



MARGINALIZED GROUPS AND CONSTITUTION BUILDING

(A ROUNDTABLE REPORT)

This report highlights the key conclusions and recommendations emerging from an expert roundtable conference organized by International IDEA in October 2013, with support from the Government of Norway.

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EXECUTIVE SUMMARY

On 28–29 October 2013, the International Institute for Democracy and Electoral Assistance (International IDEA) convened a two-day roundtable workshop in The Hague on the theme of constitution building processes and marginalized and minority groups. The roundtable brought together more than 30 theorists and practitioners drawn from academia, government, civil society and research institutions to work on issues at the intersection between constitution building processes and the political participation of minorities and members of other marginalized groups.

It aimed to distil the experiences, challenges and lessons learned from the participation of minorities and members of marginalized groups in different constitution building processes around the world. The roundtable discussions were structured around six thematic sessions:

1. Gender
2. Ethnic minorities
3. Religious minorities
4. Lesbian, gay, bisexual, transgendered and Intersexual (LGBTI) groups
5. New technology
6. International support

This briefing report highlights the key conclusions and recommendations that emerged from the discussions. These refer to process issues as well as substantive and implementation questions.

MAIN RECOMMENDATIONS

RECOMMENDATIONS ON PROCESS

1. **Positive engagement with majority groups:** Positive engagement by minorities and marginalized groups with members of majority groups will dispel perceptions and apprehensions that a stronger role for minorities in political processes undermines majority interests, thereby facilitating buy-in and support from majority groups for more inclusive processes.
2. **A multi-pronged advocacy approach:** 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.

RECOMMENDATIONS ON SUBSTANTIVE PROVISIONS

3. **Listing:** Listing specific minority groups under non-discrimination clauses rather than strong general human rights protection clauses, while desirable in constitutions, needs careful consideration and further research to identify its positive and negative implications.
4. **Gender:** Design and implement normative and gender-sensitive constitutional frameworks in order to move towards equal gender representation and participation in political processes and institutions.

RECOMMENDATIONS ON IMPLEMENTATION

5. **Inadequacy of participation and substantive rights:** Merely ensuring a role for minority participation in the process or in substantive constitutional rights is inadequate. Ensuring that exclusion is effectively overcome requires investment in a broad range of strategies that will guarantee that rights are observed and valued.
6. **Strategic litigation:** The procurement of rights through litigation should be informed by a well-defined litigation strategy grounded in a solid understanding of the judicial culture.

1 INTRODUCTION

1.1 CONTEXT ANALYSIS

In recent years, constitution building has emerged as a critical part of peace building, national reconciliation and the transition from war to stable democracies. This is true especially where conflicts were fuelled by political exclusion—especially of minority groups subjugated to entrenched patterns of discrimination and marginalization. Prominent examples of excluded groups include religious, ethnic and linguistic minorities, but also sexual minorities such as members of the lesbian, gay, bisexual transgendered and intersexual (LGBTI) community. In addition, women in these groups remain particularly vulnerable to double discrimination and marginalization. While general constitutional guarantees to individuals and groups on fundamental human rights and freedoms have traditionally been recognized as essential to address these issues, special constitutional protections are often also needed to secure effective inclusion and accommodation of these minorities.

One key lesson from experience around the world, however, is that such measures function properly only when there is minority involvement in the decision-making processes that establish protection mechanisms (International IDEA, 2011). This is the right to political participation. It is broadly understood to include participation in constitution building processes, and has long been recognized as an important principle in international law (ICCPR, 1977, article 25; CEDAW, 1979, article 7; UN Declaration on Minority Rights, 1992, article 2(2) (3); Convention on the Rights of Persons with Disabilities, 2008, article 29). The United Nations has recently further articulated the importance of minority participation in constitutional transitions (Guidance Note of the Secretary-General: United Nations Assistance to Constitution Making Processes, 2009, Principle 4).

Beyond language guaranteeing minority protection in new constitutions, in some national processes marginalized minorities have been actively engaged in the negotiations on issues that directly affect them. In South Africa, for instance, the end of apartheid created room for minorities such as the black linguistic groups, Indians and ‘Coloured people’ to play a central role in the development of South Africa’s post-apartheid constitution (1994–96). Similarly, as members of the Constituent Assembly, Nepal’s Dalits and indigenous groups were fully engaged in negotiations on drafting the country’s new constitution at the end of the civil war in 2006.

Minority exclusion from constitutional and other political processes continues to be a global problem. The resurgence of patriarchal political systems across the Arab region and increasing violence by rebel militia groups in Egypt and Libya dampened the hopes and expectations of minorities in these countries. In Zambia, institutionalized

discrimination against minorities on the grounds of sexual orientation and the absence of constitutional protections for LGBTI rights have relegated members of these groups to the fringes of society and made them invisible. Myanmar's Muslim minority, of which the Rohingyas, a persecuted ethnic minority, constitute the majority, remain largely marginalized and vulnerable to the Buddhist majority, even as the country embarks on a democratic transition and potentially on constitutional reforms. In Bolivia, structural inequalities and other forms of discrimination against the Afro-Bolivians, which perpetuate their political exclusion, have effectively undermined their ability to exercise their right to participation under the new constitutional dispensation. Similarly, the Roma minority—spread mostly across Central and Eastern Europe—are still Europe's most politically marginalized and disadvantaged group, even though liberal democratic constitutions are now the norm in the region.

This landscape of truncated minority participation in constitution building and political processes raises a number of important questions: Why do some factors promote or undermine minority involvement in some political processes but not in others? Where minorities have secured participation rights, what has been their degree of success in securing constitutional gains? What were the specific methods of successful minority engagement? What key constitutional outcomes were secured?

Beyond standard-setting and constitutional guarantees, ensuring implementation is also a critical issue because principles seldom translate into positive action. This results in internal exclusion, or participation without voice, for many groups. What are the key challenges to implementation? How can they be addressed? What lessons can be learned from different experiences? How can they reinforce each other? How can the international community best support the implementation of normative and constitutional initiatives at the national level? These questions provided the context for convening the October 2014 workshop on *Including minorities in constitution building processes: experiences, challenges and lessons*.

1.2 OBJECTIVES

THE OBJECTIVES OF THE WORKSHOP WERE TO:

- Capture and distil practical knowledge, highlighting successes and failures as well as critical success/failure factors, strategies of engagement and lessons learned from minority participation in constitution building processes and the implementation of minority rights provisions in specific national contexts.
- Establish and provide a platform to encourage and facilitate ongoing discourse on issues related to broader minority political participation, and the practical benefits of minority inclusion.

Day one of the workshop opened with formal statements from the Director of Global Programmes for International IDEA, Kristen Sample, and Norway's Special Envoy on Minority Rights, Ambassador Petter Wille. Sample highlighted the importance of giving voice to minorities and marginalized groups in constitution building processes and recognized the progress made in a variety of contexts, while at the same time emphasizing that much remains to be done—especially in post-conflict constitutional transitions. She underlined that minority exclusion is a universal problem that many

countries are grappling with, and which overlaps many other concerns such as peace building and national stabilization. Hence, she saw the need to create global platforms for debate, knowledge-sharing and the distillation of lessons into possible policy solutions.

Welcoming the timeliness of the discourse, Ambassador Wille stressed that including minorities in constitutional processes is necessary in order to have a constitution that can serve as a basis for uniting society. He emphasized that the broadening of the space for political participation is critical for enhancing social cohesion and national ownership of political processes. He also underlined the need for a solid legal foundation based on human rights to protect all societies.

The concept and agenda for the dialogue were a product of broadly based consultations internally, within International IDEA, and externally with key stakeholders. The agenda was spread over two days and structured around six thematic sessions. This narrative report examines key aspects of the thematic discussions on issues affecting the participation of minorities, and the key recommendations that emerged from the discussions.

1.3 REPORT OVERVIEW

Section 2 of this report deals with the issue of ethnic minorities, It argues that the ‘4Rs’—representation, recognition, rights and resources, which have cross-cutting attributes, are critical elements that must be considered in determining how best to mainstream ethnic minorities in political processes. It also argues that buy-in from the majority is a critical factor as sustainability depends on societal recognition and acceptance of diversity. Section 3 focuses on religious minorities. It argues that problems related to religious minorities are necessarily connected with identity. It is therefore necessary to take a broad perspective on identity in order to avoid sacrificing individual rights at the altar of minority group protections. Due to the natural inclination for societies to resist change, section 4, which focuses on women, cautions against overrating the transformative impact of constitution building processes on the status of women, regardless of whether they participate in the process. It also warns against referring to women’s groups as if they were monolithic—not all women’s groups share the same vision or a common agenda for the role of women, be it in political processes in general or the constitution building process in particular. On the role of LGBTI groups, section 5 underlines the importance of context, arguing that it is key to determining the appropriate strategy for engaging LGBTI groups and with the issues that affect them. New media, and how they interact with questions of participation, are considered in section 6. It highlights the benefits and challenges these bring to constitution building processes. Section 7 focuses on the role of the international community and how its assistance can best be tailored to increase and enhance the participation of minorities. The concluding section analyses the emerging themes and makes recommendations for policy practitioners.

2 RELIGIOUS MINORITIES AND CONSTITUTION BUILDING PROCESSES

The key question addressed by the panel was: How do constitution building processes affect the role of religious minorities in society? Discussions revolved around three central themes: participation in the process itself, the rights enshrined in the constitutional text, and oversight and implementation of the constitution. Woven through these themes were general considerations of the nature of protections for minority groups in a democratic constitutional framework and how religion is tied to notions of identity.

2.1 PARTICIPATION IN THE DRAFTING OF THE CONSTITUTION

Participation comes in the form of representation on the constitution-making body itself and in the form of public consultations. Although participation, as some authors have warned (International IDEA, 2006: 13), has its limitations and must not be over-romanticized, it still has the key potential to increase the legitimacy of and acceptance for the process and the constitution itself. Kenya's 72 per cent turn-out in the constitutional referendum of 2010, which resulted in a 62 per cent approval rate for the document, would probably not have happened if Kenyans had not been consulted and felt ownership over the process. Elsewhere, the story is often told of how South Africans, in the early days of the country's post-apartheid constitution, would travel around with pocket-sized versions of their constitution and bring it out when confronted by overbearing public officials (International IDEA 2006: 14).

With regard to participation in the constitution-making body, a key concern is who can speak on behalf of religious groups. These groups are often heterogeneous in their composition and interests, and there is a risk that group leaders will be drawn from the *'creamy layer'*,ⁱ to borrow a phrase from the Indian Supreme Court. The example of current Swiss practice was offered as an option for addressing this problem, where, in order to be recognized as a religious group for the purposes of participation in the political process at the canton level, a group must be able to demonstrate democratic organization.

Ensuring the participation of women from religious minorities should also be given due consideration, although this should be carefully engineered to ensure fair representation for women from majorities too.

With regard to consultation, for public participation to be meaningful it must be structured. The Government of Norway's consultation with the Sami community is an example of strict rules and procedures ensuring structure and giving meaning to the consultation process.

Furthermore, in order to meaningfully participate in politics, religious minority groups must feel secure and self-confident. Only if these requirements are satisfied will they be able to organize freely.

Community mobilization is crucial, as it empowers representatives to speak with a strong voice. In addition, minority groups would be well-advised to enhance their advocacy strategy by building alliances with other religious minority communities. The media should be utilized to ensure minority concerns are heard when there is no minority representative at the bargaining table.

Lastly, minorities are more likely to have a say in constitution-making if the process is democratic. A democratic process should therefore be a key demand by minority groups from the outset

2.2 CONSTITUTIONAL DESIGN

The cornerstone for the protection of religious minorities is a strongly worded non-discrimination clause, as well as an affirmation of freedom of religion or belief. Numerous other provisions, however, not least on freedom of assembly, due process rights and electoral systems, can be just as important in ensuring that constitutional protections are not just paper protections. Religious minorities also seek the ability to continue their cultures and practices, and in this regard the role of religion in public and private education is significant.

Recognition in the text of the constitution is a common demand by religious minorities. This can provide a means of recognizing such minorities within the national identity, guarding against problems of the registration of religious groups or registration for individual citizenship documents and recognizing the suffering faced by certain marginalized groups. However, such recognition is not without its problems. First, a list of groups, if not comprehensive, may attract resentment from the groups that are left out. Second, tactically, some groups may prefer to be left out. For example, some Baha'i representatives feared that inclusion by name in the 2014 Egyptian Constitution would provoke a backlash, and instead preferred to the phrase 'Muslims and non-Muslims'.

The state has a duty to ensure individual rights in cases where illiberal minorities do not respect the overall normative rights framework. The South Africa Constitution provides an example of how to balance group autonomy with individual rights through the explicit delineation of a hierarchy, whereby personal status laws can be passed by parliament but, like other laws, must be compliant with the constitution's Bill of Rights.

Switzerland's use of its federal structure is also of note. The federal government is responsible only for guaranteeing freedom of religion and interferes only if there is conflict between two groups. It is left to the cantons to regulate religion and the relationship between church and state within their jurisdiction. The question of what it means to be Swiss is therefore separated from the issue of religious identity.

Personal status laws are of particular concern to religious minorities. The success of the group in achieving an area of legal autonomy over the private sphere, however, should not be allowed to endanger the rights of individuals. True religious freedom entails free entry into and exit from a religious denomination without penalty. This is

different from the conception of religious freedom embraced, for example, in Egypt, where minority religious groups obtain a monopoly on or control over their members, as expressed in personal status laws.

A number of issues arise in the context of constitution-building in the Arab world. The constitutional prohibition of blasphemy is often poorly defined and used as a tool of political oppression by the religious majority, rather than as a protection for religious minorities. Freedom of religion may not include the freedom to choose one's religion, but only to practice the religion you were born into. The use of *Shari'a* (Islamic law) as a source for legislation or inclusion of Islam as a characteristic of the state can restrict rights within a given interpretation of religious law. Women's rights in particular are at risk in such cases. All these issues affect not only non-Muslims, but also Muslims with religious beliefs that differ from those given the power to interpret what *Shari'a* means and how it affects the constitution and the laws.

The overarching role of religion in the public sphere has become a polarizing issue even in a country as religiously homogeneous as Tunisia. The notion of a 'civil state' was included in the 2014 constitutions of both Egypt and Tunisia, but exactly what this means in terms of the relation between religion and the state is neither defined nor understood.

2.3 CHALLENGES IN IMPLEMENTATION

The real challenge in protecting religious minorities often comes during the implementation of the constitution. Where the implementing laws are passed and executed in a non-democratic manner, the constitutional provisions on non-discrimination, for example, become meaningless.

An independent and competent judiciary steeped in democratic values offering access to justice for all is the cornerstone of minority protection. Furthermore, it is important that religious minorities are themselves represented on the bench. In Kenya, for example, the Judicial Service Commission and the Judges and Magistrates Vetting Board have both played a role in increasing the number of Muslims in senior judicial positions.

The development of gender-sensitive programmatic parties—that is, political parties with, among other things, clear and coherent gender-sensitive policies and agendas—can provide linkages to help break down barriers and points of conflict between religious groups. The challenge is, however, that in many places with religious divides, such as Iraq, the only political parties that exist are organized along religious lines.

'Fourth branch' institutions such as a National Human Rights Commission can also play an important role in ensuring that constitutional protections for religious minorities are upheld, so long as they are not co-opted by an illiberal government. In South Africa and Kenya there are additional specialist independent commissions—the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the National Cohesion and Integration Commission, respectively. The success of such commissions is not always assured, however, but depends to a large extent on funding and capacity.

Parliament has the primary responsibility for passing implementing legislation. Representation within parliament, and inclusion through consultative, legislative and budgetary processes, are essential to ensure that constitutional safeguards for religious minorities are properly enshrined in law.

The South African model provides an alternative approach. Religion is not separated from the public domain, but its presence in the public sphere is affirmed as long as it is voluntary and equitable.

2.4 GENERAL CONSIDERATIONS AND CONCLUDING THOUGHTS

When looking at constitutional protections for religious minorities, it is necessary to take a wider perspective and look at the overall situation confronting religious minority communities. For instance, it is important to consider whether they are able to come together freely to discuss drafts and provide inputs, and so on. Underlying issues of discrimination need to be addressed if real progress is to be made.

Religion forms part of people's identity. Recognition of one's religious community can therefore be of existential importance, and often symbolic recognition of the community as part of the nation is as crucial as any equity or agency measures.

While minority rights deserve to be safeguarded, the problem of illiberal minorities looms large, and individual rights should not be sacrificed at the altar of minority group protections. Religious minorities themselves should be governed democratically, so that the voices of women and those of other factions are heard loud and clear and properly represented. It should also be noted that in some states, such as Bahrain or Syria, it is the religious majority rather than the minority that has been marginalized.

Constitutions must find a balance. On the one hand, there is the challenge of providing sufficient guarantees to the majority that the existing state will not fall apart as a result of efforts by a minority to gain greater recognition. On the other hand, the minority must be confident that its identity and vital interests will be adequately safeguarded. Finding such a balance will benefit society as a whole, as a minority with adequate safeguards for the maintenance of its identity and its vital interests can afford to join with the majority in an integrated effort to ensure a better, mutually beneficial future.

3 PATHWAYS FOR ETHNIC MINORITIES IN CONSTITUTION BUILDING

How can the plight of ethnic minorities in post-conflict transitions be best addressed through constitution building? Where constitution building takes place in the aftermath of conflict, the relationship between different ethnic minorities and dominant ethnic groups within the state is often acrimonious. There are many different dimensions to this problem, and these can vary from one context to another. Often, demands by ethnic minorities for power dispersal mechanisms that ensure their participation in political decision-making on an equal basis are pitted against the interests of a dominant majority that wishes to safeguard national unity and integration. When ethnic minorities occupy resource-rich areas of a country, as in the case of Kurdistan, minority demands for power dispersal become even more pronounced because the minority feels entitled to local resources and fears their exploitation by the majority. In Kenya, for example, the distinction was historically made between the Kenya of the North, or the so-called Northern Frontier Districts made up of the marginalized but today oil-rich Turkana region, and the Kenya of the South, comprised of the so-called political tribes, Kikuyus, Kalenjins, Luo, and so on.

At another level, what might at first appear to be a minority claim can become more complex when historical, demographic and cultural dimensions are taken in totality. On the one hand is a majority group that conceptualizes the minority rights question in proprietary terms. This group sees itself as ‘the chosen ones’ with ownership rights over everything in the political community to the exclusion of all those who fall outside that group, who may be entitled to certain rights as minorities. On the other hand are some minority groups *within* the same political territory who see themselves not as a minority but as a distinct, historical or territorial *nation* that cannot be subordinated to the dominant ideology of the majority. This latter situation is more problematic as the minority’s claims go beyond demands for equal treatment within the polity—something which can easily be addressed through other constitutional mechanisms. In Sri Lanka, which emerged as one example of this dilemma, this was the dynamic in the relationship between the Liberation Tigers of Tamil Eelam (Tamil Tigers)—Tamils are the country’s largest minority—and the Sinhala-Buddhists who make up 76 per cent of the population. The dominant Sinhala-Buddhist view is that they are not only demographically but also historically and culturally the owners of the island, while all others are minorities with certain claims. They demand that the nature and character of the state be closely entwined with their own Buddhist identity. In contrast, the Tamils consider themselves not as a minority subordinate to the Sinhalese, but as a distinct, historical, territorial nation in the north and east of the island, the claims of which must be considered ‘apart from’ and not ‘as part of’ the majority. It is this specific *national* claim that not only puts them on a path of conflict with the Sinhala-Buddhist worldview, but also makes constitutional accommodation extremely difficult. In fact, the only such accommodation ever made was a very limited framework of devolution under the 13th

Amendment to the 1987 Constitution, which was forced on the Sri Lankan government by India.

A third variant of the ethnic minority problem exists when gender is factored in as a fluid variable. Constituting half or more of any nation, women can hardly be conceptualized as a minority, but rather as a marginalized majority. Depending on the prevalence of patriarchal structures, women experience varying degrees of discrimination. The situation for women becomes even more precarious when they belong to a group that is considered a minority, as they are then exposed to double discrimination. How can such women be meaningfully included in the constitutional process and protected? This becomes even more complicated when the minority itself is economically stratified. In that case, what can be done to ensure that any forms of accommodation are meaningful, that they trickle down and do not just benefit the elite among the minority?

The conference discussions highlighted this concern numerous times. In the case of Nepal, for instance, quotas were established for women but only those in the creamy layer benefited from these provisions. To what extent did the women who were elected to the Constituent Assembly represent all women? Who are the real beneficiaries of a quota system or similar such arrangements? The same can be seen with the Madhesis, Janjanatis and the Dalits, whose delegates mostly came from the creamy layer. Who do they represent? Even in Sri Lanka, which has a large number of women in high political office, the fact remains that they very much act as the kith and kin of the political establishment.

The disaggregation of the data and the result might be merely a cosmetic form of accommodation. In Sweden, for instance, where a Sami Parliament has been created to accommodate the demands of the indigenous Sami minority, women are represented only as alternate members or substitute delegates, while men take the key leadership positions in both parliament and the political parties.

Constitution building in post-conflict transitions is very much about state building. Sometimes this involves lumping together different nations to produce a new nation state, while at the same time ensuring that the different nations or ethnicities within the state, regardless of their size, stay within the resulting constitutional framework, which provides equal protection to all. Achieving such parity is a challenge, especially in the African and Asian contexts where ethnic identity is strong in comparison to national identity.

3.1 DECONSTRUCTING THE PROBLEM

Tackling the challenges of integrating ethnic minorities into a larger national whole, in the context of constitutional processes, requires an analysis of such minorities' key demands—a process that is not straightforward. Often, the demands might appear to be two different sides of the same coin; at other times as completely different coins. The example cited was that of Nepal, where the decision that Nepal needed to become a federal state was taken without a proper analysis or understanding of the issues under dispute and a clear vision for going forward.

Nonetheless, four key concerns, all of which came up in the different country case studies, stand out as critical with respect to mainstreaming ethnic minorities: representation, recognition, rights and resources—or what Nicole Töpferwien calls the ‘4Rs’.

3.1.1 RECOGNITION

Recognition is often taken as a given, but it may be worthwhile disaggregating the concept. What kind of recognition is the group seeking? Do the majority and minority share an understanding of the status for which recognition is being sought? Does the majority accept it? Is recognition simply being understood as the symbolic acknowledgement of a group’s existence? Or does it entail an action that touches on, and therefore imperils, the core of the state’s identity? How important is it?

There is at least one reason why recognition needs to be properly conceptualized. This is the fact that certain groups want to be recognized as minorities who are entitled to special treatment to reinforce their sense of belonging to the greater whole. Sometimes, these claims result from the numerical inferiority or geographic isolation of the group, resulting in marginal to zero participation in the social, economic and political life of the greater whole. Where this is the case, the solution is more straightforward: Recognition can be achieved either through an international agreement such as the International Labour Organization (ILO) Convention number 169 or the European Council Framework Convention—both of which have been critical to advancing the recognition of the Samis in Scandinavia in general and Sweden in particular. Recognition can also occur through a nation’s legal or constitutional framework. This is the approach taken by article 260 of the Constitution of Kenya (2010), which explicitly defines marginalized communities and marginalized groups. The important message being sent here is one of belonging to and acceptance by wider society. Other groups are reticent about being called a minority. They see themselves either as part of a greater state building project that denies the significance of their minority status, or as a separate nation in need of separate governance structure and claims to sovereignty. The latter scenario applies to the Tamils in Sri Lanka.

3.1.2 REPRESENTATION

If a constitution is a negotiated political agreement between different parties with different interests, space must be accorded to every party to safeguard their interests. Viewed thus, representation and participation go hand in glove. Like recognition, they send a message of inclusion in the sense of being part of the state.

A bigger question is how to ensure that representation is effective. Representation must go beyond mere presence or the need to showcase the ethnic and regional diversity of the context in question, to encompass the numbers necessary to make any participation that comes with it meaningful. Second, representation must take into account the diversity within the minority group to avoid the issue of ‘creamy layer representation’ discussed above. Third, representation should not be limited to the key political institutions, but permeate all other structures that form the face of the nation, such as the army, the police, and so on.

3.1.3 RIGHTS AND RESOURCES

The question of rights is an important one as the menu of options available is often large. What is practically feasible or even acceptable might vary from one context to another. Taking political rights as an example, the right to some degree of autonomy and self-rule through some kind of mutually agreed power-sharing arrangement such as federalism or decentralization is one demand that is frequently made by ethnic minorities, as in Nepal or Tamil Sri Lanka. Majority groups often view granting such rights as tantamount to suicide, as they affect the identity and survivability of the state. This is particularly the case if minorities occupy a resource-rich region that effectively forms the bread basket of the state, such as Catalonia in Spain or South Sudan before it gained independence. In this context, what is needed may be a balancing act—some kind of institutional arrangement that accommodates the interests of the minority without threatening those of the majority or other groups.

Even then, it must be noted as a caveat that rights alone may not be sufficient. Minorities need to feel a sense not only of belonging, as discussed above, but also of ownership of the state and its resources as a constituent entity. They want to be full participants—not just associates that are tolerated and looked after.

3.2 GENERAL CONSIDERATIONS

There is no one single mechanism to achieve all of the above. A formula must be worked out that carefully balances rights with the need for representation and recognition. In addition, buy-in by the majority, the political leadership and wider society is critical. Sustainability depends on the degree of acceptance within society and on whether diversity is recognized and accepted. Proposed mechanisms and solutions are likely to work only when there is broad consensus within society. Nepal provides a useful example of the benefits of buy-in and the challenges that come in its absence. Specifically, the issue of army integration was easily addressed because there was buy-in from all corners. This partly explains why the process has not witnessed any reversals despite disagreements on thorny issues that delayed constitutional agreement. On federalism, however, there has been no agreement because the dividing line runs much deeper. Switzerland provides a good example of where the policy of granting equal weight to four different languages only worked in practice because there was broad acceptance—approximately 97 per cent.

Finally, it is important to *think about implementation from the outset*—the challenges that might be faced and their solutions. Non-implementation might result in frustrated expectations and trigger demands that complicate the possibility of future agreements.

4 PATHWAYS FOR WOMEN IN CONSTITUTION BUILDING

Creating spaces for women has emerged as an important goal in contemporary constitutional reform processes. Including women in the design of solutions to address past wrongs and in building a more just society is especially important after conflicts, in which women often suffer the most. The participation of women in both constitution building and the resulting national politics is increasingly recognized as a key ingredient of enhancing the quality of democracy. Nonetheless, even though women often constitute a numerical majority, they tend to be marginalized in such processes. A key challenge facing women therefore is how to secure a constructive political role. Two key questions informed the discussions around this main challenge: what perpetuates female exclusion and how to break the cycle of marginalization.

4.1 CAUSES OF THE MARGINALIZATION OF WOMEN IN CONSTITUTION BUILDING PROCESSES

A number of causes can be identified, many of which are structural. These include *patriarchal belief systems*, which combine with *illiteracy* and *socialization* to generate two types of behavioural patterns in men and women in society. On the one hand, patriarchal belief systems prevalent in many post-conflict societies require men to be the breadwinners and responsible for protecting their families. They also become the face of the family to the outside world. This has encouraged men to develop a superiority complex in which they see themselves as in charge, whereas many women have developed an inferiority complex—seeing themselves, misguidedly, as capable of playing only a supporting role to the men. In Syria, for example, cases were reported of women turning down opportunities for political leadership in the false belief that men would be better equipped for these roles. In Liberia, women played leading roles during the war but after its end often withdrew to their traditional roles of catering to the household, showing interest only in issues of subsistence or survival rather than engaging with policy issues and constitutional reform. One of the greatest challenges to the constitutional review commission has been its inability to mobilize women to engage constructively in the ongoing process—all this, interestingly, in a country where women played key roles in the peace processes following the war.

Another challenge is the fact that where women have succeeded in getting a place at the table, they are often expected to wear two or even three hats. First, as women, they are generally expected to speak for all women, but because gender is a category that cuts across different minority groups, they may also be required to speak as representatives of a marginalized minority. On the other hand, where they are elected on a party ticket, they are also expected to take the party line. Representing such a diverse range of concerns can produce *conflicts of interest*, for instance, in situations where the party

on whose ticket a woman is elected does not prioritize women's issues, but only selects women candidates to fulfil legal requirements for access to the political arena.

There is also a *lack of trust* even among women's groups. In nations emerging from conflict or long years of dictatorship, this is easy to understand as some women might have aligned themselves with the oppressive regime, therefore arousing the suspicion of their female compatriots..

In other cases, women's effective engagement has been undermined by the *absence of solidarity and support* from other women. Although widely acclaimed as a solid and credible candidate for the country's highest political office, Kenya's Martha Karua, for instance, generated fewer votes from women than from men. In Liberia, President Sirleaf Ellen Johnson faced similar resistance from the female constituency when she first ran for office. In their view, political leadership was for men and not women. In the big picture, whether women show solidarity with one another is often a function of the interaction of different power groupings, such as the class, language, ethnic and religious groups to which women belong. It is often the case that a poor woman from a specific ethnic, caste, religious or linguistic group has more in common with a man of similar social circumstances but from a different group than with a rich woman from the same group. This unfortunate reality—*lack of trust and solidarity*—impairs women's ability to collectively engage in political processes generally and constitution building in particular.

4.2 BREAKING THE CYCLE OF MARGINALIZATION

A number of points were raised in connection with breaking the cycle of marginalization and promoting greater inclusion and participation among women. The first was the need to include men. Any solution that sees men as the problem rather than part of the solution is likely to create resistance to change.

Secondly, there was stress on the need to create effective *mechanisms for the proper representation* of women in all political institutions, including constitution building institutions such as constituent assemblies or commissions. One approach is electoral reform. To date, quotas have been one of the key approaches used to increase women's representation, but the zipper system is increasingly recognized as an important mechanism to raise gender representation. Under the system, candidates on election lists are listed alternately on the basis of gender: if the first candidate on the list is male, the second must be female. Although significant in increasing the representation of women, the zipper system is only useful if there is genuine political will to fully implement it in ways that result in parity. Further, in order to achieve results closer to parity attention must be paid to whether lists are open or closed (closed lists will prevent prioritizing of male candidates) and also whether women are at the heads of lists.

Thirdly, increased levels of representation in constitution making bodies or in the eventual parliament should be accompanied by high levels of organization and capacity building. The Nepali experience provides a positive example of training and educational programmes contributing to the formation of a vocal Women's Caucus on women's issues within the Constituent Assembly. Education and training also endowed women with the capacity to engage with various thematic committees, some of which they led.

Tunisia also presents a positive example of how women's mobilization through street protests resulted in positive changes to draft constitutional articles that had originally discriminated against women.

Lastly, women representative on constitution making bodies should settle for 'making up the number' but should seek position of authority including in the overall leadership of the institution, as well as in leading important committees – not limited to committees dealing specifically with women's and children's issues.

4.3 GENERAL CONSIDERATIONS

Firstly, there was a clear consensus among panellists and participants to think carefully about effective participation for gender equality. This included understanding that men, as well as women, should be included in the agenda for change as well; interrogation of the term 'women's groups' to understand that they are not monolithic, and that they may have hierarchies of identity which compete for their priorities in terms of advocacy; and lastly to ensure that women participants in the constitution building process have positions of authority in the leadership of the institution and of sub-committees.

Secondly, with regards to constitutional design issues it was acknowledged that political representation, non-discrimination, family law, citizenship, property and inheritance are often key issues for women, but the agenda for change among women's groups should look broadly at stability, prosperity and democracy – the development of which will likely improve the lives of women.

Lastly, there was some discussion over the need to think beyond the text of the Constitution and continue to mobilize to ensure adequate implementation. Advocates should capitalize on the momentum and transformational moment of the constitutional transition to ensure the promise of the constitution is upheld.

5 LGBTI GROUPS AND CONSTITUTION BUILDING PROCESSES

LGBTI communities have recently scored several major successes in ensuring constitutional protections for their members. Examining case studies from three diverse areas—Sweden, Nepal and South Africa—the panel discussed the advocacy strategies used by LGBTI communities to shape constitutional amendments and review processes. Even though the contexts were extremely diverse, they arrived at common recommendations for advocacy strategies: build broad alliances, directly address misconceptions, pay attention to the roles of the media and the courts, and time advocacy efforts properly.

The Swedish case study examined how LGBTI activists leveraged the constitutional right to freedom from physical violation to end the practice of forced sterilization for those who sought to change their legal gender; the Nepal case study focused on the advocacy strategies used by the Nepali panellist himself when he served as the only openly gay member of his country’s Constituent Assembly; the South African case described efforts—before, during and after the constitution building process in the 1990s—to bring an end to discrimination against LGBTI persons in South Africa.

5.1 PRELIMINARY CONSIDERATIONS

LGBTI minorities are markedly different from the other types of minorities discussed. Whereas religious minorities group around different personal beliefs and ethnic minorities around a common shared history, LGBTI groups deal with sexual orientation and gender identity. This difference informs the issues LGBTI communities address and the strategies they use for participation. Furthermore, issues that affect lesbian, gay or bisexual individuals may not be relevant to transgendered and or intersexual persons, and vice versa.

In addition, while the constitutions of both Sweden and South Africa are among the few to include sexual orientation in their non-discrimination clauses, the differences in the cases presented were instructive because they constituted opposite ends of the spectrum of purpose for which constitutions might be drafted. Whereas the South Africa Constitution is the archetypal transformative process, seeking to change society by elucidating a new constitutional vision for the nation, the Swedish Constitutional Amendment of 2011 reflected the state of society that existed at the time, and came into being once society had reached a high level of acceptance with regard to legal protections for LGBTI groups.

5.2 BUILDING ALLIANCES

LGBTI movements are often small in number and lack any clear powerbase. Forming alliances with other minority groups thus becomes an essential strategy for advancing LGBTI concerns. Furthermore, political party alliances are crucial to achieving representation of LGBTI concerns within political structures. An understanding of party interests is thus crucial for determining how LGBTI activists might integrate their community's concerns into partisan campaign manifestos.

In Nepal, the LGBTI movement was a leading member of several alliances. The oppression that Nepal's LGBTI community faced included regular abuse from the security forces and led to a feeling that there was 'nothing to lose'. LGBTI individuals were therefore among the first to lead street protests against the monarchy. They were soon joined by women and disability groups, and later by political parties. These alliances endured throughout the constitution building processes.

In South Africa, on the other hand, LGBTI activists sought to 'hitch their wagon' to the rising star of the African National Congress (ANC) by challenging the ANC to announce its policy on LGBTI rights, asking whether the ANC's struggle was only about black versus white or rather about ending all forms of oppression, including those tied to gender and sexuality. The ANC responded with assertions that they wanted to eliminate all forms of oppression.

Alliances with political parties were important across the board, as LGBTI groups sought to lobby parties to include demands in their political manifestos. The contrasting methods used in Sweden and Nepal reflected societal attitudes in both countries. Whereas in Sweden public pressure during election campaigns was a powerful tool for ensuring that political parties responded to demands, in Nepal trust-building measures such as one-on-one meetings were more effective.

The panellists agreed that personal connections should be maximized. In Nepal, Sunil Pant was given the opportunity to be listed as a candidate by a small political party, which enabled him to turn a social issue into a political issue. In South Africa, ANC leader Simon Nkoli announced that he was gay and then helped make the connection between the struggle against apartheid and a broader national liberation struggle that incorporated LGBTI concerns.

5.3 BEYOND NON-DISCRIMINATION AND EQUALITY CLAUSES

The inclusion of sexual orientation or gender identity on the list of groups mentioned in a non-discrimination clause may be a powerful recognition and signalling tool. Along with equality and marriage clauses, these often form the central plank of LGBTI advocates' campaigns. However, a robust rights regime and a strong and independent judiciary are often just as, if not more, important to realizing LGBTI rights.

In Sweden, the legal battle to outlaw the forced sterilization of those seeking to change their gender identity eventually met with success thanks to the constitutional protection provided against physical violation by public institutions. In Nepal, before addressing laws that discriminate against sexual orientation, the LGBTI community persuaded the Supreme Court to recognize a new third gender in national identity documents for

those who self-identify as neither a man nor a woman. In South Africa, the inclusion of a non-discrimination clause in the 1996 Constitution marked the start of an important series of court battles.

5.4 THE ROLE OF THE COURTS

The use of litigation to enforce constitutional rights should be strategic. In South Africa, activists chose not to begin by litigating the right to same-sex marriage. Instead, they pushed for the decriminalization of sodomy in order to familiarize the court with the issues at hand.

South Africa demonstrates the limitations of a strictly court-focused approach. After creating the framework for progressive LGBTI rights expansion in sexual relations, the court proceeded to confer certain immigration, pension, adoption and succession rights on permanent same-sex life partnerships. When the issue of same-sex marriage finally came before the Court in 2005, however, the Court directed the issue back to the legislature, signalling its recognition that at a certain point in the gender-rights struggle, the legitimacy of political leadership is needed and the courts cannot substitute for the legislature. In Sweden, a combined strategy of litigation in the courts, concurrent media campaigns and political lobbying was ultimately successful in ending forced sterilization.

5.5 BEING IN THE ROOM VERSUS PUBLIC PARTICIPATION

Although large scale advocacy campaigns can be effective, personal advocacy—one-on-one negotiations with decision makers—makes a vital difference. Opportunities for one-on-one advocacy are increased if activists can gain seats in a constituent assembly. The case of Sunil Pant in Nepal is instructive in this regard. Sunil met with each of his 600 fellow-members of the Nepal Constituent Assembly. He arrived at each session early, using the time to sit with fellow-members before the start of the session to make a personal presentation on his laptop regarding the LGBTI community. Through these tactics he was able to forge personal relationships with numerous drafters and convert these relationships into political alliances. It was Sunil's access to the assembly which enabled him to conduct a personalized re-education campaign and correct the misconceptions held by many of the members.

This personal lobbying contrasts with the public consultation campaigns organized in South Africa. Consultations were organized across the country around the issue of same-sex marriage, but these became opportunities for people to express strongly homophobic sentiments, making the events difficult environments for the LGBTI community to speak out. While public consultations are important, they should be designed carefully to enable everyone to take part.

5.6 GENERAL CONSIDERATIONS

Recognition of the context in which constitution building takes place is key to determining the appropriate strategy for engagement on LGBTI issues. Is it a transformative process, enabling the constitution to be the vision of society as it wishes

to be; or is it looking to update the constitution to reflect changes which have already taken place in society?

Building alliances is a crucial strategy in all cases. This may happen in cooperation with other minority groups or civil society organizations, but it should also include engagement with political parties and the media.

Advocates should look beyond the specifics of discrimination and equality clauses. The most likely factors in achieving a constitutional design that protects LGBTI rights are a robust overall rights regime and a strong and independent judiciary.

Decisions to enforce rights through the courts should be taken strategically in terms of case selection, and should allow the court time to familiarize itself with the issues at hand before delving into more polarizing cases such as same-sex marriage. Combining public interest litigation, political lobbying and media campaigns can be effective when well timed. Personal connections and advocacy from within can make a vital difference, in particular in societies where misinformation and misunderstandings regarding LGBTI communities are commonplace.

6 NEW MEDIA AND MINORITY POLITICAL PARTICIPATION

The rapid expansion of and advances made in information and communication technologies (ICTs), especially the development of social media, have important implications for political participation by marginalized groups. New technologies can significantly increase participation in constitution building processes by enhancing access to information and facilitating the creation of networks. Marginalized groups, in particular, can take advantage of these benefits, especially where groups are widely dispersed physically or where physical meetings are difficult due to security fears. The important roles of social media channels such as Facebook and Twitter in building networks that contributed to the toppling regimes in the context of the Arab Spring provide useful templates for how marginalized groups can leverage new technology and social media to mobilize, disseminate information and channel their demands.

Technology can provide data that can be used as hard evidence. In contexts where the numbers of minorities, or their views, are disputed, such data are invaluable in ensuring the voice of marginalized groups is heard.

However, it is important to recognize that technology is only a tool, and certainly no panacea for some of the overarching challenges facing participation by marginalized groups in the constitution building processes covered in the other conference panel discussions. New technologies, and social media in particular, can be of great benefit to constitution-making bodies in conducting public participation. They should not be seen as replacing personal consultations, however, but rather as an additional tool.

Constitution-making bodies should be clear about their objectives in using the technology, rather than just opening Facebook or Twitter accounts and hoping that people will send in submissions. In terms of enlarging the constitutional debate, constitution-making bodies should seek to engage people in discussions about issues which are important to them, rather than attempting to drag them into a conversation about the constitution per se. Importantly, constitution-making bodies should ensure that they have appropriate capacity, in terms of staff to design and manage the technical tasks involved, and local knowledge to design culturally appropriate software and programs that will be well-received and used by the target audience.

Lastly, the panel honed in on the use of technology for data collection and analysis, to ensure that inputs received from public participation during the constitution building process are delivered to the constitution making body in a format where they can actually inform the discussions and negotiations.

Challenges to the use of ICTs include: possible disparities in access to mobile phones or computers, although access to mobile phones can often be a leveller across economic

divides; cost, although used well technology should be a cost-saver; and problems related to the anonymity of submissions and manipulation of the technology to promote particular viewpoints (e.g. through using multiple Facebook accounts). However, all forms of public participation present similar challenges, and these drawbacks should not be used as an excuse not to reap the benefits of technology as a participation tool.

7 THE INTERNATIONAL COMMUNITY

The international community is becoming increasingly involved as a key player in constitution building in post-conflict countries or those undergoing democratic transitions. In respect of the specific question of the political participation of marginalized groups and minorities, for instance, it has articulated various normative frameworks and principles that should guide national actors in designing and implementing properly inclusive processes. These include: CEDAW, 1979, article 7; the United Nations Declaration on Minority Rights, 1992, article 2(2) (3); and the Convention on the Rights of Persons with Disabilities, 2008, article 29. The UN has further articulated the importance of minority participation in constitutional transitions (Guidance Note of the Secretary-General: United Nations Assistance to Constitution Making Processes, 2009, Principle 4). The international community also maintains direct connections with such processes by enabling stakeholders and disadvantaged groups to participate effectively, providing technical advice on substantive and procedural issues and facilitating dialogue between different interest groups to ensure that minority questions and issues affecting marginalized groups remain on the agenda.

In Nepal, international involvement was critical in a number of areas, not least the design of the electoral system following the Comprehensive Peace Agreement of 2006. The international community contributed by ensuring the design of an electoral system that would result in the election of an inclusive Constituent Assembly. (Marginalized groups were not always given major roles in thematic committees.) Nepali women, as the largest marginalized group in the country, also greatly benefitted from the international presence. Many women's NGOs and civil society organizations received funding from foreign donors for capacity development and awareness-raising. In addition, international actors seconded thematic experts to work closely with local stakeholders, providing technical advice on substantive issues. Finally, they facilitated dialogues to build consensus around divisive issues, and organized study visits abroad to learn about other constitutional systems, all funded by international assistance.

In Kenya, where trust among stakeholders was completely lacking, international experts from South Africa, Uganda and Ghana were asked to sit on the drafting panel, thereby guaranteeing objectivity and preventing political manipulation of the drafting process. In Yemen as in Libya, the advocacy work of the UN has been significant in the establishment of quotas. This facilitated the presence of women not only in the meeting rooms but also at the decision-making table.

This increasing involvement has led to concern about how to enhance the efforts of the international community in promoting minority concerns in constitution building processes. What should be the appropriate approach and role of the international community? What kind of challenges does the international community face in its

effort to promote minority inclusion in constitution building processes? In addressing these questions, a number of key issues were highlighted, ranging from caveats to the concept of an international community to the challenges that international that actors face.

7.1 CAVEATS

The first caveat deconstructs *the notion of the international community: who its members are, their agenda, values and role, and how these marry with the agenda of national stakeholders*. These questions are important, not least because the international community is not a monolith. The term is often incorrectly used as though it were a single unit representing a particular goal or set of interests. The reality, however, is that there are a variety of different actors from individuals to countries, international organizations and development or aid agencies, often tied to the foreign policies of the funding countries, with competing interests among themselves. In many cases cited, instead of collaborating and cooperating, donors were perceived to be in competition with each other over who could facilitate the constitution making process. While the reasons for this are not always clear, the reality is that it damages the credibility of the international community and raises questions about the true motives for their interventions.

In addition, the very nature of constitution building processes requires that they remain sovereign endeavours. Where internationals intervene to promote or drive a specific self-interested agenda, rather than effectively helping to promote global democratic and progressive values such as the rule of law and human rights, the sovereignty of the process and the value of international assistance is put in question. This is true especially in countries with a legacy of colonial rule, such as Egypt. Here, international involvement especially by the United States was viewed as an infringement of sovereignty, and associating political actors with 'foreign interests' served to discredit them.

The Kenyan process of 2008–2010 provides an example, on the issue of abortion, of where the United States clearly sought to promote a particular policy position. On the land issue, the British in particular appeared to be pushing for a formula that would protect the interests of people whose acquisition of land owed something to their colonial connections or special relations with the UK. The same can be said of the Zimbabwean process, where the UK has always maintained strong views on the land redistribution question. Such direct attempts to determine the direction of certain constitutional policy options made without due regard to the local context and its values are bound to foment distrust and resistance to international actors.

Closely related to the above issues, and connected to the international community's interaction with national actors, is the issue of *impartiality*. This is especially important in post-conflict transitions, where years of violence between different groups has destroyed trust. One value of international involvement in this context is the perceived neutrality it brings, from which lies their ability to liaise with or mediate between the different groups. However, that trust must be built and maintained with all parties to the process, and internationals must be perceived to be impartial in their relations with all national stakeholders if their legitimacy is not to be compromised.

National ownership remains a core principle of the United Nations Secretary-General's guidance notes on international assistance initiatives. Underlying this principle is the idea that international assistance, especially when provided by or through the UN, must be sensitive to the need to provide advice and options without appearing 'prescriptive'. In other words, international actors must be seen to be 'encouraging' rather than 'prescribing'. Thus, the formulation in one of the guidance notes, in relation to promoting rights established under international law for minorities and marginalized groups, instructs assistance providers to 'encourage compliance with international norms and standards'. In addition to national sovereignty, one reason for the need to encourage rather than prescribe relates to the inherent tension in the notion of rights protection. For instance, should individual or group rights be given more prominence in a constitution? Different stakeholders see the issue differently, which makes any approach that is perceived as prescriptive ill-advised.

The encouragement approach however also poses challenges, in particular with regard to ensuring that minority and marginalized voices are heard. This is the case, for instance, where—as in Iraq—the process of negotiating the constitution was dominated by groups with completely different priorities. In this case, the male-dominated Iraqi Commission while acknowledging the need to carefully consider the article on personal status, which was of particular interest to women's groups as it affected their legal position in the new society, nonetheless regarded it as not an immediate priority. Clearly, just trying to get stakeholders to see things in a different light was insufficient.

While it could also be argued that the shortage of women on the commission was a factor, a presence is also not always sufficient. One explanation for this might be the system used to ensure that presence. Quotas—in addition to some electoral systems—is one example of a mechanism that the international community has long promoted and advocated, but how the quota seats are filled creates risks. For instance, it is argued that one limitation to quotas is that where they are filled by nomination or closed party list, there are risks that the women selected will be silent or compliant in order to maintain their positions. Who selects the candidates and the selection criteria are therefore critically important.

Another explanation is that marginalized and minority groups are not always homogeneous. In some cases, such as in Nepal, there are minorities within minorities, and this is not always apparent to the international actors working with them. Sometimes, even just speaking to one group or interacting with them might be seen as backing a particular side. In Nepal, the international community was often criticised for working only with the dominant minorities. At other times, speaking to some members within a specific group was misperceived by others as favouring a particular approach. Thus, which representatives of minority or marginalized groups are included on the constitution making body can often be as important as whether the groups are represented at all.

7.2 GENERAL CONSIDERATIONS

In general, assistance from international actors is critical to improving the political participation of minorities and marginalized groups, not least in the processes of constitution building. Such assistance can take the form of:

- elaborating guiding principles, norms and values;
- providing access to global comparative experience and technical cooperation in specialist thematic areas;
- capacity building; and
- facilitating dialogue between different interest groups.

However, achieving this requires a number of challenges to be overcome, such as:

- building trust;
- achieving buy-in from all actors;
- convincing all actors of the international community's impartiality and objectivity; and
- finding the correct balance between the need to remain non-prescriptive without compromising the values espoused by the international community to national stakeholders.

International actors must therefore be aware of certain caveats if they are to improve the effectiveness of their assistance with respect to minorities and marginalized groups. Included among these is the need to:

- ensure respect for national ownership;
- be responsive to national sensitivities and contexts;
- recognize that there is no 'one size fits all' solution, and the limits of certain generally accepted approaches such as quotas to achieving the desired results; and
- remain impartial.

8 CONCLUDING ANALYSIS AND RECOMMENDATIONS

Several themes recurred throughout the six substantive sessions of International IDEA's roundtable panel presentations and discussions on pathways to constitution building. This chapter identifies these themes and issues, together with the lessons emerging from the roundtable's rich analyses, and makes a number of recommendations to those involved in constitution building. These recommendations can be found at the end of each of the three thematic sections. These themes cover issues concerning participation and representation in constitution building by marginalized groups, issues focused on formulating the constitutional text itself and issues related to the processes of constitutional oversight and implementation.

8.1 PARTICIPATION AND REPRESENTATION

The first insight from the roundtable is the recognition that when elite-driven, the constitution building process is unlikely to yield inclusive outcomes. It is important to mobilize marginalized groups to meaningfully contribute to the constitution building process. In the long term, this will ensure sustainable peace and security, as well as the recognition of diverse identities.

8.1.1 REASONS FOR EXCLUSION FROM CONSTITUTION BUILDING PROCESSES AND STRATEGIES FOR OVERCOMING EXCLUSION

One common source of conflict in constitution building and politics writ large is the question of which marginalized groups are or should be involved in the process, and which groups have been excluded and why. Systemically embedded patriarchal belief systems in many post-conflict countries together with strong socialization forces and low levels of literacy have engendered among men a need to be in control and among women a belief that they are at best only capable of supportive functions. Even though women frequently play critical roles in overcoming conflict, in countries such as Syria and Liberia they have either turned down political leadership roles, believing men to be better placed to fulfil them, or were difficult to mobilize because they prioritized subsistence or survival over political participation and leadership.

The roundtable's discussion on pathways for women to engage in constitution building noted that breaking the marginalization cycle requires the adoption of a number of interconnected strategies. These include seeing men as the solution rather than the problem, and realizing that women, through their socialization, are typically active contributors to women's collective marginalization. The same lesson applies to other marginalized groups. Building and sustaining alliances with both dominant groups and other marginalized groups is critical to overcoming political exclusion, particularly for religious and LGBTI minorities that lack strong powerbases.

More specifically, changing attitudes and identifying potential supporters through the training of politicians, journalists and judges were important strategies deployed by LGBTI groups in Malawi and Nepal, leading to some impressive shifts in public opinion on LGBTI acceptance (International IDEA 2013b).

Education and sensitization about minority rights must involve the political leadership and their constituent political parties, as these are gatekeepers which determine how far marginalized groups can engage in political processes. International IDEA's recent research on political parties in Africa suggests that even in countries with legislated quotas, only 12 of the 45 political parties in the 33 countries surveyed complied with these quotas in their own key policy documents (International IDEA 2014).ⁱⁱ Educational and training programmes must build the capacities of women's and other marginalized groups for political engagement,ⁱⁱⁱ and address the technical aspects of constitution building. Training programmes should also advance the general population's acceptance and even appreciation of marginalized people's identities and rights.

As societies rely more and more on ICT for their daily communication needs, it has become increasingly important to ensure that marginalized minority and majority groups have access to these networks and can leverage them to participate in constitution building processes. Such technologies can help geographically dispersed minority groups such as LGBTI find their common voice (International IDEA 2013b). Using ICT also provides easily accessible data as evidence to verify marginalized groups' numerical dimensions, something which dominant groups often contest. However, while these technologies can assist minorities when physical meetings are fraught with danger, it is also important to note that states can use ICT to keep track of regime critics and crack down on them.

An additional and important lesson to emerge from the discussion on ICT was that when using social media as a means to advance public participation in constitution building, ICT should not be seen as a replacement for face-to-face consultations. Simply opening a Facebook or Twitter account and expecting a broad range of marginalized groups to submit opinions is a strategy that is bound to fail, especially when the marginalized groups have low levels of literacy or cannot afford computers and are therefore unlikely to access the Internet. In addition, constitution building processes should engage people in discussions about issues of importance to them rather than expecting people to enthusiastically participate in a discussion about the constitution per se. This is a critical lesson that applies to alliance building strategies in general. The LGBTI panel discussion on the Nepal case mentioned that when trying to build political bridges to elites, it is important to address issues of concern to them. In Nepal, such elite concerns were climate change and natural resource management.

Sunil Pant's presentation referred to the adoption by LGBTI activists of more confrontational approaches to reform after abuse by the security forces led activists to conclude they had nothing to lose in being the first group to lead street protests against the monarchy.

8.1.2 REPRESENTATION AND PARTICIPATION CHALLENGES

Different marginalized groups present different participation and representational challenges and require different strategies to overcome these. While participating in a constitution building or reform process, additional questions need to be asked about whether marginalized groups should focus on the whole array of issues confronting constitution building, or merely focus on the issues that confront them as a group.

Furthermore, the basic questions of what constitutes effective representation and the extent to which it meets the demands of minority and other groups also requires discussion. One common observation in designing representative and participatory processes is that representation must take account of the diversity *within* minority groups and produce a correspondingly diverse representation to avoid overrepresentation of the wealthier, better educated and better connected minority elite, sometimes referred to as the creamy layer. Effective representation must also extend beyond political institutions to other structures, such as the civil service and the police, which, when occupied by dominant groups, tend to ignore injustices experienced by marginalized minorities (International IDEA 2013:54; Gurung 2012:2; Baldwin, Chapman and Gray 2007).

Although the extent of genuine participation can vary considerably, a key benefit of at least the *perception* that participation is genuine is that it provides legitimacy to and acceptance of the constitution. However, representational legitimacy is a widely acknowledged concern, and so is the difficult question of who has the right to speak on behalf of minority—and particularly religious—groups. Religious groups are frequently heterogeneous, both economically and politically, while their representation is often perceived to be from the elite within the group. Similar concerns hold for ethnic minority groups, women, LGBTI groups and many others. Indeed differences in sub-group power and varying political interests within minorities and other marginalized groups were a recurring roundtable theme.^{iv}

That marginalized groups are rarely homogenous and often feature a range of opinions means that multiple conflicts must be resolved before these groups can manage any change process. This often means educating themselves, building consensus, and building minimum common positions and alliances before attempting to sensitize majorities.

A representational phenomenon that is particularly evident in constitution building is the incorrect assumption that when members of marginalized groups are awarded a seat at the constitution building table, these individuals can and should wear many representational hats. This particularly applies to women delegates, who are often expected to speak for all women. In addition, because gender cuts across many marginalized groups, women are also often expected to represent other marginalized minorities, as well as the interests of their party if they belong to one. Their job becomes even more challenging when their multiple hats are in conflict with one another. A case in point is the woman who represents both women's interests and the needs of a party that simply uses women as candidates to meet a quota system or other legal requirements but is not interested in women's issues per se. This is a common phenomenon in post-conflict situations (Krook 2006: 303–327).

The assumption that women have homogenous political interests ignores the fact that they are just as politically heterogeneous as men, including in both conflict (Hedström 2014) and post-conflict settings (Sørensen 1998:3). These differences can be exacerbated by ethnic, religious, cultural and other identity differences, although gender can sometimes be a constructive bridge with which to overcome such differences (International IDEA 2013a: 235). The lesson from this is that women are not politically homogenous, although gender can sometimes help to resolve the differences that stem from unrelated political differences.

8.1.3 MORE EFFECTIVE PARTICIPATION AND REPRESENTATION MECHANISMS AND PROCESSES

The roundtable identified several factors critical to increasing the legitimacy and effectiveness of participation in constitution building by religious and other minority groups. How groups are recognized and how participation is structured are two such factors. Switzerland provides one example of overcoming the challenge of religious group recognition at the canton level, where religious groups are required to demonstrate *internal* democratic organization prior to achieving official recognition.

Public participatory processes must also be well-structured and, importantly, democratic in order to facilitate minority group participation. One example is the Government of Norway's consultations with the Sami community. These consultations used strict rules and procedures to provide an accepted structure and ensure that the participatory process was meaningful. Very often, so-called participatory processes involving consultation with marginalized groups are at best tokenistic (Arnstein 1969). Security and self-confidence were also cited during the roundtable as necessary prerequisites for meaningful public participation, particularly for women, LGBTI groups, ethnic minorities and minority religious groups.

Sunil Pant's work in Nepal illustrates some critical lessons in political mobilization, particularly the capacity of a single representative working alone to influence constitution building and legislative processes by building political alliances. We often think of effective advocacy as depending on large-scale community organizations and public participation campaigns, but Sunil's success, having been elected to Nepal's 2008 Constitutional Assembly, in building relationships with all 600 fellow constitution drafters was a crucial factor in inscribing LGBTI protections in the constitution.

The efficacy of this approach contrasts markedly with the public consultation campaigns organized across South Africa to consider same-sex marriage. The consultation provided opportunities for opponents to express strongly homophobic sentiments, in turn creating intimidating environments in which LGBTI members feared speaking out. The lesson from this experience is that while public consultations are important in facilitating debate, dialogue and community education on such issues as LGBTI and women's rights, the public engagement process requires careful planning and management to ensure exchanges remain positive and lead to constructive outcomes (UNIFEM 2007:19).

8.1.4 RECOMMENDATIONS

Numerous recommendations arise from the lessons discussed in this section:

- Ensure that constitution building processes aim to advance peace, security and acceptance of diversity; mobilize a diverse and representative membership of marginalized groups to contribute in well-structured, democratic and genuinely participatory ways.
- Invest in the education by marginalized groups of their own members on effective consensus building processes, as these will allow them to arrive at minimum common positions and broad internal alliances prior to engaging with majorities in constitution building processes.
- Build alliances by marginalized groups with dominant groups such as political leaders and their political parties, journalists and the judiciary. This can happen through face-to-face relationship building, but also through education and training campaigns geared to sensitizing dominant groups to the needs of the marginalized. Ultimately, this should be extended to the wider public. Such processes start with marrying the interests of the dominant group to the marginalized group's agenda
- Take steps to ensure that women are provided with opportunities to engage in constitution building processes and on their concerns with issues such as livelihood security and, in post-conflict settings, safety and security, and effective food security.
- Train and build the confidence of members of marginalized groups, particularly women, to engage in the technical issues around formulating constitutions.
- Ensure that the security concerns articulated by marginalized groups are given paramount consideration during these processes.
- Recognize that marginalized groups, including women, are not necessarily politically homogenous and therefore capable of representing a wide-ranging set of interests apart from their own, even if shared identities such as gender can be used as a bridge to overcome intra-group differences.
- Recognize that ICT is only one of many tools available to facilitate the engagement of marginalized groups with constitution building processes, and therefore should not substitute for other approaches such as face-to-face consultations.
- Ensure that exchanges using ICT focus on participants' interests and link these to the constitution building agenda.
- Ensure that public consultations organized as part of the constitution building process are carefully planned and managed so that marginalized groups are not stigmatized during such events but are able to participate fully in a safe and secure environment.

8.2 CONSTITUTIONAL FUNCTION, DESIGN AND REFORM

8.2.1 CONSTITUTIONAL FUNCTION

Two cases presented at the roundtable concerning the inclusion of sexual orientation in constitutions' non-discrimination clauses illustrate the stark contrasts in the functions that constitutions are seen to fulfil. While the 1997 South African Constitution reflects the outcome of a transformative process intended to shape society by identifying a new constitutional vision for the nation, including the protection of LGBTI rights, the 2011 amendment to the Swedish Constitution reflected evolving social attitudes that had come to accept the need to provide legal protections for LGBTI groups. This happened in spite of the fact that many Swedish politicians had not yet accepted it, leaving citizens themselves to lead the process.

8.2.2 MINORITY IDENTITY AND RECOGNITION, NATIONAL IDENTITIES AND CHALLENGING THE ZERO SUM GAME APPROACH TO CONSTITUTIONAL INTERESTS

A key question that requires resolution in the constitutional design process is the extent to which the recognition of marginalized groups and the allocation of rights is symbolic, as in the cases of the Sami in Sweden and Canada's first nations people, or state defining, as in the case of the Tamils in Sri Lanka. In addition, does constitutional recognition necessarily confer the right to control resources in a particular geographic area, which is often the cause of tensions and conflict between marginalized and ruling groups?

One common theme noted throughout the roundtable discussions was the strategic importance of using the language of entitlement when discussing minority rights rather than viewing these rights as a gift from the majority. Also critical is the need to understand and indeed overcome the fears of the majority, as illustrated by Sunil Pant's approach in explaining to members of the Nepal Constitutional Assembly that rights are not a limited resource. Granting rights to marginalized groups does not necessarily mean that the majority's rights are taken away from them. A key lesson that emerged throughout the roundtable is that overcoming such fears and securing the majority's support for the inclusion of marginalized groups in constitutional design and its outcomes is critical to generating longer term community acceptance.

A further lesson for marginalized groups and inclusion reformers is that entrenched positions preventing marginalized groups from realizing their rights do not last forever. Recognizing that customary practices and traditions change over time and are underpinned by a wider array of more flexible values that can be aligned with human rights provides hope that even the most entrenched positions opposed to rights for marginalized groups can change (International IDEA 2013a).

Furthermore, countries such as Canada and India (International IDEA 2011, 2008), which moved away from defining a single national identity in processes such as constitution building to view their national identity as either multicultural or pluralistic, provide an alternative model to the need to define a single national identity as a prerequisite for unifying a nation.

8.2.3 LISTING SPECIFIC MARGINALIZED GROUPS IN RIGHTS PROTECTION CLAUSES AS OPPOSED TO INCLUDING A STRONG GENERAL HUMAN RIGHTS PROTECTION CLAUSE

Including particular marginalized groups on a list of groups contained in a non-discrimination clause within a constitution may serve a powerful recognition and identity purpose for such groups, and this often forms the basis for minority advocates' campaigns. However, given that group identities and the rights these groups enjoy change over time, this practice will almost invariably result in certain marginalized groups being excluded from such clauses.

The roundtable also heard examples of groups, such as the Baha'i in Egypt, that preferred not to be listed in order to avoid a political backlash preferring instead that the terms Muslims and non-Muslims be used in the constitution. The issue of constitutional protection signals some possibilities for further research on the implications—positive and negative—of listing marginalized groups in non-discrimination clauses, and whether this yields more productive outcomes for marginalized groups in the longer term than protection under strong human rights clauses.

8.2.4 COURT ACTION TO PROTECT THE RIGHTS OF MARGINALIZED GROUPS

The inclusion in constitutions of clauses identifying those groups which require rights protections is a common demand for religious minorities as a means to gain recognition within the national identity. However, the absence of such clauses does not necessarily mean that these groups are disadvantaged. As was noted during the LGBTI panel discussion, the presence of a strong general non-discrimination article and a fundamental rights clause in the constitution, and in the cases of religious minorities affirmation of freedom of religious belief, are likely to provide as much protection. This is particularly true in the presence of an independent judiciary, which is equally if not more important to protecting the rights of marginalized groups.

This is exemplified by the legal battle in Sweden to outlaw forced sterilization, a 1972 legal requirement imposed on people wanting to change their gender identity. In 2013, the Stockholm Administrative Court of Appeal overturned the law, declaring it unconstitutional on the ground that it contravened people's constitutional protection against physical violation by public institutions. Similarly, in Nepal, after lobbying from the LGBTI community, the Supreme Court overruled laws discriminating against LGBTI minorities by creating a legal status for third genders in national identity documents—at the time one of only seven countries to have done so.

One key lesson for advocates is that litigation needs to be strategic. This was a lesson learned in South Africa, where activists chose not to begin their campaign by litigating on same sex marriage rights but instead to lobby for the decriminalization of sodomy in order to familiarize the court with the issues before moving on to a publicly more contentious issue.

8.2.5 ACCOMMODATING RELIGIOUS MINORITIES: PERSONAL STATUS LAWS AND POLITICAL DESIGN

One of the many challenges confronting constitution designers is accommodating personal status laws to the extent that, as an area of legal autonomy governing the private sphere, they are balanced with the rights of individuals as defined under the state's laws. The South African Constitution was cited during the roundtable as an example of providing a workable balance that enabled religious minorities to continue their cultures and practices, thus providing an acceptable degree of group autonomy, while at the same time protecting individual rights. It achieved this by delineating a hierarchy that allowed personal status laws to be passed by parliament but, as with other laws, requiring that they should be compliant with the constitution's Bill of Rights as the paramount legal reference.

In certain circumstances, such as in the Netherlands, consociational electoral systems have been able to accommodate religious differences while promoting a national identity. Alternatively, the vertical separation of powers in Switzerland's federal system provides that religious identity is dealt with at the provincial or canton level, where the authorities determine the recognition provided to religious minorities, as distinct from the national level, where Swiss identity is separated from religious identity.

8.2.6 DESIGNING CONSTITUTIONS TO ENSURE WOMEN'S EQUAL REPRESENTATION

Another issue is the design of constitutions to ensure that they include effective mechanisms for women's equal representation. One approach, used to date with mixed results, is gender quotas to increase women's representation, often to a target of 30 per cent, in elected bodies.^v This issue reflects the larger theme of social and political change and how best to achieve it. Many inclusion advocates believe that attempts at radical change can be counterproductive, leading to a backlash reversing any gains achieved.

As was noted during the roundtable, certain options deployed in closed list proportional representation and party bloc electoral processes, such as zipper or zebra candidate lists (International IDEA 2007), can increase women's representation to 50 per cent. However, in Libya and Tunisia, quota systems were either used in a minority of seats (Libya) or poorly implemented (Tunisia), resulting in less than the 50 per cent representation anticipated.

The lesson here is that identifying mechanisms that facilitate women's equal representation requires an examination of the efficacy of deploying particular quota percentages in the cultural and political contexts under consideration. It also requires electoral provisions in the constitution and in subsequent electoral laws that are conducive to the equal representation of women. Moreover, electoral management bodies must properly implement and monitor these legal requirements.

An additional lesson from the roundtable discussion on gender representation was that having women as representatives in constitution building processes and parliaments is necessary but not sufficient. Women should be assuming positions of political leadership, such as heading political party delegations, chairing committees and assuming positions of decision-making power such as key ministerial positions, House Speaker positions

and other leadership roles. The Inter-Parliamentary Union (IPU) found that women were filling around 11 per cent of such positions in parliaments around the world in 2008 (IPU 2008: 76). Provisions on the composition of independent commissions in the 2010 Kenya Constitution are an innovative attempt to promote gender balance in leadership positions by prohibiting the chairperson and vice-chairperson from being of the same gender.

8.2.7 INTERNATIONAL ACTORS AND CONSTITUTIONAL DESIGN AND REFORM

While the international community—typically comprising donors, democracy cooperation and support organizations, aid and development agencies and international organizations such as the United Nations—is often assumed to be engaging in constitution building processes in a purely supportive way, the realities do not always match the intentions. The roundtable cited the international community’s constructively supportive roles in constitution building in Nepal, Kenya and Yemen, as well as its role as a third party in Kenya guaranteeing some objectivity and preventing political manipulation in the drafting process. It played a critically supportive role in facilitating women’s and other marginalized groups’ engagement in the constitution building process in Nepal, and helped to establish quotas for women in Yemen.

However, while these cases exemplify the positive contributions the international community has made to constitution building, the nature of international assistance means that assistance can morph into interference and conditional value prescriptions, or often be perceived as such. In spite of the positive examples cited above, the roles played by some donor countries in two of the above-mentioned countries—Nepal and Kenya—together with their roles in Zimbabwe can be perceived as interference with constitutional policy options without regard to local context and values.

The lessons identified for international community actors are that they must, first, build and maintain trust with all parties throughout the constitution building process, ensuring that national stakeholders perceive their actions as impartial; and, second, provide advice and present options by *encouraging* parties to adopt certain options rather than appearing to be prescriptive in doing so. For example, when promoting rights established under international law to protect minorities and marginalized groups that might be opposed by so-called traditional norms and values, international actors need to understand that different stakeholders see the issue differently, making any approach that might be seen as prescriptive, as opposed to ‘encouragement’, ill-advised.

The encouragement approach has its own challenges, however, not least the likelihood that it will not always be possible to include representation from all marginalized groups and, as noted in section 3, minorities within minorities. Finding a balance between the need to remain non-prescriptive while impartially presenting the case for marginalized groups’ rights under international law requires sensitivity, good judgment and a long-term approach.

8.2.8 SUBSTANTIVE AND PROCESS RECOMMENDATIONS

Several recommendations arise from the lessons discussed throughout this section:

- That those who facilitate the participation of marginalized groups in constitution building processes invest sufficient effort in gaining majority group support and, in so doing, reassure majority group opinion shapers that granting rights to marginalized groups does not mean that majority group rights will be diminished.
- That those engaged in constitution building consider alternative models to those that seek to define a national identity in narrow terms, such as by using religious, ethnic, linguistic or other single identity characteristics that exclude minorities or powerless majorities. That consideration instead be given to describing national *identities* or using acceptance of difference as a defining national characteristic.
- That those engaged in advocating for marginalized groups' rights adopt a broad approach to their strategy for constitutional change, focused 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.
- That the decision to strive for inclusion on lists in non-discrimination clauses be considered carefully and that further research be undertaken to identify the positive and negative implications of listing marginalized groups in such clauses, including the extent to which this yields more productive outcomes in the longer term for marginalized groups than protection under strong general human rights protection clauses in constitutions.
- That in designing mechanisms to ensure women's equal representation in political forums, including constitution-making bodies and parliaments, constitution designers keep in mind that the 50 per cent quota systems used in conjunction with electoral systems such as closed list proportional representation and party block-voting have tended to yield the best results (International IDEA 2007). In addition, electoral laws and electoral management bodies should ensure that these systems are used in the ways that are intended.
- That international community actors engaged in constitution building processes build and maintain trust with all parties, ensuring that national stakeholders view their actions as impartial while providing advice on and support for the process of securing marginalized groups' rights by *encouraging* parties to adopt these rights rather than by *prescribing* them as a necessity.

8.3 ISSUES ARISING FROM THE IMPLEMENTATION OF CONSTITUTIONS

8.3.1 CONSTITUTIONS REQUIRE ONGOING DEVELOPMENT AND ARE NOT A FINAL RESOLUTION TO PROBLEM-SOLVING

Any assessment of whether the challenges of designing workable constitutions have been satisfactorily overcome must necessarily await the implementation stage, when the realities meet the theories and the planners' intentions. The fact that every context in which constitutions are designed differs considerably makes the replication of lessons learned elsewhere necessarily hazardous. Nonetheless, anticipating the challenges arising from the implementation of constitutions and resolving them during the drafting process is a critical process, particularly with regard to resolving post-conflict ethnic issues (Hartzell and Hoddie 2003; Sørensen 1998).

An important lesson arising from the discussion on women's participation in constitution building is the need to remember that constitutions are not in themselves a solution to women's and other marginalized groups' political exclusion, as realities often turn out to be considerably different from what is envisaged when a constitution is framed. This has been illustrated by the South Africa experience, where notwithstanding the protections granted to women in the post-apartheid constitution, women have been exposed to increasing violence, including sexual assault. This outcome means that the critical determinants of attitudes to and behaviours towards women and girls are cultural belief systems that reproduce patriarchal practices and the roles girls and boys are socialized into adopting. These roles that can only be changed in the longer term by the interplay of developments designed to address the cultural, social and political factors shaping these patriarchal practices. Providing women and other marginalized groups with meaningful roles in constitution building and enshrining their rights in the constitution itself are important first steps in this complex change process.

8.3.2 UNDERSTANDING JUDICIAL CULTURE PRIOR TO TESTING CONSTITUTIONAL RIGHTS IN COURTS

As is highlighted in chapter 3, while court action can be an important strategy in facilitating the involvement of marginalized groups in testing constitutional rights and ultimately in constitutional reform, it should be noted that judiciaries operate very differently within the same and across different countries, which requires an understanding of local judicial culture and an appreciation of what is possible in each context.

The lesson here is that the strategy of beginning litigation with issues that are not overly contentious and that judges can fully understand before proceeding to more contentious and complex issues warrants serious consideration. A second lesson is to avoid the assumption that judicial cultures across a particular country or between different countries are all alike.

8.3.3 RECOMMENDATIONS ON IMPLEMENTATION

This discussion on the issues that stem from the implementation of constitutions and require consideration during their framing produced the following recommendations:

- Providing space for marginalized groups in constitution building and securing rights in the final document will not in itself lead to the rights of marginalized groups being observed. Ensuring such rights are observed and valued will rely on an investment in strategies to overcome exclusion. Key among these are broader public education campaigns to reverse generations of internalized patriarchal values of superiority, discrimination and exploitation.
- Those who seek to procure rights through litigation must enhance their understanding of the judicial culture they are dealing with. South Africa offers useful examples of this. Activists developed a strategy that prioritized the issues most likely to secure public and judicial support. More contentious and difficult issues were reserved for negotiation at a later stage, once the judiciary and the public had become more familiar with and enlightened about the issues at stake

8.4 CONCLUSIONS

This chapter has detailed some of the many lessons and recommendations that flowed from the themes of marginalized groups' participation and representation, constitutional functions, and the design and reform of marginalized groups' interests, as well as the issues that stem from the implementation of constitutions.

As with the roundtable itself, it raises more questions than it proposes solutions, largely due to the fact that finding pathways for all marginalized groups to engage productively in constitution building is an exceptionally difficult task, and indicators of success are difficult to find. For example, is it a success to formulate and approve an impressive Bill of Rights in which minorities are recognized and their rights clearly articulated, but that remains unimplemented in practice? The many unanswered questions raised by the roundtable open up new possibilities for research and provide food for thought that will complement the recommendations presented above.

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BIBLIOGRAPHY

ARTICLES

Arnstein, Sherry R. (1969), 'A Ladder of Citizen Participation'. *JAIIP* 35(4), pp. 216-224.

Gurung, I. S., Successful Inclusion of Ethnic Minority in the Democratic Governance of Nepal: A Case Study of the Struggle of the Gurung in Sirdibas to Elect their First Gurung (Stockholm: International IDEA, 2012) unpublished

Hartzell, C., & Hoodie, M. (2003), 'Institutionalizing Peace: Power Sharing and Post-Civil War Conflict Management'. *American Journal of Political Science* 47, pp. 318-332.

Hedström, J. "We demanded to go to the battlefield! We were very excited to go!" Militarism and women's rights in Kachinland.' Paper presented at the 3rd Annual IFJP Conference, University of Southern California, Los Angeles, May 9-11, 2014

Krook, M.L. (2006), 'Reforming representation: The diffusion of candidate gender quotas worldwide'. *Politics & Gender* 2(03), pp. 303-327.

Inter-Parliamentary Union, Equality in Politics: A Survey of Women and Men in Parliaments. Reports and Documents no. 54 (Geneva: Inter-Parliamentary Union, 2008)

CASE LAW

Administrative Court of Appeal in Stockholm, Department No. 3, *Determination of Gender Identity*, 19 December 2012, Case No. 1968-12.

Nepal Supreme Court, *Pant v. Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD), translated in *Nat'l Jud. Acad. L.J.*, 2008, at 262.

Supreme Court of Kenya, *Advisory Opinion No. 2 of 2012 in the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, 8 October 2012.

CONSTITUTIONS & AGREEMENTS

Constitution of the Arab Republic of Egypt, 18 January 2014.

Constitution of Kenya, 27 August 2010.

Comprehensive Peace Agreement concluded between the Government of Nepal and the Communist Party of Nepal (Maoist), 21 November 2006.

Constitution of the Republic of South Africa, 10 December 1996, Act 108 of 1996.

Constitution of the Republic of Tunisia, 26 January 2014.

INTERNATIONAL IDEA SOURCES

Ghai, Y., 'Constitution-building Processes and Democratization: Lessons Learned', in: International IDEA, *Democracy, Conflict and Human Security: Further Readings* (Stockholm: International IDEA, 2006), pp. 232-249.

Larserud, S., & Taphorn, R., *Designing for Equality. Best-fit, medium-fit and non-favourable combinations of electoral systems and gender quotas* (Stockholm: International IDEA, 2007).

M. Salter, *Democracy for All? Minority Rights and Minorities' Participation and Representation in Democratic Politics. The International IDEA Democracy Forum, Madrid, Spain, 28-29 November 2011. Background note* (Stockholm: International IDEA, 2011).

International IDEA, *Political Parties in Africa through a Gender Lens* (Stockholm: International IDEA, 2014)

International IDEA, *Journeys from Exclusion to Inclusion: Marginalized women's successes in overcoming political exclusion* (Stockholm: International IDEA, 2013(a)).

Hedström, J., & Smith, J., *Overcoming Political Exclusion. Strategies for marginalized groups to successfully engage in political decision-making* (Stockholm: International IDEA, 2013(b)).

International IDEA, *Political Parties in Africa: Challenges for Sustained Multiparty Democracy* (Stockholm: International IDEA, 2014).

International IDEA, *Democracy and Diversity: Expert Consultation Report, 26–27 November 2008 Pretoria, South Africa* (Stockholm: International IDEA, 2009)

INTERNATIONAL TREATIES AND AGREEMENTS

Council of Europe, *Framework Convention for the Protection of National Minorities*, 1 February 1995, ETS 157.

International Labour Organisation (ILO), *Indigenous and Tribal Peoples Convention, C169*, 27 June 1989, C169.

UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 24 January 2007, A/Res/61/106.

UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 18 December 1992, A/RES/47/135.

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, Vol. 999.

UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660.

UN Secretary-General (UNSG), *Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes*, April 2009.

Convention for the Elimination of all forms of Discrimination Against Women, 1979

REPORTS

Inter-Parliamentary Union (IPU), *Equality in Politics: A Survey of Women and Men in Parliaments (Reports and Documents No. 54)* (Geneva: Inter-Parliamentary Union, 2008).

Baldwin, C., Chapman, C., & Gray, Z., *Minority Rights: The Key to Conflict Prevention (Report)* (London: Minority Groups International, 2007).

UNIFEM (2007), *Women Building Peace and Preventing Sexual Violence in Conflict-Affected Contexts* (New York: UNIFEM, 2007).

Birgitte Sørensen (1998), *Women and Post-Conflict Reconstruction: Issues and Sources (WSP Occasional Paper No. 3)* (Geneva: United Nations Research Institute for Social Development (UNRISD), 1998).

NOTES

ⁱ A term used in Indian politics, generally understood to refer to relatively wealthier and better educated members of otherwise backward classes usually excluded from the benefits of measures of affirmative action or positive discrimination.

ⁱⁱ For an extensive analysis of the range of strategies women and other marginalized groups have successfully employed to overcome exclusion from political processes, including constitution building, see (International IDEA 2013a and 2013b).

ⁱⁱⁱ Such programmes need to include the type of knowledge dissemination, training and confidence-building measures highlighted by International IDEA in its identification of strategies that were successful in facilitating women's and other marginalized groups' transitions from political exclusion to inclusion (International IDEA, 2013a, 2013b).

^{iv} This theme of intra-group differences and the strategies to overcome them is explored in detail in recent International IDEA publications (2013a and 2013b).

^v The 1995 Beijing Conference on Women set 30 per cent as the critical mass needed for women to be able to make a meaningful contribution to what has historically been a male domain. The 30 per cent target also reflects a gradual approach to change adopted by many countries in the light of the challenges presented by the systemic resistance to change observed in many countries concerning women's roles and other questions of equal rights.

ANNEX: A

CONCEPT NOTE

INCLUDING MINORITIES AND MARGINALIZED GROUPS IN CONSTITUTION BUILDING PROCESSES: EXPERIENCES, CHALLENGES AND LESSONS

BACKGROUND

In recent years, constitution building has emerged as a critical part of peace building, national reconciliation and the transition from war to stable democracies. This development is pronounced where conflicts were fuelled by political exclusion—especially of minority groups subjugated to entrenched patterns of discrimination and marginalization. Prominent examples include religious, ethnic and linguistic minorities; but also sexual minorities such as lesbians, gays, bisexuals and the transgendered (LGBT). In addition, women belonging to these groups remain particularly vulnerable to double discrimination and marginalization. While general constitutional guarantees of fundamental human rights and freedoms to individuals and groups are traditionally recognized as essential to addressing these issues, special constitutional protections may be needed to secure effective inclusion and accommodation of these minorities.

Yet, one key lesson from experiences around the world is that such measures function properly only when there is minority involvement in the decision-making processes that establish protection mechanisms (International IDEA, 2011). This is the right to political participation, also broadly understood to include participation in constitution building processes, and long recognized as an important principle in international law (ICCPR, 1977, Article 25; CEDAW, 1979, Article 7; UN Declaration on Minority Rights, 1992, Article 2(2) (3); Convention on the Rights of Persons with Disabilities, 2008, Article 29). Recently, the UN has further articulated the importance of minority participation, specifically in constitutional transitions (Guidance Note of the Secretary-General: United Nations Assistance to Constitution Making Processes, 2009, Principle 4).

Beyond language guaranteeing minority protection in new constitutions, marginalized minorities have been actively engaged in the negotiation of issues that directly affect them in some national processes. In South Africa, for instance, the demise of apartheid created room for minorities such as the black linguistic groups, Indians, and ‘coloured people’ to play a central role in the development of South Africa’s post-apartheid constitution (1994–96). Similarly, as Constituent Assembly members, Nepal’s Dalits and indigenous groups were fully engaged in negotiations to draft the country’s new constitution following the end of the civil war in 2006.

At the same time, minority exclusion in constitutional and other political processes continues to be a global problem. Across the Arab region, the resurgence of patriarchal political systems, and rising violence by ethnic and rebel militia groups, in the wake of the ‘Arab Spring’ revolutions in places like Egypt and Libya have dampened the hopes and expectations of minorities in these countries. In Zambia, institutionalized discrimination against sexual minorities, and the absence of constitutional protections for LGBT rights have effectively relegated members of these groups to the fringes of society, and left them invisible. Myanmar’s Muslim minority (of which the Rohingyas, a persecuted ethnic minority, constitute the majority), remain largely marginalized and vulnerable to the Buddhist majority even as the country embarks on democratic transition and potentially, constitutional reforms. In Bolivia, structural inequalities and other forms of discrimination against some non-indigenous minority groups such as Afro-Bolivians have effectively undermined their ability to utilize their rights to participation under the new constitutional dispensation, thereby ensuring their continuous political exclusion. Likewise, the Roma minority—spread mostly across Central and Eastern Europe—are still Europe’s most politically marginalized and disadvantaged group, even now liberal democratic constitutions are the norm.

This truncated landscape of minority participation in constitution building and political processes raises a number of relevant questions: what factors are promoting or undermining minority involvement in some processes but not in others? Where minorities have secured participation rights, what has been their degree of success in securing constitutional gains? What were the specific methods of minority engagement? What were the key constitutional outcomes secured?

Beyond standard-setting and constitutional guarantees, ensuring implementation is also increasingly a critical issue as principles seldom translate into positive action. The result is internal exclusion or participation without voice for many groups. What are some of the key challenges to implementation and how can they be addressed? What lessons can be learned from the different experiences and how can they reinforce each other? How can the international community best support the implementation of normative and constitutional initiatives at the national level?

Against this background, the International Institute for Democracy and Electoral Assistance (International IDEA) is convening a two-day conference on minority political participation. Building on similar initiatives taken by International IDEA, for example at the November 2011 International IDEA Democracy Forum, the conference will address the question of minority political participation more specifically in the context of constitutional reform processes. The theme for the conference will be *‘Including Minorities in Constitution building processes: experiences, challenges and lessons’*. Rich comparative global experience on the role of minorities in constitution building processes will provide the basis for discussion and learning.

CONFERENCE OBJECTIVES:

- Capture and distil practical knowledge highlighting successes/failures, as well as critical success/failure factors, strategies of engagement, and lessons learned from minority participation in constitution building processes and the implementation of minority rights provisions in specific national contexts.

- Establish and provide a platform to encourage and facilitate ongoing discourse on issues related to broader minority political participation, and the practical benefits of minority inclusion.

EXPECTED OUTPUTS:

- A report that summarises key insights and policy recommendations on minorities in constitution building processes for dissemination within the broader democracy building community.
- The establishment of a global forum for ongoing discussions on issues of minority political participation.
- Depending on the quality of deliberations, a report on minorities in constitutions may be incorporated into International IDEA's Practical Guide on constitution building

EXPECTED OUTCOMES:

- Enhanced insight into the possibilities, challenges and limitations of ensuring effective minority engagement and implementation of minority rights in constitution building processes.
- Increased comparative knowledge and understanding of ways of facilitating greater minority inclusion in high-level decision-making in constitution building processes.

PARTICIPATION:

Practitioners, policymakers and experts, who have been involved in or currently work with issues of minority rights and participation, in particular within the context of constitution building processes at both the national and the international levels. They will be drawn from countries in Africa, Latin America, Asia, Europe and North America.

ANNEX: B

PROGRAMME

**CONFERENCE ON MINORITIES AND MARGINALIZED GROUPS ●
28–29 OCTOBER 2013 ● MERCURE CENTRUM DEN HAAG HOTEL ●
THE HAGUE, THE NETHERLANDS**

***INCLUDING MINORITIES AND MARGINALIZED GROUPS IN CONSTITUTION
BUILDING PROCESSES: EXPERIENCES, CHALLENGES AND LESSONS***

ANNOTATED BACKGROUND AND AGENDA

With constitution building recognized as a critical component of conflict transformation, the role of minorities and marginalized groups in drafting constitutions, and how those constitutions respond to the needs of a diverse society, is an issue of paramount importance in arriving at sustainable solutions for a peaceful society based on the rule of law. How are members of marginalized groups making their voices heard in the design of constitutional solutions in the transition from conflict to stable democracies? What factors are promoting or hindering that effort and how can hindrances be overcome? How are social media and international involvement impacting their efforts? What are some of the best practices of minority participation in securing constitutional protections in constitution building processes? Building on similar initiatives taken by International IDEA, for example at the November 2011 International IDEA Democracy Forum, the conference will address these and many other questions.

28 October	
09:00–09:30	Registration/Coffee
09:30–10:00	Opening Session <ul style="list-style-type: none">• Welcome remarks: Ms Kristen Sample, Director for Global Programmes, International IDEA• Opening Statement: Ambassador Petter Wille, Special Envoy for Minorities, Government of Norway

10:00–12:30	<p>Session I: Pathways for Religious Minorities in constitution building processes</p> <ul style="list-style-type: none"> • Sumit Bisarya, Senior Project Manager, CBP Programme (moderator), International IDEA • Ambassador Petter Wille, Special Envoy for Minorities, Norway • Mr Zaid al-Ali, Senior Adviser on Constitution Building, International IDEA • Mr Carl Soderbergh, Minority Rights Group, UK
12:30–13:30	Lunch
13:30–15:00	<p>Session II: Pathways for Ethnic Minorities in constitution building processes</p> <ul style="list-style-type: none"> • Sumit Bisarya, Senior Project Manager, CBP Programme (moderator), International IDEA • Dr Nicole Topperwein, Expert Consultant, Ximpulse, Switzerland • Mr Asanga Welikala, University of Edinburgh, Scotland • Dr Ekuru Aukot, Former Director of Committee of Experts on the Constitution, Kenya • Mr Stefan Mikaelsson, President of Sami Parliament, Sweden
15:00–16:30	<p>Session III: Pathways for Women’s Groups in Constitution building</p> <ul style="list-style-type: none"> • Ms Kristen Sample, Director of Global Programmes (moderator), International IDEA • Ms Susan Stigant, United States Institute for Peace, USA • Cllr Gloria Scott, Chair, Constitutional Review Committee, Liberia • Mr Jan Reynders, Senior Consultant for Gender Justice, GVB, Netherlands • Ms Basma Soudani, League of Tunisian Female Voters, Tunisia
16:30–16:45	Coffee break
16:45–17:45	<p>Session IV: Pathways for LGBT Groups in Constitution building</p> <ul style="list-style-type: none"> • Mr Julian Smith, Senior Advisor, Diversity Programme (moderator), International IDEA • Mr Sunil B Pant, Blue Diamond Society, Nepal • Dr David Bilchitz, Director, Institute for Advanced Constitutional, Public, Human Rights and Int’l Law, South Africa • Ms Ulrika Westerlund, The Swedish Federation for Gay, Bisexual and Transgender Rights, Sweden
19:00–21:00	Cocktail/Dinner reception

29 October 2013	
09:00–10:30	<p>Session V: New Media and Minority Participation</p> <ul style="list-style-type: none"> • Ms Helena Bjuremalm, Senior Programme Manager (moderator), Democracy and Development Programme, International IDEA • Dr Nivien Saleh, Thunderbird University, USA • Mr Walter Owuor, Independent Consultant, Kenya • Mr Brendan Ballou, Stanford University, USA
10:30–11:30	<p>Session VI: The Role of the International Community</p> <ul style="list-style-type: none"> • Prof. Cheryl Saunders, International IDEA Board Member, Laureate Professor, Melbourne Law School (moderator), Australia • Mr Jason Gluck, Senior Political Affairs Officer, Constitutional Focal Point, UNDPA • Dr Ekuru Aukot, Former Director of Committee of Experts on the Constitution, Kenya • Ms Kamla Bisht, Embassy of Norway, Nepal
11:30–12:00	<p>Concluding session</p> <p>This session will allow Prof. Cheryl Saunders of Melbourne University, a member of the International IDEA Board of Advisers and Mr Carl Soderbergh of Minority Rights Group to draw together the key issues emerging from the six sessions, and discuss holistic issues unaddressed in the specific panels.</p>
12:00–13:00	<p>Closing Lunch</p> <ul style="list-style-type: none"> • Closing Remarks, Ms Kristen Sample, Director for Global Programmes, International IDEA

Detailed concept note and agenda available at: <http://www.constitutionnet.org/event/conference-minorities-and-marginalized-groups>

Please also see video interviews with some participants, available at:

<https://www.youtube.com/watch?v=1dRRaO2HPdU>

and

<https://www.youtube.com/watch?v=0VmM3bGaM5U>

