

A subset of the recorded elements—those that appear to correlate most strongly to the success or failure of a process—will be discussed in Section III, below. These elements include most of those measured qualitatively: civic education, public participation, transparency, and the role of experts. In addition, elements also bearing on success *not* recorded in the chart but observed by the author throughout the process of preparing the country studies and chart are discussed. These form the basis of some suggested guidelines for process-designers in making choices about constitution-making procedure.

## **3 Findings from the Comparison**

### **3.1 Realistic Timeframes**

Within the cases studied, successful processes generally fell within a timeframe of two-five years from finalisation of a writing plan to implementation of the constitution. Processes that were either too long or too short ran into problems at either end. As described above, the timeframe recorded here focused on the formal process—that which was agreed upon by official organs and institutions, from the date of agreement to date of constitutional implementation. As such, the often long prelude, that in which a new constitution is called for and the writing process negotiated and finalised, was recorded as an element of Phase I, but was excluded from the formalised timeframe. As emphasised previously, this important period merits further study, but is beyond the scope of this article.<sup>7</sup>

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<sup>7</sup> The end of the study at the date of implementation of the constitution also excludes important constitutional events, such as the first instance of judicial review, or the first challenge to government corruption in violation of the constitution by civil society or the media, and a more complete study might record these elements as well. The primary recipient of the study, the Libyan CDA, had to make a very practical decision about extending its own referendum and implementation deadline so that expectations could be set as to when elections should be held

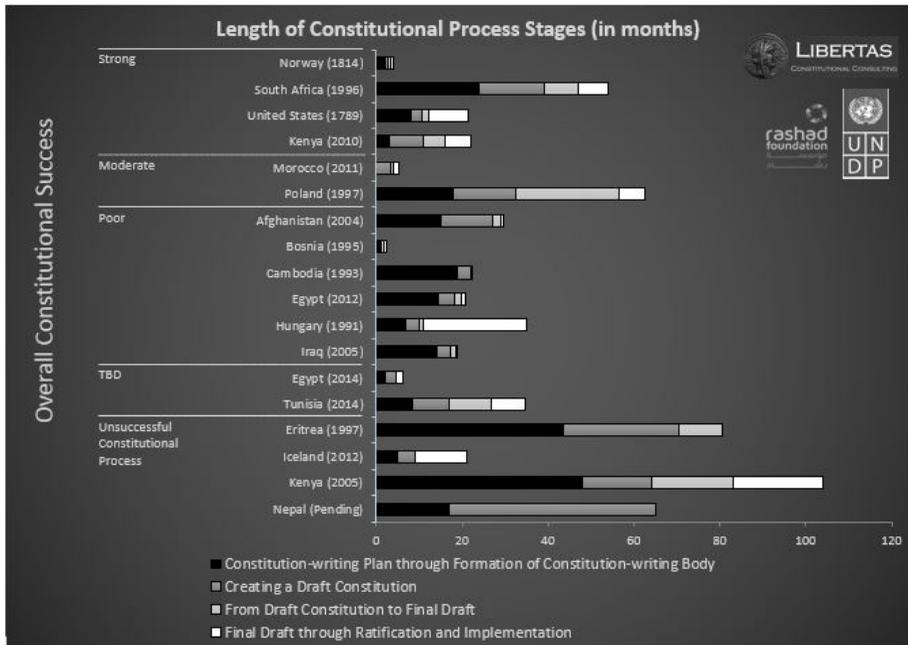


Figure 1: Length of Constitutional Process Stages

For those processes under study, successful processes had a pre-draft phase (excluding the preliminary phase) that was roughly equal to the post-draft phase. This meant that a draft constitution was considered, discussed, and edited for just as long a period as was required to write a draft, presumably allowing for greater refinement, perfection, and acceptance by the populace before successful finalization and implementation.

The median duration of the implementation phase in successful processes was around six months, and in many cases problems could be observed when this phase was much longer or much shorter. This may be because transition to the new constitution and the constitutional rule of law required institutional changes that could not be executed successfully in haste. On the other hand, a long implementation process may indicate things such as a failed referendum, lack of

again and the second interim congress terminated. With these decisions imminent, it was helpful to the CDA to know how other processes were timed and what their outcomes were. It was also helpful for the CDA to know not only overall comparative timelines, but how each phase compared in length.

public support, or official ‘feet-dragging’ that boded ill for official compliance with the new constitution once implemented.

The length of the preliminary phase—between deciding on a plan and the election or nomination of a constitution-writing body—had no observable effect on constitutional success in any of the cases studied. Many processes with long preliminary phases were successful, including Poland and South Africa, but unsuccessful and incomplete processes also had long preliminary phases. The same held true for the long ‘prelude’ phase. The prelude period could meander or proceed in fits and bursts as consensus for a new constitution built, waned, then built again, finally leading to a formal agreement to write a constitution—all without any observable impact on the legitimacy of the process or the success of the resulting constitution. So too could the preliminary period take several years (although not stop and start) without impacting the process or constitutional success.

Apart from this preliminary phase, however, it appears that processes shorter than six months generally resulted in less successful outcomes. Of the cases studied, this is borne out by Bosnia, Cambodia, Egypt (2012), and Iraq—processes lasting less than six months. If only the pre- and post-draft stages are considered, Hungary’s 1989 constitutional process was also extremely short, at four months. The constitution that resulted is also considered to have fared poorly, being replaced in 2011 in a highly controversial process.<sup>8</sup> For each of these countries, key elements of constitutional process design were missing—for all but Egypt (2012), for which the issue was the exclusion of important societal elements—the too-short processes lacked either meaningful pre- or post-draft public consultation, or both. Exclusion of these time-consuming elements was one reason the process was so short, and might well be a reason why the constitutions that resulted were less successful.

Although most countries with shorter process timeframes failed, two historical cases included prove exceptional cases that highlight some of the difficulties in comparing historical processes with contemporary ones. The United States Constitution’s timeframe is frequently pointed to within contemporary Libya as having a short constitutional timeframe, with the Constitutional Convention lasting only four months. The Constitutional Convention, however, only accounts for the pre- and post-draft stages. Other elements normally included in these stages were instead incorporated in the preliminary and implementation stages,

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<sup>8</sup> P Krugman, ‘Hungary, Misunderstood?’ (*The New York Times Online*, 21 Jan 2012) <<http://krugman.blogs.nytimes.com/2012/01/21/hungary-misunderstood/>> [accessed 25 March 2014].

which were far longer—one and two years, respectively. The implementation phase involved extensive public participation in the lead up to ratification. Elections for state ratifying conventions extended the franchise radically,<sup>9</sup> and public debate within the conventions and concurrent to it (e.g., in pro-Federalist and anti-Federalist editorials) ultimately resulted in meaningful change to the constitution in ten amendments.<sup>10</sup> Secondly, the preliminary phase included extensive informal public education through active and mass-scale pamphleteering, for example the widely read *Common Sense* by Thomas Paine and *Thoughts on Government* by John Adams.<sup>11</sup> Thirdly, many of the drafters of the U.S. Constitution had expertise and experience in constitutional design from drafting their own state constitutions, or from their lived experience under those constitutions (or later iterations) for roughly the previous decade.<sup>12</sup> This last explanation may also apply to the historical example of Norway, a three-month process, where many drafters had studied constitutional design and Enlightenment theories of government.<sup>13</sup> That meaningful constitutional development in the U.S. occurred during unlikely points in the constitution's development underscores the need for flexibility in interpreting timeframes. The implementation and preliminary phases should be considered in determining the U.S. constitution's true timeframe. Moreover, these aspects demonstrate problems with comparing historical to contemporary processes.

A lengthy process often means continual changes to the process and loss of momentum, such as has occurred in Nepal (which has yet to produce a draft) or in Hungary, whose 1989 constitutional moment was missed altogether. Poland's eight-year constitutional process is exceptional, though it lost momentum at least once. Its moderately successful culmination despite process length may be explained in part by: 1) the drafters' obsession with process legitimacy; 2)

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<sup>9</sup> A Amar, *America's Constitution: A Biography* (Random House, 2005) 14-18.

<sup>10</sup> See generally K Bowling, "A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights' (Fall 1998) 8 *Journal of the Early Republic* 224.

<sup>11</sup> See generally B Bailyn, *The Ideological Origins of the American Revolution* (2<sup>nd</sup> edn, Harvard University Press 1992).

<sup>12</sup> G Wood, *The Creation of the American Republic, 1776-1787* (The University of North Carolina Press 1969) 430-438.

<sup>13</sup> Norway celebrates the 200<sup>th</sup> anniversary of its constitution this year, the third oldest in continuous operation. The Norwegian drafters were highly esteemed, many of them experts within their given fields, and several had constitutional and even comparative experience. Under the threat of a retributive Swedish take-over for Norway's support of Napoleon, perhaps the prestige of the drafters, the so-called 'Men of Eidsvoll' and the process-designer, Danish Crown Prince Christian Frederik, contributed to Norway's constitutional success.

its inclusiveness; 3) the constitutional experience of experts and other leaders participating in the process; and 4) Poland's long fixation on constitutionalism.

From the cases studied, it would appear that successful processes are those that identify realistic deadlines for the procedural elements they wish to include, with reference to the level of expertise of their drafters. Processes under six months seem to have precluded adequate time for important elements of constitutional design, such as public participation or organising an inclusive drafting body. The provision of nominated experts as drafters may decrease the time needed for drafting. Processes over five years were slowed due to indecision, continual changes to the process, or lack of political consensus; all elements that serve to undermine the legitimacy of the process, cause public apathy, and cause a loss in momentum that is extremely difficult to reverse. The involvement of experts internal to the process may again serve to right some of the problems associated with an otherwise too-long process.

### **3.2 Public Participation: Including the Voice of the People Both Substantially and Meaningfully**

Most successful constitutions from this comparative study involved mechanisms for substantial and meaningful public participation. Meaningful public participation must be preceded by unbiased civic education, helping the public to know how to participate and what their constitutional options are. Pre-draft public consultation is more difficult to incorporate than post-draft public consultation, but the issues that arise in this regard may be effectively addressed by the use of modern information and communications technology and well-considered feedback mechanisms.

It is apparent that public participation was not dispositive for constitutional success in the processes under study. Unsuccessful and incomplete constitutional processes included public consultation just as much as successful ones—if not with more consistency. The public participation chart depicted below is informative, but displays only public participation and success rates. If taken alone, it would seem to suggest that public participation had little bearing on success or resulted in either great success or extreme failure in the process. Either way, commonly-held beliefs about the importance of public participation to process and constitutional success are challenged by this comparative case study. It would appear that, as a rule, public participation is a necessary but not sufficient procedural element of constitutional success.

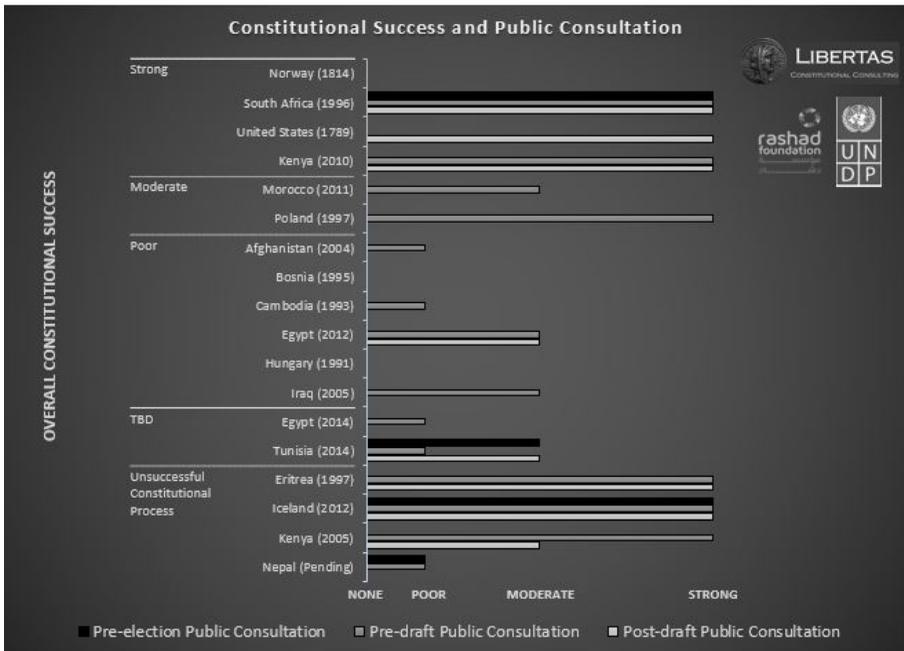


Figure 2: Constitutional Success and Public Consultations

It seems that public participation must be both meaningful and substantial to engender the kind of process legitimacy that produces a successful constitution. ‘Meaningfulness’ here is judged as a quantum of the public’s impact on the constitution’s content. Submissions and public commentary cannot be meaningful if they are not produced in formats that can be readily incorporated by drafters, either due to volume or nature of the submission. The size of the political community will make a difference here; for example both South Africa and Iceland’s constitutional process solicited open-ended contributions, but proved to be more useful in the smaller and more homogeneous Iceland. Public hearings, giving the public the chance to interact face-to-face with the drafters, can also be a meaningful form of public participation. Sessions of this type can prompt ideas and questions in the minds of the drafters and may impact their positions and attitudes towards the constitution. Where well received, forms of public influence such as demonstrations, petitions, and editorials can also be meaningful. However, as the actual meaningfulness of these methods can only be judged subjectively, a more reliable way to ensure meaningfulness may be to allow the public

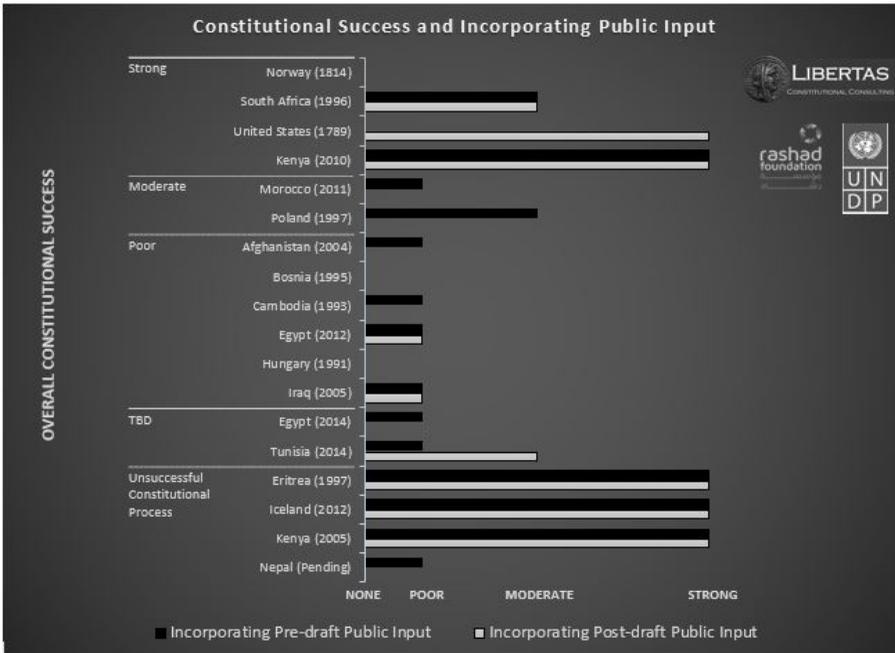


Figure 3: Constitutional Success and Incorporating Public Input

to determine the issues upon which the constitution turns, for example through conducting preliminary surveys or pre-referendums on key issues, or by allowing commentary (followed up by revisions) to provisional articles, as occurred in Iceland.

‘Substantiveness’ may be judged by the amount of constitutional text or issues that are impacted by public participation. Up and down referendums after completion of a final text, may not, alone, meet this requirement. Referendums or surveys on key issues prior to the creation of a draft will meet this requirement, as will allowing the public to comment on and suggest edits to provisional texts, so long as these influence the final text. Successful participation presents the public with real choices. In Morocco, the public received propaganda from the king rather than information presenting constitutional choices. In Iraq, information was less biased, but failed to focus on significant constitutional issues, effectively precluding the public from affecting the outcome on these matters.

Several factors will prevent public participation from being meaningful or substantial. Lack of precision in the design of a public participation campaign

can prevent substantial participation. One reason, in addition to its overlap with civic education, that Afghanistan's public consultation failed to be effective was that conversations with the public were kept vague, and so difficult to incorporate into the text. Timing issues can also prevent incorporation of public feedback, as was the case in both Afghanistan and Iraq. In Afghanistan, the time allotted for public participation and civic education—both late in the process and too short for permitting incorporation of the feedback—pre-empted the public's role in the drafting process. In Iraq, the volume of feedback elicited from the public was impressive, yet the feedback excluded significant populations—Sunni and Kurdish—and the lack of time and clear procedures prevented meaningful incorporation. Because of these issues, feedback did not reach the drafting body till their role was usurped by the more exclusive Leadership Council.

It would appear that public participation's impact reflects the agency of political elites. Although comprehensive public participation campaigns were run in Eritrea, Iceland, and Kenya (2005), political processes prevented the finalisation or the implementation of the constitution. In Kenya (2005), the legislature re-wrote the constitution, nullifying much of the public's input in previous drafts. In Iceland, after a process widely praised for its ingenuity in 'crowd-sourcing' a constitution, the Icelandic legislature (*Althingi*) failed to bring the constitution to a final vote to carry it into force. Eritrea's completed process, widely hailed for its incorporation of public feedback at various stages, was stymied when President Afwerki and the ruling party refused to implement the constitution and hold new elections. In short, political manoeuvring prevented successful implementation of constitutions that benefited from very good public participation campaigns. Had elites not intervened, it is likely that these constitutions and their processes would have been successful, with public participation certainly contributing to that success.

Effective public participation depends on a public able to engage in important constitutional issues and options. In order to have a meaningful constitutional voice, members of the public need to know how to articulate their constitutional preferences, usually requiring prior civic education. Civic education is most useful if it precedes public participation, allowing the public to make informed decisions about constitutional options and outcomes before communicating these to constitutional decision-makers. Appropriate timing of both is particularly relevant in developing countries or for populations where education levels are generally low. In Afghanistan, public participation overlapped with civic education, diminishing the effectiveness of both. Civic education can also help to ensure a smooth transition as the constitution is implemented. *Post-hoc* civic education,

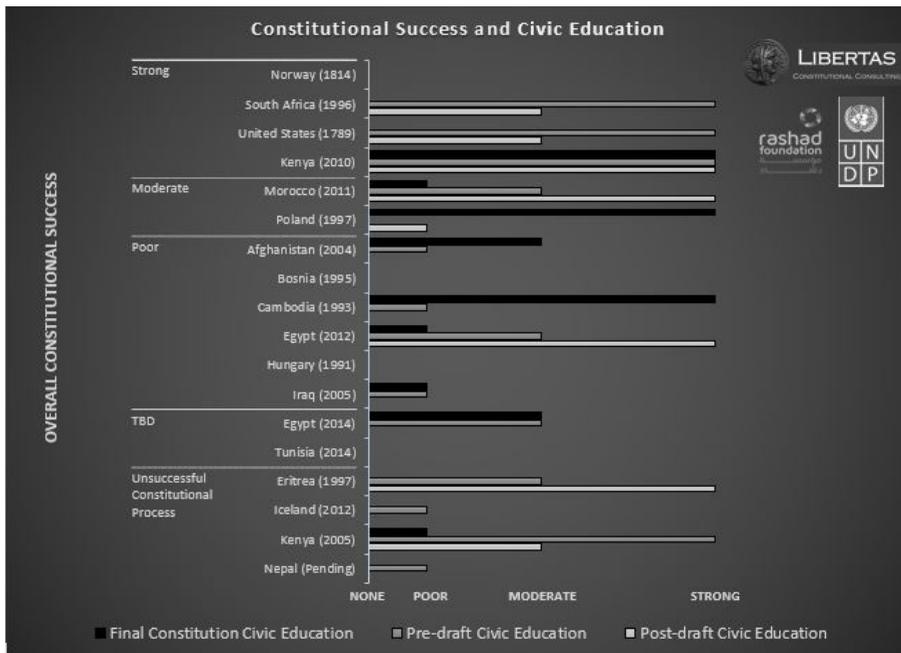


Figure 4: Constitutional Success and Civic Education

however, cannot compensate for failing to provide it at an earlier stage or failing to incorporate public feedback. Processes that suffered from these ills include Afghanistan, Iraq, Egypt (2012), and Kenya (2005).

One of the best means of public education is a transparent process and good record-keeping that can be shared with the public. Iceland’s method of webcasting plenary sessions and posting successive drafts online was a means to invite participation, but also served to educate the public. This supports the conclusion that effective civic education should precede public participation; not only was education incorporated into the electoral process for the special constitutional body, but the public were educated about the constitution’s substance by watching the proceedings and reading draft texts *before* they engaged in feedback mechanisms by suggesting textual edits.

Such substantial public participation requires sophisticated methods for processing feedback, particularly when elicited pre-draft. One of the problems with South Africa’s otherwise excellent public participation was that there was little way to incorporate all two million pre-draft submissions. However, both

Kenyan processes addressed this issue by maintaining a database and a research crew that coded submissions topically and placed them into discrete binary formats that could be used by drafters. Where funding or sophistication is lacking for such a system, feedback formats could be carefully structured in binary formats to ease processing.

Post-draft feedback is, by definition, more constructive, as it is based on an existing text. Iceland successfully incorporated the 5,000 submissions made to the various draft articles posted online. Yet post-draft feedback poses other challenges, as constitutions nearing the finish line are almost always the by-product of multi-party, elite negotiations. The United States navigated this issue successfully by encouraging feedback in binary form after negotiations were completed (ratify the constitution or not) and then incorporating more complex public feedback (suggestions for Bills of Rights) via amendments.

### **3.3 Transparency: Poor Transparency Contributes to Poor Constitutional Outcomes**

The transparency of a constitution-drafting body, or its openness to public scrutiny, has been stressed by groups like USIP as essential to constitutional success. This comparison also suggests that transparency is a useful ideal: all but one process (Egypt (2012)) ranking 'poor' on the success scale also ranked poorly on the transparency scale. However, transparency may not be *essential* to constitutional success, as only 50% of successful constitutions within the study have a higher than 'poor' rating for the quality of transparency. While this may qualify strong claims about the role of transparency in crafting a successful constitution, it seems safe to consider transparency to have a presumptive positive influence on constitutional processes.

This positive influence seems to have been counteracted in unsuccessful and incomplete constitutional processes such as Eritrea, Iceland, and Kenya (2005) by political forces preventing the successful completion or implementation of the constitution, in a similar manner to public participation. In Eritrea, early constitutional proposals were released to the public. Mass public meetings, all of which were recorded, were held in 157 different locations across the country as well as sixteen held abroad, involving over 121,000 Eritreans.<sup>14</sup> Furthermore, there is evidence that public input was incorporated in the final

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<sup>14</sup> B H Selassie, 'Constitution Making in Eritrea: A Process-Driven Approach' in *Framing the State in Times of Transition: Case Studies in Constitution Making* (USIP, 2010) 69.

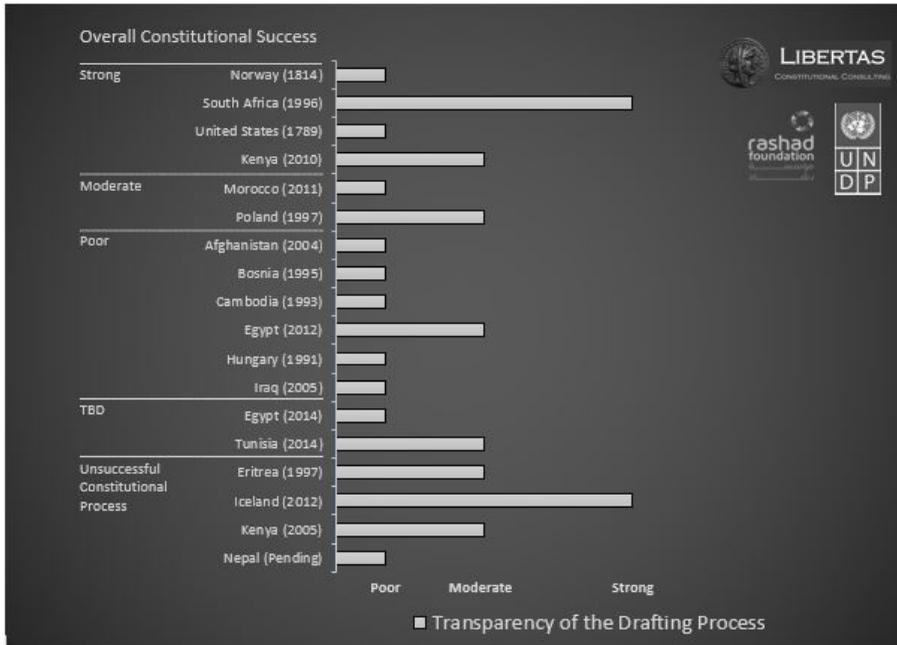


Figure 5: Constitutional Success and Transparency

draft.<sup>15</sup> Minority party views, however, were suppressed, and some scholars argue that the true process was closed, as the dominant, armed party, the People's Front for Democracy and Justice, never intended to implement the final draft.<sup>16</sup> In Iceland the open, participatory process, including web-streaming proceedings of the Constitutional Assembly, was dominated by the liberal party throughout, and conservative participation was low. Conservatives within the *Althingi* then blocked the constitution being brought to an open vote and,<sup>17</sup> since the return of a conservative government to power in 2013, the process has stalled.<sup>18</sup> In the Kenya (2005) process, although meetings of the Constitutional

<sup>15</sup> Id.

<sup>16</sup> T Medhanie, 'Constitution-making, Legitimacy and Regional Integration: An Approach to Eritrea's Predicament and Relations with Ethiopia' *Diiper Research Series*, Working Paper No. 9 (2008) 2, 14, 21, and 22.

<sup>17</sup> B Kaufmann, 'Not a Fairy Tale. The Icelandic Direct Democracy Saga (Part 1)' (*Democracy International*, 2 Apr 2013) Accessible at: <<https://www.democracy-international.org/not-fairy-tale-icelandic-direct-democracy-saga-part-1->> [accessed 9 April 2014].

<sup>18</sup> L Mirani, 'Iceland's experiment with crowd-sourcing its constitution just died' (*Quartz*, 29

Commission were not open, it produced lengthy public reports on deliberations and incorporated the results of an extensive public participation campaign.<sup>19</sup> Yet the moderately transparent process was undermined by its unexpected hijacking by the legislature, whose approval, meant to only be a formality, resulted in a complete—closed—re-write of the text.<sup>20</sup>

### 3.4 Use of Experts: Local Expertise Preferred over Foreign Experts and Influences

All successful constitutions from the comparative study included experts, most of them local. Such was the case in Kenya (2010), Norway, Poland, South Africa, and the United States. In fact, constitutional bodies and decision-makers from these countries seemed to have been ‘stacked’ with the best constitutional minds the nation had to offer. Including local experts is not impossible when drafters are elected; in Poland and South Africa, elected drafters drew in local experts via special commissions or working groups. However, process-makers should consider whether they want to have local experts serve as constitution drafters when deciding whether to elect or nominate drafters, as expert ‘stacking’ is more easily accomplished where drafters are nominated by elites rather than elected by the people. Such was the case in Kenya (2010) and the United States. Nominations allow for pooling and vetting the most qualified drafting candidates from specific regions or the entire country. Elections will tend to select candidates with popular legitimacy, but not necessarily expertise.

International intellectual influences or experts featured a small but prominent role in successful constitutions. In historical constitutions, including Norway and the United States, international sway took the form of intellectual influence. In a modern context, international influence is also significant but tends to be more direct. In South Africa, international experts were consulted after a first draft was produced, but otherwise played bit parts throughout. Kenya (2010) reserved one seat on their Committee of Experts tasked to draft the Constitution for an international expert, which was awarded to a scholar from South Africa.

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March 2013) Accessible at: <<http://qz.com/68910/icelands-experiment-with-crowd-sourcing-its-constitution-just-died/>> [accessed 7 April 2014].

<sup>19</sup> Constitution of Kenya Review Commission, *1 Main Report: The Commission’s Method of Work* (2003) 86.

<sup>20</sup> AL Bannon, ‘Designing a Constitution-Drafting Process: Lessons from Kenya’ 116 *Yale L.J.* (2007) 1838-39.

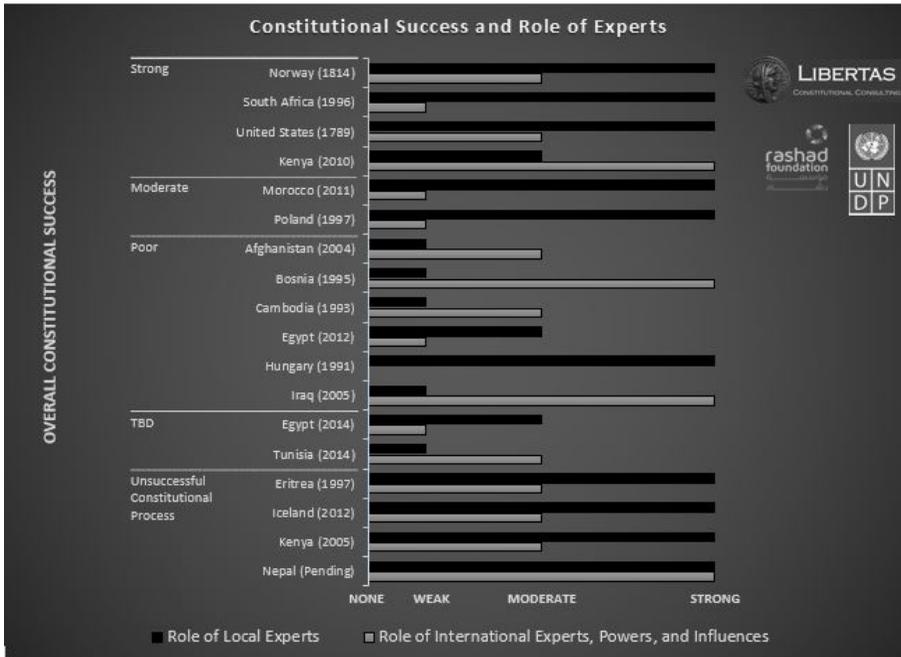


Figure 6: Constitutional Success and Role of Experts

They also developed an extensive library so that comparative constitutions could be studied.

Too much international influence or presence can be detrimental to a constitutional process, because the result may be maladjusted to local needs and circumstances, or may suffer from the negative perception of foreign fabrication. For a constitution to become respected as the basic law of a new legal order, it needs to be ‘owned’ by the people it governs such that it engenders voluntary compliance with the law. This stands in contrast to the post-World War II (or even post-Cold War) days when foreign powers, and their experts armed with the *Federalist Papers*, were accepted as legitimate drafters for a country’s founding document. Bosnia and Iraq are examples of this trend. Bosnia’s mostly foreign-written constitution has yet to establish peace and the rule of law in that country, and pressure from the United States in Iraq forced through a constitution in a short timeframe that did not mediate ethnic and sectarian tensions, the repercussions of which are being felt as of this writing. Afghanistan’s

constitution was effectively re-written by international interests, producing a document garnering little respect by the country's warring factions. In short, constitution-writers should be wary of too much international presence, but there is little downside—and much upside—in ensuring the active participation of local constitutional experts. Such will improve the prose and practicality of the written text, as well as ensuring the appearance and reality of local origin for a document that must become the people's own.

### **3.5 Inclusiveness: Critical to Constitutional Success**

Inclusiveness has been identified by USIP, Interpeace, and others as important to constitution-drafting. The study undertaken here demonstrates just how critical it is to include elites from all political parties, factions, and minorities in the drafting process. Although it was not recorded as part of the comparison chart, the in-depth country studies undertaken for its preparation revealed that *all* successful, and one moderately successful constitution under study—Kenya (2010), Norway, Poland, South Africa, and the United States—included representatives from all major factions and regions in the drafting process and in key decisions and negotiations.

There are three suggested benefits to inclusiveness. First, because they were included in key decisions, all parties invested in the process and became interested, despite their interim wins or losses, in the constitution's ultimate success. As a result, these processes were able to achieve consensus or near-consensus within the constitution-drafting body regarding the final constitution, which facilitated public consensus, as in the United States and South Africa. Secondly, including representatives from various elements of society—tribes, classes, interests, regions, etc.—helped those represented by them to feel included vicariously. It was a means for the greater populace to participate indirectly in the proceedings, despite any other means of public participation. If their views were represented and considered, even if the outcome was not ideal from their point of view, they could trust that the deliberations had been fair and endorse the outcome. Finally, including all groups prevented one or the other from sabotaging the process or constitutional structure, such as is currently happening in Libya and Iraq, and which brought about the overthrow of Morsi and rejection of the 2012 constitution in Egypt.

A significant means of fostering inclusiveness and a distinctive organisational culture leading to consensus was early plenary policy discussions within the constitution-drafting body. Drafters of successful constitutions (Kenya (2010),

Norway, South Africa, and the United States), engaged in healthy plenary policy discussions to work through and reach consensus on large issues early on in the process. Early, successfully completed negotiations and compromises contributed to later cohesion, momentum, and the confidence to work through smaller compromises quickly. Tunisia's process, too early to be called successful, witnessed almost immediate organisation into six themed committees in which all substantive discussions and writing took place for much of the process. Plenary policy discussions came much later. Tunisia's difficulties during the process may have been prevented had plenary discussions come earlier in the process.

Efforts at inclusiveness, even if ultimately unsuccessful, helped to engender process legitimacy and eventual acceptance of the final product by an overwhelming majority of the people. Such was the case in South Africa, where drafters made repeated efforts to reach out to extreme and militant parties on the left (especially to the Pan Africanist Congress and Inkatha Freedom Party). Efforts at accommodation and compromise in the United States fostered general acceptance of the process and constitution as the fundamental law of the land even by those who opposed its contents.<sup>21</sup>

Conversely, failure to include certain elements of society, especially political elites, can sabotage an otherwise good process. Such was the case in Kenya (2005), Iceland, and Eritrea, all exemplary participatory processes. Egypt's 2012 constitution did not satisfy the moderates who claimed responsibility for the revolution that toppled Mubarak, triggering a counter-revolution and, unfortunately, another process which failed to include significant elements of society. Although it is too early to tell, Egypt's 2014 constitution, opposed by Islamists, may find a similar fate to its 2012 predecessor.

In sum, inclusion of all elites and factions appears key to constitutional success. Successful constitutions were inclusive enough to reach at least near-unanimity, while unsuccessful constitutions could in part be characterised by their exclusion of important social elements and power-bases. In fact, in several cases, non-inclusiveness trumped all other positive elements of a process—public participation, transparency, and local expert involvement.

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<sup>21</sup> For example, Daniel Shay, who led Shay's rebellion in Massachusetts (an armed opposition to state and federal forces which provided the impetus for the convening of the Federal Convention in 1787), was an Anti-Federalist delegate to the Massachusetts Constitutional Convention. Even though he opposed the Constitution's ratification, Shay led no more rebellions after its passage into fundamental law. He had become vested in the process through participation; as a result, despite Shay's disagreement with the outcome, he abided by it.

### 3.6 Promise-Keeping: The Process as a Proto-Constitution

Another observation from the in-depth country reports that is not apparent from the comparison chart itself is that the drafters' ability to adhere to their own constitution-writing plan played a very important role in those processes that were successful. If drafters were able to comply with the rules governing them in establishing the constitution, the constitution that resulted tended to receive better acceptance by the population and achieve a better rule of law state. The process thus became a 'proto-constitution'. Adhering to the plan and meeting deadlines in these processes served to maintain momentum, but perhaps also signalled to the public the importance of the document on which the drafters were working. Respect for the 'proto-constitution', often contained in an interim constitution, earned the respect of the people, which translated into enhanced legitimacy for the ultimate constitution.

Complying with their own rules often came at great cost to drafters. The prime example of this comes from the Kenya (2010) process, where the Constitution's Committee of Experts adhered to the prescribed timeline despite great obstacles: when politicians withheld funding for the Committee's mandate, rather than delaying the process, the experts chose to self-fund until public monies were forthcoming. South African drafters made similar Herculean efforts in adhering to the initial plan laid out in their transitional constitution by working long hours and then through the night in the final hours before their deadline.

Interestingly, keeping to the plan was not possible unless the process was also inclusive. Including relevant elites from most if not all elements of society and engaging in early plenary discussions allowed the body to build an internal culture of trust through early compromises, which then lead to more and more easily-attained compromises, permitting the kind of progress and speed necessary to comply with external and internal deadlines. Such was the case in South Africa, Kenya (2010), Norway, and the United States.

On the other hand, it appears that processes that are constantly subject to change, such as Nepal and Poland, tend to lose momentum and legitimacy. Although this was corrected with great effort in Poland, processes can flounder—such as the case in Nepal as of this writing. It is important to note, however, that this applies only after a process has been finally decided. The machinations that occur during the 'prelude' to a constitutional process, where the plan itself is formed, has no bearing on ultimate success. South Africa's multi-year 'prelude', initiated by a transitional constitution, is a case in point. Once a plan is decided upon, however, the process crystallises, and sticking to it seems to make a differ-

ence to the outcome. The one exception to this hallmark of constitutional success within our study is that the overall process should not be too short. If, as in Iraq, a process is adhered to which is too short in the first place, compliance will make no difference.

## 4 Conclusion

Comparative case-studies can aid decision-makers setting the framework for a constitutional process to make informed decisions, as well as drafters writing a new constitution themselves. This is particularly crucial in post-conflict situations, in which time and resources are often constrained, and the effort to create a basic law requires the cooperation of competing social forces and visions for the society. From this study, the following observations would appear to be justifiable, even in light of the difficulties discussed in Section II, above. In particular, four procedural parameters appear to have affected the outcome in a number of cases:

1. *Inclusiveness.* Excluding groups, especially elites, seems to reliably result in poor outcomes. If a constitution-making process is not inclusive, it will not much matter what other choices are made regarding the process, as the exclusion of relevant groups and social segments can unravel an otherwise model process.
2. *Compliance with Reasonable Timelines.* The second guideline is to take whatever time is necessary in the 'prelude' and preliminary stages to plan a realistic process, but then hold to that timeframe despite all obstacles. This may be most difficult, but especially crucial, in conflict and post-conflict situations. Process designers and drafters alike should be careful to treat the process plan as they would want the public to treat the ultimate constitution. The reasonableness of the timeframe elected will in part depend on the elements process designers include, noting that civic education and public participation campaigns can take quite a long time, and that drafting time need not take as long if drafters are nominated experts rather than elected representatives. Thus processes under six months are likely too short, especially where they involve public participation and elected drafters. Processes longer than five years may see a loss of momentum and legitimacy and public apathy.

3. *Public Campaigns and Transparency.* If the process is otherwise inclusive, public participation campaigns seem to improve the chances of constitutional success. Where process designers elect to run public campaigns, our study emphasises that public participation becomes more meaningful if preceded by civic education and provision for it is either made after a draft constitution is published, or accompanied by adequate mechanisms to code and process submissions. The public's acceptance and 'buy-in' to the process is greater if they feel their participation actually bore on significant constitutional decisions. Extensive public participation campaigns wherein public feedback is actually incorporated into constitutional texts may lessen or eliminate the need for a transparent, open-door drafting process. That said, the lack of transparency is often a hallmark of poor constitutional outcomes, and thus should be avoided if possible.
4. *Experts.* The inclusion of local over foreign experts, whether drafters themselves or nominated by drafters to assist the process, will help to improve the perception that the constitution is homegrown, and enhance the likelihood that a constitution will be accepted as fundamental law. Drafters with constitutional expertise will decrease the length of time needed for technical drafting. Compiling a drafting body that is also an expert body is easier to accomplish when the body is nominated rather than elected.

This paper is designed to illustrate the sort of comparison in which a constitutional assembly such as the Libyan CDA could engage, and to sketch a methodology for this exercise. It is generally accepted that process bears on constitutional outcomes, and drafters increasingly desire to divine predictive guidelines from comparison—a 'roadmap to success'—drawn from the experience of others. Although this paper falls short of proffering such a roadmap—and, indeed, none can exist—the guidelines offered here must be taken into consideration with specific, in-country conditions, such as existing political institutions and constitutions and, especially, historical traditions of constitutionalism within the country. Indeed, the wide range of processes compared owe their ultimate success or failure not only to the procedural elements studied, but also to the contingencies of each constitution's unique history and circumstances. (Although the one element that seems capable of destroying *any* process, no matter how well-planned or executed, is the lack of inclusiveness).

Each political community must find its own path to constitutionalism. The kind of systematic comparison provided above, organised temporally and thematically around individual procedural elements, can be very helpful in that task. This sort of comparison should act as a basis on which to apply country-specific knowledge to the task of designing a constitutional process in light of its cultural, legal, political, and institutional background. As more countries in transition approach constitution-making in the next decade and undertake comparisons in preparing their constitutional process and substance, it is hoped that the methodology presented will invite comment and debate, leading ultimately towards a more rigorous approach to comparisons of this nature.