

# THE IMPACT OF GUIDING PRINCIPLES ON CONSTITUTION MAKING

Policy Paper No. 33, June 2025



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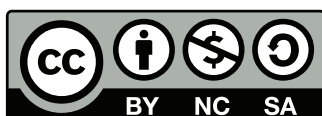
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# EXECUTIVE SUMMARY

This paper explores the role and significance of guiding principles in constitution-making processes. Guiding principles (or ex ante substantive principles) are sometimes negotiated and sometimes imposed. Either way, they constrain the content of the new constitutional framework. These principles are particularly relevant in the context of large-scale constitutional transitions when there is widespread political contestation and distrust among stakeholders.

The paper begins by defining guiding principles and distinguishing them from procedural principles. Procedural principles govern the constitution-making process, while guiding principles influence the new constitution's content. Guiding principles can provide assurances to minority groups and encourage their commitment to the constitution-making process. But it can also be challenging to enforce guiding principles and ensure they are implemented.

Historical examples illustrate the varied application of guiding principles. During South Africa's transition from apartheid, guiding principles were negotiated mainly to protect the interests of the outgoing ruling minority. These principles were reinforced by the role of a newly established Constitutional Court, mandated to certify the new constitutional text for compliance with the principles. In contrast, in contexts where autocratic or military regimes control the process, guiding principles may be imposed while ignoring the opposition's demands, perhaps prompting their boycott of the process.

The paper further examines the scope and level of detail of guiding principles. Detailed principles can provide strong assurances to minority groups but can be challenging to negotiate, especially in post-conflict settings. Conversely, less detailed principles may still foster trust and dialogue but offer fewer assurances. The paper emphasizes the need to find a balance between detail and flexibility to accommodate evolving political dynamics. It also explores instances when the nature and level of detail changed in response to evolving demands from different stakeholders. Where principles are negotiated as part

of conflict-to-peace transitions, and those principles are detailed enough to significantly constrain the constitution-making body, it is important to make sure that a wide range of political and social groups are involved and agree with the principles.

Guiding principles can be included in different types of transition and can occur through various mechanisms, including national dialogues, political or peace agreements, ordinary legislation and executive decrees. Political will is the ultimate determinant of how binding such principles will be, but incentives and constraints for compliance depend on the level of inclusion in the original agreement, the principles' level of detail, and the presence and robustness of a verification or compliance mechanism.



# INTRODUCTION

Constitutional negotiations often involve tense political contestation, particularly during a large-scale constitutional transition. Stakeholders may have differing views on how the process should be designed and what the content of the new constitution should be. This is particularly the case in fragile environments with long histories of distrust among the negotiating parties.

Sometimes, before negotiating the actual constitutional text, key stakeholders agree on a series of substantive principles aimed at guiding (or constraining) the upcoming constitution-making process. These have been described as upstream constraints ‘imposed on the assembly before it starts to deliberate’ (Elster 1995: 373).

Famously, during South Africa’s transition from apartheid the parties agreed to a series of guiding principles to constrain the elected Constituent Assembly. These principles were the result of a deal and provided security to the outgoing government (and minority group) that their interests would not be challenged, further drawing them into the process (Ebrahim and Miller 2010: 112). As well as agreeing to the principles, the parties mandated the newly established Constitutional Court to certify that those principles were appropriately reflected in the new constitutional text, thereby reinforcing them (see Ebrahim 1999: 627–30; Ebrahim and Miller 2010: 139–43).<sup>1</sup>

Substantive principles, particularly when negotiated and agreed between opposing parties, ideally provide assurances to minority groups that their interests will be protected. This encourages their commitment to the ensuing constitution-making process and disincentivizes them from thwarting it. However, it is important to recognize that negotiated principles are often

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<sup>1</sup> For more on the mechanisms and institutions mandated to verify or certify the implementation of guiding principles, please see Chapter 4: How guiding principles come about and where they can be found.

difficult to enforce or may lack sufficient detail to play a significant role in the constitution-making process.

In other contexts, such as where an autocratic or military regime controls the constitution-making process, the process may allow certain stakeholders to define substantive principles (or recommendations) to guide the constitution-making body, by convening a national dialogue, for example. In some instances, these national dialogues have resulted in substantive principles designed to ensure minimum guarantees for political alternation and checks and balances that diverge from the regime's vision (such as in Chad 2022). More importantly perhaps, these types of substantive principle can also provide an entry point for the international community to exert pressure on the regime.

**Imposed principles may either pave the way for a unilateral constitution-making process, which may lack legitimacy, or significantly hinder negotiations on a future constitution.**

On the other hand, when guiding principles are imposed on the constitution-making body by a single group or individual, this may prompt others to boycott the process and contest its outcome. Imposed principles may then either pave the way for a unilateral constitution-making process, which may lack legitimacy, or significantly hinder negotiations on a future constitution.

This paper addresses guiding principles that may contribute to the content of new (and final) constitutional frameworks, and that were expressly and formally agreed or imposed in advance of such a process. Substantive (guiding) principles are to be distinguished from procedural principles in that the latter determine parameters for the process of constitution making, while the former guide the content of the new constitutional framework.<sup>2</sup> Principles that are found in the existing constitution's amendment procedure are not included.

The paper:

- identifies guiding principles (Chapter 1);
- surveys some historical examples of guiding principles and clarifies its own universe of cases (Chapter 2);
- examines variations in the content, scope and level of detail of these principles (Chapter 3);
- provides an overview of how guiding principles are established and the types of document in which they may be outlined (Chapter 4);
- analyses the mechanisms or institutions mandated to verify the principles' implementation (Chapter 5);
- provides conclusions (Chapter 6); and
- highlights some key considerations for those involved in negotiating guiding principles (Chapter 7).

<sup>2</sup> Substantive, as opposed to procedural, principles will be referred to as 'principles' or 'guiding principles' in the rest of this paper.

## Chapter 1

# IDENTIFYING GUIDING PRINCIPLES

Guiding principles, also called *ex ante* substantive principles (or ‘pre-constituent’ principles in francophone jurisdictions), are principles that constitution makers are mandated to include or operationalize in the new constitutional framework.<sup>3</sup> They may be very general in scope—for example, ‘goal declarations’ related to: (a) the independence, territorial integrity and national unity of the country in question; (b) the defence of fundamental rights and freedoms, and the protection of the rule of law and political pluralism; (c) separation of powers; (d) democracy and good governance, and free and fair elections; or (e) gender equality. Or they may be more detailed and therefore context-specific, such as a principle in the South African Interim Constitution (article XXX, 1) calling for an ‘efficient, non-partisan, career-orientated public service broadly representative of the South African community’. Guiding principles in general often reflect key aspects of the historical context in which the particular process is taking place, as well as international norms and standards and other precedents (Brandt et al. 2011: 60).

There are also instances when negotiators identify a single issue that they perceive has thwarted past processes or constitutional implementation. They then highlight this issue as a principle for the future process without providing much detail on how it should be translated into the future constitutional text. Some examples include: (a) the Iraqi ‘Law of 2004 of Administration for the State of Iraq for the Transitional Period’ with its reference to the prohibition for the Iraqi Armed Forces to ‘terrorize or oppress the people of Iraq’ (article 59a); (b) Rwanda’s Arusha Accords, which followed the Rwandan genocide and refer to the rejection of exclusion and discrimination; and (c) Thailand’s 2014 Interim Constitution, in which the fight against corruption constituted a prominent guiding principle for the future constitution (Ministry of Foreign Affairs 2014).

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<sup>3</sup> In francophone jurisdictions, *ex ante* principles are often denominated pre-constituent in reference to the constituent power theory. According to this theory, an ‘original’ or ‘primary’ constituent power has the power to make a new constitution and is distinguished from the ‘derived’ or ‘constituted’ constituent power, which refers to the power to amend or reform an existing constitution following prescribed rules set by the original constituent power (Sieyès 1789; Schmitt 1934; Burdeau 1983).

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Whether they are the result of negotiations among opposing parties, are defined by certain political forces that do not represent the entire political spectrum or are imposed by a single group, guiding principles can significantly constrain the constitution-making body in its decisions on the content of the new constitution (Elster 1995: 373; Saunders 2012: 5).

So sometimes principles may be seen as undemocratically constraining future decision makers—that is, the drafters of the new constitutional framework (Brandt et al. 2011: 66). However, the key question on the democratic quality of the constitutional transition seems to be less about whether or not there are guiding principles, and more about the extent to which the negotiations around these guiding principles (if any), and the ensuing constitution-making process, are inclusive or take into account demands from majority and minority groups alike.

Guiding principles can also drive or shape constitutional paradigm shifts, as they may articulate necessary and significant changes to past constitutional frameworks, orienting the drafters in particular directions. This occurred in South Africa's transition from apartheid to democracy and in Nepal's post-conflict transition from a centralized monarchy to a federal republic.

## Chapter 2

# HISTORICAL EXAMPLES AND THE UNIVERSE OF CASES

South Africa is often heralded as the paradigmatic case of negotiated guiding principles, but such principles also preceded the South African process.

In India, in the aftermath of World War II—in December 1946—interim prime minister Jawaharlal Nehru submitted the ‘Objectives Resolution’ to the Constituent Assembly. This was adopted by consensus and included content to guide the drafting of the Indian Constitution.<sup>4</sup> The principles in the resolution formed the basis for the constitution’s preamble. In Germany, on 1 July 1948, the occupying forces submitted a set of three documents—the Frankfurter Dokumente—to the 11 German regional prime ministers to guide the future German constitution-making process both procedurally and substantively (‘Frankfurter Dokumente’ 1948).

Since the 1940s and 1950s, guiding principles in decolonization processes have sometimes been agreed—though often imposed on the constitution-making body by the colonial government—in an attempt to constrain future design choices.

In France, amid the war of independence in Algeria, the legislature of the Fourth Republic tasked Charles de Gaulle’s newly formed government with preparing a draft constitution. The constitutional statute enacted by the legislature on 3 June 1958 imposed procedural requirements and five substantive principles: (a) universal suffrage as the sole source of power; (b) separation of powers; (c) political accountability of the government to the legislature; (d) the independence of the judiciary to ensure the protection of rights and freedoms

<sup>4</sup> The resolution states the intention: (1) to foster unity of the nation and to ensure its economic and political security, to have a written constitution, and to proclaim India as a sovereign, democratic republic; (2) to have a federal form of government with the distribution of powers between the centre and the states; (3) to guarantee and secure justice, equality, freedom of thought, expression, belief, faith, worship, vocation, association and action to all the people of India; (4) to provide adequate safeguards for minorities, backward and tribal areas and depressed and other backward classes; (5) to maintain the integrity of the territory of the republic and the sovereign rights on land, sea and air according to the law of civilized nations; (6) to attain a rightful and honoured place in the world and make willing contribution to the promotion of world peace and the welfare of mankind (see the full version at The Nehru Blog n.d.).

enshrined in the preamble of the 1946 Constitution; and (e) the establishment of new relations with ‘the peoples associated with the Republic’.

In 1981, Namibian political parties, the South West Africa People’s Organisation (SWAPO), the United Nations, so-called Frontline States<sup>5</sup> and the Western Contact Group (WCG)<sup>6</sup> agreed to a series of substantive principles to guide the Namibian constitution-making process. The WCG introduced those principles as part of the more general settlement negotiations for Namibia’s independence, and following UN Security Council Resolution 435 (1978), which did not include any details as to either the process or the content of the future constitution. Once agreed by all negotiating parties, the WCG proceeded to submit them to the UN Secretary-General (UN Security Council Document S/20967). In the end, the ‘1982 Constitutional Principles’ were agreed years before the constituent assembly was elected and started drafting the post-independence Namibian Constitution in 1989, but still very much guided the constitution-making process (Brandt et al. 2011: 62; Wiechers 1989, 2010). Namibia is not the only case where the international community was involved in the negotiation of guiding principles (see Box 2.1).

After the end of the Cold War, in the 1990s, guiding principles were often imposed on national conferences or dialogues, or negotiated within the framework of a national conference or dialogue in order to constrain or guide future constitution-making bodies (Murray 2017: 18). In Benin, for instance, in 1989, outgoing president Kérékou and other representatives of the state agreed to abandon the one-party system and Marxism–Leninism as the doctrine of the state and to convene a national conference to make recommendations on the future of the country. President Kérékou then appointed a preparatory committee mandated to determine the membership and agenda of the National Conference. This preparatory committee also drafted a series of additional guiding principles for the National Conference, which in turn developed detailed suggestions to guide the future constitution-making body (Harlander 2016: 26). The National Conference was initially conceived as a consultative body. However, because of the mistrust of the delegates participating in the conference towards the government, the delegates decided at the first conference meeting to declare the conference to be sovereign, thus making its recommendations legally binding. Benin became a precursor in that regard and inspired other francophone countries. Most of the national conferences held in francophone Africa during democratic transitions in the early 1990s declared themselves sovereign, including Chad, Congo, Niger, Togo and Zaire (currently the Democratic Republic of the Congo). All these national conferences defined binding guiding principles for the future constitution-making body.

<sup>5</sup> Frontline States included Angola, Botswana, Mozambique, Tanzania, Zambia and Zimbabwe.

<sup>6</sup> The Western Contact Group (WCG) was an unofficial body that included government representatives of Canada, France, the United Kingdom, the United States and West Germany. The WCG managed to negotiate a comprehensive peace and independence process with the South African Government and Namibian political parties, which became UN Security Council Resolution 435 (1978) (Wiechers 2010: 84).

### Box 2.1. The role of the international community in defining guiding principles and overseeing their implementation in Kosovo

In the case of Kosovo, the international community played an important role in defining the guiding principles and certifying that they were complied with (Caka Nimani 2022; see also Chapter 5: Mechanisms and institutions mandated to verify or certify their implementation). The principles were agreed during the 2006–2007 Vienna Talks, and as part of the Comprehensive Proposal for the Kosovo Status Settlement (informally called the Ahtisaari Plan), submitted to the UN Security Council on 26 March 2007. The settlement, which was not accepted by Serbia nor by the Russian Federation in the Security Council, provided for a series of general principles (article 1) as well as a full annex to the settlement on ‘Constitutional Provisions’, which stipulated in detail some of the content of the future constitution of Kosovo. The guiding principles referred to the multi-ethnic and

secular nature of the state; respect for the rule of law, democratic standards and market economy; equality of all citizens; and respect for internationally recognized human rights, among others. The annex on constitutional provisions, which could be understood as very detailed guiding principles, mostly related to institutional design, including provisions on the legislature, the executive, the judiciary and fourth-branch institutions, as well as to decentralization and local government. Most of these institutional provisions were meant to ensure power sharing among different ethnic groups, as well as the protection of minority rights, with a particular emphasis on the Serb minority mostly concentrated in the north of the country along the border with Serbia. At the same time, though, these guiding principles left enough space for ‘locally made decisions’ (Caka Nimani 2022: 113).<sup>1</sup>

<sup>1</sup> Furthermore, the Constitutional Working Group, and ultimately the Commission, also had to decide whether 10 other annexes contained in the Settlement had to be incorporated into the Constitution, or could be left to legislation. It was decided that some annexes or parts thereof had to be incorporated into the Constitution, and others could be dealt with by law (Caka-Nimani 2022).

In the period between 2000 and 2023, 49 processes resulted in new ‘final’ constitutions being adopted worldwide,<sup>7</sup> and 19 of these constitution-making processes were to some extent guided by principles.<sup>8</sup> These processes occurred in countries undergoing very different types of transition, namely from conflict to peace and after foreign invasions, popular protests, military coups, post-electoral violence and secession, and other regime-led transitions. And while in some of these countries principles were clearly imposed by the executive, in others some form of negotiation or consultation took place among key stakeholders to agree to principles (see Table 2.1).

<sup>7</sup> According to the Constitute Project, these include: Afghanistan 2004, Angola 2010, Bahrain 2002, Bhutan 2008, Bolivia 2009, Burundi 2005, Central African Republic 2016, Chad 2018 and 2023, Comoros 2018, Congo 2015, Côte d’Ivoire 2016, Cuba 2019, Democratic Republic of the Congo 2006, Dominican Republic 2002, 2010 and 2015, Ecuador 2008, Egypt 2012 and 2014, Eswatini 2005, Fiji 2013, Guinea 2010, Hungary 2011, Iraq 2005, Kenya 2010, Kosovo 2008, Kyrgyzstan 2010, Madagascar 2010, Mali 2023, Montenegro 2007, Morocco 2011, Mozambique 2004, Myanmar 2008, Nepal 2015, Niger 2009 and 2010, Qatar 2003, Rwanda 2003, Senegal 2001, Serbia 2006, Syria 2012, Thailand 2007 and 2017, Timor-Leste 2002, Tunisia 2014, Turkmenistan 2008, Tuvalu 2023 and Zimbabwe 2013.

<sup>8</sup> Based on the authors’ research, these include: Angola 2010, Bahrain 2002, Bhutan 2008, Burundi 2005, Chad 2018 and 2023, Fiji 2013, Iraq 2005, Kenya 2010, Kosovo 2008, Madagascar 2010, Mali 2023, Montenegro 2007, Morocco 2011, Myanmar 2008, Nepal 2015, Rwanda 2003, Thailand 2017 and Zimbabwe 2013.

Table 2.1. Types of guiding principle related to different types of transition

| Type of transition          | Negotiated guiding principles                                      | Imposed guiding principles                           |
|-----------------------------|--|--|
| Post-conflict transition    | Angola 1992,*<br>Burundi 2000,†<br>Nepal 2005/07,*<br>Rwanda 1992* |  |
| Foreign invasion            | Iraq 2004*   |  |
| Popular protests            |  | Bahrain 2001,<br>Morocco 2011                        |
| Military coup               | Chad 2022,†<br>Madagascar 2009,†<br>Mali 2015/21†                  | Fiji 2012,<br>Myanmar 1992/2003,*†<br>Thailand 2014* |
| Post-electoral violence     | Kenya 2009,*<br>Zimbabwe 2008*                                     |  |
| Secession                   | Kosovo 2007, Montenegro 2006                                       |  |
| Other regime-led transition | Chad 2018†   | Bhutan 2001  |

Source: Compiled by the authors. The years correspond to the time in which the principles were signed or adopted.

Note: \* Guiding principles included few details in these cases. † Key stakeholders boycotted negotiations on principles.



## Chapter 3

# SCOPE AND LEVEL OF DETAIL OF GUIDING PRINCIPLES

Whether imposed or negotiated, the length and level of detail of guiding principles can vary significantly. When they are the result of negotiations between formerly warring parties—with some exceptions such as Namibia and South Africa—guiding principles are often sparsely defined. One reason for this may be that it is difficult for groups that have recently been engaged in armed conflict to sit at a negotiating table and agree on details, particularly if these relate to precisely the issues that caused the conflict. Other reasons could be a general lack of commitment to the rule of law or lack of understanding about the role that guiding principles can play in a constitution-making process. Examples include Angola and its 1992 Interim Constitution, Rwanda and its 1992 and 1993 Arusha Accords, Nepal and its 2006 Comprehensive Peace Agreement, or more recently the 2018 Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS). All these stated broad guiding principles such as respect for the rule of law, political pluralism, free and fair elections, the protection of fundamental rights, judicial independence and separation of powers. These guiding principles ostensibly served as a baseline for constitutional design and a signal of joint intent. At the same time, they left the space wide open for constitution makers to freely interpret how those principles would be reflected and operationalized in the new constitutional text and also neglected critical issues at the root of the conflict, such as access to land or how to manage ethnic divisions.

At the other end of the spectrum are cases such as South Africa, where schedule 4 of the 1993 Interim Constitution included 34 detailed 'constitutional principles'. These encompassed issues such as: the prohibition of any form of discrimination and the promotion of racial and gender equality; affirmative action for disadvantaged people to ensure equality before the law; multiparty democracy, regular elections, universal adult suffrage, a common voters' roll and proportional representation; three main levels of government; a non-partisan public service; provincial boundaries, powers and functions, and the right of provinces to adopt provincial constitutions; the recognition of traditional monarchs; and even the establishment of a financial and

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**Whether imposed or negotiated, the length and level of detail of guiding principles can vary significantly.**

fiscal commission and other independent institutions. As mentioned in the introduction to this paper, the scope and level of detail of South Africa's constitutional principles—as well as the fact that a newly established Constitutional Court was to certify the draft against those principles—was primarily meant to accommodate the white minority group, which previously had dominated the state and was concerned that its interests could be adversely affected by a constitution drafted in a process dominated by the previously excluded majority. The level of detail and the binding nature of these constitutional principles—resulting from their entrenchment in the Interim Constitution and the certification requirement—gave the minority group strong assurances that its interests would be protected, which ensured the group's participation in the process (Brandt et al. 2011: 64; Ebrahim and Miller 2010).

Guiding principles can also have an intermediate level of detail. In some of these cases, the principles represent a clear constitutional choice that still needs further articulation. In others, there is a mix of principles that are enunciated but need articulation and principles that can be incorporated into the constitutional text without (much) further negotiation. Arguably, principles in constitutional processes in both Bhutan and Fiji (see Box 3.1) had such an intermediate level of detail.

Sometimes the nature of guiding principles can change during the transition in response to particular demands. The Nepali constitution-making process (see Box 3.2) is an example where guiding principles were minimally detailed at the start of the process but evolved as specific stakeholders demanded further specifications, notably transforming the rather abstract provision mandating

### Box 3.1. Guiding principles in Fiji 2012

The case of Fiji included some particularities in that the principles were included in an executive decree—Decree No. 57 of 2012—that set up the constitutional process and were imposed by the military junta as part of a broader plan to write a new constitution. The guiding principles consisted of a mix of clear constitutional choices, such as setting the voting age at 18 and establishing a secular state, and broader principles that required further elaboration, such as 'good and transparent government', 'an independent judiciary', 'the removal of systemic corruption', and the inclusion of provisions designed to achieve 'true democracy' and 'respect for human rights'. The 'elimination of ethnic voting' also represented a significant shift

from the status quo.<sup>1</sup> Decree No. 57 provided for the establishment of a Constitutional Commission responsible for developing the draft constitution and conducting civic education and public consultation. Decree No. 58 provided for a Constituent Assembly responsible for reviewing the draft and adopting the constitution, and a process to evaluate the conformity of the constitution with the guiding principles. Once the Constitutional Commission had finalized the draft, however, the military government rejected it and repealed Decree No. 58 and instead adopted its own draft (Kant 2014; Saati 2020; Regan, Kirkby and Kant 2023). But the guiding principles set out in Decree No. 57 were at least formally reflected in the new constitutional text.

<sup>1</sup> Other than the inclusion of provisions designed to achieve 'true democracy' and respect for human rights, there was a list of 'non-negotiable principles and values', which included: a common and equal citizenry; a secular state; the removal of systemic corruption; an independent judiciary; elimination of discrimination; good and transparent governance; social justice; one person, one vote, one value; the elimination of ethnic voting; proportional representation; and a voting age of 18 years (Fiji Constitutional Process (Constitution Commission) Decree 2012 (Decree No. 57 of 2012), part 1, article 4).

the ‘restructuring of the state’ into the need to establish a ‘progressive Democratic Federal System’ (2007 Interim Constitution of Nepal, article 138).

### Box 3.2. Guiding principles evolving during the transition: The case of Nepal

In Nepal, the 2005 12-Point Agreement between the Seven Political Parties and the Communist Party of Nepal (Maoists) only provided that the signatories committed themselves to holding elections for a constituent assembly to restructure the state (preamble), upholding democratic norms and values, such as a ‘competitive multiparty system of governance, civil liberties, fundamental rights, human rights, the principle of rule of law, etc.’ (principle No. 4), and protecting ‘the independence, sovereignty and the geographical integrity and the national unity of the country’ (principle No. 10). Chapter 3 of the 2006 Comprehensive Peace Agreement on ‘Political-Economic-Social Transformation and Conflict Management’ underscored these principles, particularly the need ‘to carry out an inclusive, democratic

and progressive restructuring of the state by ending the current centralized and unitary form of the state ...’ (article 3.5). It was only the amended version of the 2007 Interim Constitution that mentioned that the restructuring of the state was meant as the transformation of the state into ‘a progressive Democratic Federal System’ (article 138). This amendment was enacted to accommodate demands from the Madhesi community, who protested (among others) against the silence in the Interim Constitution regarding the concept of federalism (International IDEA 2015). However, no further details were provided as to the type and specific characteristics of Nepal’s future democratic federal system, while related decisions were left to the Constituent Assembly.

In brief, one of the challenges in negotiating guiding principles is the principles’ scope and level of detail. When negotiated and agreed by key stakeholders, detailed principles can serve to protect the interests of minority groups and conflict parties that may have had a certain leverage at the start of the negotiations (often through the threat of resuming the violent conflict) but would be outvoted in the main constitution-making process. Detailed principles can significantly constrain the constitution-making body, offering less margin for interpretation and ideally greater assurances to negotiating parties that what they agreed on will be reflected in the new constitutional text.<sup>9</sup> But agreeing on details is always difficult, especially after violent conflict.

Less detailed or more general principles may be easier to agree on and ideally may serve to foster trust between warring parties and maintain their commitment to engage in dialogue, as well as offer a general framework for the constitution-making body to work under. If strategically decided, they can be important in driving radical constitutional shifts, as they may articulate necessary and significant changes to past constitutional frameworks, orienting the drafters in particular directions, such as a change from a one-party system to a multiparty democracy or from a centralized monarchy to a federal republic. But on the other hand, very general principles can be ignored by the parties and provide fewer assurances to parties that lack (significant) representation in the constitution-making body.

<sup>9</sup> This is what is referred to as ‘insurance theory’, whereby specificity can serve as a form of insurance for political actors who are uncertain about their future power. In other words, by specifying details in principles agreed to in advance of constitutional negotiations, these actors can protect their interests and ensure that their interests will be met regardless of who holds power in the future (Ginsburg 2010).

**Notably, most of the processes that resulted in either vague or less detailed (even though perhaps significant) principles were negotiated.**

### **3.1. DETERMINING THE SCOPE AND LEVEL OF DETAIL, AND THE PRINCIPLES' REFLECTION IN THE CONSTITUTIONAL TEXT**

The scope and level of detail of guiding principles can depend on a number of factors. When imposed, authorities have few constraints in terms of including particular content or details.<sup>10</sup> When they are negotiated, the higher the level of division and polarization between the different parties, the harder it will be to agree to details, particularly on issues that have previously been divisive. Notably, most of the processes that resulted in either vague or less detailed (even though perhaps significant) principles were negotiated, including Angola 1992, Iraq 2004, Kenya 2009, Nepal 2005 and 2007, Rwanda 1992 and Zimbabwe 2008.

Arguably, lower levels of polarization and a relative balance of power between key stakeholders may lead to more detailed agreements. In some instances, when stakeholders have had time to discuss principles in advance of the negotiation process, their preparedness also impacts the level of detail. Principally, however, it is the uncertainty regarding actors' representation in the future constitution-making body, as well as the perceived need to agree on particular principles early in the process (perhaps for fear of changing circumstances on the ground), that may be the most crucial motivation for actors to agree to specific details. In this case it would appear that actors should also be interested in establishing mechanisms or institutions meant to verify the implementation of guiding principles. In some instances, however, the absence of these mechanisms may actually facilitate agreement on detailed guiding principles (see Box 5.2).

Processes that incorporate highly detailed principles occur in very different contexts and types of transition, although imposed principles often have higher levels of detail, such as in Bahrain 2002 and Morocco 2011. Sometimes a dialogue or a negotiation process boycotted by part of the opposition manages to agree to detailed principles, such as Burundi 2000, Chad 2018 and 2022, and Mali 2021; and sometimes detailed principles may also be genuinely negotiated by all parties, besides Namibia and South Africa (and also Montenegro 2006). In those cases where highly detailed principles have been negotiated, they are usually reflected in the draft constitution. In other words, when conflict parties manage to agree to detailed principles, those are likely to imprint the new constitutional text.

The case of Chad 2022 is interesting from another point of view. While part of the political opposition boycotted the national dialogue process, representatives still managed to agree on issues that would prove to be controversial, such as an unamendable five-year presidential term limit, renewable only once (Republic of Chad 2022). The unamendability clause was included in the preliminary draft constitution, but it was subsequently removed by the executive before the ratification of the constitution in referendum.

<sup>10</sup> The authors found only two cases—Myanmar 2008 and Thailand 2017—where principles were vague (or incomplete) and at the same time imposed by a military junta.

This points to a disagreement between the demands of representatives in the national dialogue (who had been appointed by the executive) and the executive itself. It also offers the international community (and in this case, regional organizations) leverage for engagement either to mediate between stakeholders or to incentivize decision makers to comply with principles that may appear to curb their powers and meet international and regional democratic standards.

Bahrain (see Box 3.3) and Morocco are notable as well, in that while the principles were imposed by the executive, they were partly informed by public demands (and meant to quell demonstrations). However, given the control that the executive wielded over the respective process, and in the absence of a formal verification process, the extent to which, in these contexts, principles find reflection in the new constitutional text depends on the leverage that national or international groups and organizations have over the executive. In the case of Morocco, in the wake of the Arab Uprisings the principles were translated into the constitution, leading to a substantive decrease in the level of societal instability. What happened in Morocco stands in stark contrast to the situation in Bahrain.

### Box 3.3. Imposed guiding principles not reflected in the Constitution of Bahrain

In Bahrain, the principles listed in the 2001 National Action Charter were not incorporated into the new constitutional text despite the fact that they were widely supported by the population (O'Sullivan 2005). While the regime drafted those principles partly in response to popular pressure, its main objective was to consolidate power and authority.<sup>1</sup> One of the most controversially discussed principles was the establishment of an appointed second chamber of parliament, which—according to the National Action Charter (Chapter V:

Democratic Life)—was to only have an advisory role. The government-led constitution-drafting process, however, established a second non-elected chamber with lawmaking authority that would supersede the authority of the elected chamber (Mohamoud 2005). One of the most visible, if indirect, consequences of this decision was the start of popular demonstrations seeking democratic reform in the wake of the Arab Uprisings (ICG 2011).

<sup>1</sup> Principles included in the National Action Charter comprised: establishing a constitutional monarchy; establishing a bicameral legislature (appointed upper chamber); a series of core values and principles, including development, rule of law/justice, equality, liberty, security, peace, education, social solidarity and equal opportunity; protection of individual freedoms; freedom of belief, freedom of expression and publishing, freedom to form civil society organizations, family as the basis for society, employment as a duty and a right, promotion of science, literature, arts; Islam as the main source of legislation; separation of powers; independence of the judiciary; people's right to participate in public affairs; a series of economic principles; security principles; and foreign relations principles.

Another factor to bear in mind when looking at the scope and level of detail of guiding principles is the momentum for consensus among different stakeholders on specific constitutional design issues, as the case of The Gambia illustrates (see Box 3.4).

While it is understandable that, particularly in post-conflict settlements, it may be difficult (and perhaps imprudent) to agree to detailed principles, in some instances stakeholders should not hold back in terms of detailing principles they can agree to. Trusting that the momentum for change will persist over

### Box 3.4. Negotiations in The Gambia

After long-term ruler Yahya Jammeh lost the November 2016 presidential election against opposition leader Adama Barrow, the new government, supported by a coalition of Gambian political parties and civil society groups—Gambia Coalition 2016—initiated a constitutional reform process. There was an initial moment of hope and general agreement that change was necessary, including in response to the need to limit the number of terms a president could sit.

The 2017 Constitutional Review Commission Act included six very general principles that the commission should safeguard and promote (article 6 (d) (i)–(vi)). One provided for the introduction of presidential term limits in the future constitutional text. While all parties agreed to this principle, no further details were provided regarding its implementation—for example, the number of terms allowed, whether the term limits would apply retroactively and whether the constitutional provision

would be amendable.<sup>1</sup> These specifications, particularly the retroactivity of term limits, became a bone of contention. Retroactivity would have prevented the sitting president from seeking re-election beyond 2026, and so the president's allies in parliament rejected the new 2020 draft constitution, which included such a clause (Saine 2021).

This case illustrates how parties can have, and maintain, strong consensus on a broad principle (the idea of presidential term limits) but disagree on how that principle should be applied. On the one hand, this calls for careful consideration of how principles might be interpreted and applied to avoid later disagreement. But at the same time, it is also evident that not everything can be legislated for, and ultimately agreement over principles is no guarantee of a successful and consensual conclusion to the process.

<sup>1</sup> '[T]he importance of ensuring periodic democratic elections based on universal adult suffrage, including the introduction of term limits for serving in the office of President' (2017 Constitutional Review Commission Act, article 6 (d) (v)).

time, despite changing circumstances, may sometimes also be imprudent. However, agreeing to detailed principles too early in the process may not only alienate segments of society but also be a roadblock for future negotiations. Furthermore, sometimes even detailed principles can be the subject of discussion regarding their actual interpretation. It is also important that all stakeholders have a common understanding of the principles' interpretation.

In summary, the scope and level of detail of principles will depend on the readiness of the parties to agree to fundamental issues that will both guide and constrain the future constitution-making body. Agreeing on details is difficult and can be controversial, but different stakeholders may have a different understanding of what more general principles stand for. Ambiguity may help the parties to construct tailored narratives for their constituents. However, sometimes the negotiation process can be more important than the substance of the final agreement, in the sense that it may be critical for parties to engage each other outside of the battlefield and agree to the basics, which may allow further engagement later in the process (as in Nepal 2015). Less detailed principles may be easier to agree on and serve to initiate dialogue and foster trust between warring parties, as well as offer a general framework for the constitution-making body to work under. On the other hand, ambiguity offers fewer assurances to affected parties who may lack significant representation in the constitution-making body.

## Chapter 4

# HOW GUIDING PRINCIPLES COME ABOUT AND WHERE THEY CAN BE FOUND

As mentioned before, either guiding principles may be imposed by powerful actors in or outside the country in question<sup>11</sup> or they may be negotiated in various forums.<sup>12</sup> Where principles are negotiated, actors that request them may have built influence and leverage during the conflict and early negotiations that they may fear might diminish during the constitution-making process (as in South Africa). These stakeholders may use guiding principles to constrain any future constitution-making body from drafting a text that could adversely affect their interests (Ginsburg 2010). This is the reason why, particularly in transitions from conflict to peace, it is paramount that a wide range of political and social groups agree on the principles before the actual constitution-making process starts, especially when these principles are detailed and give the constitution-making body little room for negotiation (see Brandt et al. 2011: 63).

Indeed, in most cases all significant parties to the conflict were involved at the stage of negotiating and developing guiding principles (for example,

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**Where principles are negotiated, actors that request them may have built influence and leverage during the conflict and early negotiations that they may fear might diminish during the constitution-making process.**

<sup>11</sup> In six instances, those guiding principles were imposed by the executive, either by a military junta (Fiji 2012, Myanmar 1992/2003 and Thailand 2014) or by a monarch (Bahrain 2001, Bhutan 2001 and Morocco 2011). Imposed guiding principles mostly relate to executive-led transitions following a military coup or popular protests (where protests do not topple the regime but it is then pressured to respond to popular demands).

<sup>12</sup> In three cases guiding principles were negotiated among warring parties following internal armed conflicts (Angola 1992, Burundi 2000 and Rwanda 1992). In Nepal, guiding principles were also established as part of a peace process following internal armed conflict but were negotiated between warring parties and various political parties. In three other instances, guiding principles were negotiated among political parties in the aftermath of electoral violence (Kenya 2009 and Zimbabwe 2008) or foreign invasion (Iraq 2004). In two cases, these principles were negotiated with the involvement of, or imposed by, the international community as part of secession or independence processes (Kosovo 2007 and Montenegro 2006). In both Chad and Mali, guiding principles were elaborated during national dialogues boycotted by key opposition and civil society groups due to the consultative, rather than binding, nature of each dialogue's conclusions and the perception that its mandate and agenda were directed by the government.



Angola 1992, Kenya 2009, Kosovo 2007,<sup>13</sup> Madagascar 2009,<sup>14</sup> Nepal 2005/07, Rwanda 1992 and Zimbabwe 2008). In certain instances, some warring parties were excluded (Iraq 2004)<sup>15</sup> or boycotted the negotiations (Burundi 2000,<sup>16</sup> Chad 2018 and 2022, and Mali 2021). Notably, in Chad 2018 (arguably also in 2022) and Mali 2021 the boycott and rejection of guiding principles by key stakeholders paved the way for a unilateral constitution-making process, resulting in contentious new constitutional texts that significantly strengthened the powers of the president.<sup>17</sup>

Carefully considering which groups may be included—or at least invited to engage—in negotiations around principles can be key when developing a more or less detailed agreement and one that has sufficient backing to allow for its own implementation.

**The effect of guiding principles on the constitution-making body may also depend on the form (or the format) in which they have been adopted or the extent to which the agreement is considered to be legally binding.**

#### 4.1. DOCUMENTS OUTLINING PRINCIPLES

The effect of guiding principles on the constitution-making body—whether they are implemented or not, and the extent to which they constrain the constitution-making body—may also depend on the form (or the format) in which they have been adopted or the extent to which the agreement is considered to be legally binding. At the same time, the legally binding nature of these agreements will be compounded by the parties' commitment to their application.<sup>18</sup>

For the most part, guiding principles are included in documents or agreements setting out the process of constitutional change (see Table 4.1).

<sup>13</sup> Even though not all parties around the negotiation table ultimately ratified the agreement.

<sup>14</sup> 'Following the ouster of President Ravalomanana's administration and the military's handover of presidential powers to Mr. Rajoelina, the Southern African Development Community (SADC), African Union (AU), United Nations (UN), and Organisation Internationale de la Francophonie (OIF) convened peace talks between Rajoelina, Ravalomanana, and two other former presidents deemed leaders of opposition movements (Albert Zafy and Didier Ratsiraka). This led to two sets of accords in late 2009 that called for an inclusive and neutral transitional government and elections, the Maputo Political Accord (signed 8 August 2009) and the Transition Charter (signed 9 August 2009). Both the Maputo Political Accord and the Transition Charter include language about establishing a new constitution as well as the use of a referendum for the adoption of the new constitution, and they establish the organ in charge of drafting the new constitution, i.e. a National Commission for the Review of the Constitution. However, little to no progress was made on implementation and Rajoelina denounced the agreements in December 2009. While the constitutional process that followed did include some elements of the Maputo Political Accord/Transition Charter, it was ultimately guided by a separate national process led by President Rajoelina and his High Authority of the Transition (HAT) government' (International IDEA 2022 on Madagascar).

<sup>15</sup> Members of the former Ba'ath party were excluded from the Iraqi Government Council, which was one of the parties agreeing to the Law of 2004 of Administration for the State of Iraq for the Transitional Period (International IDEA 2022 on Iraq).

<sup>16</sup> The two main Hutu rebel groups—the National Council for the Defense of Democracy—Forces for the Defense of Democracy (CNDD–FDD) and the Party for the Liberation of the Hutu People—National Forces of Liberation (PALIPEHUTU–FNL)—did not participate in the Arusha negotiations when guiding principles were agreed (International IDEA 2022 on Burundi).

<sup>17</sup> In the case of Chad 2018, key opposition and civil society groups boycotted the forum and the process for the development of guiding principles notably because of the consultative, rather than binding, nature of the forum's conclusions, and the perception that its mandate and agenda were directed by the government (Mandibaye 2018).

<sup>18</sup> The 1789 Philadelphia Convention is perhaps the most paradigmatic case where a constitution-making body ignored its mandate to amend the existing confederal constitution and instead drafted a federal constitution for the USA (Saunders 2012: 5). Still, it appears that the USA is more of the exception than the rule in terms of explicitly contravening its overarching objective of maintaining the extant confederal constitution. Most constitution-making bodies comply at least nominally with guiding principles.



These documents include, for instance, peace agreements or interim constitutions and reports of national conferences or dialogues that provide recommendations for the country's future. Principles could also be included in the existing constitution via an amendment, as was the case in Chile's ultimately unsuccessful 2023 constitution-making process. They could be provided as part of specific legislation or an executive decree establishing the constitution-making body or the broader process. They may be part of the terms of reference of a parliamentary committee or commission (as in Kenya and The Gambia) that is mandated with developing suggestions for, or actually drafting, a new constitution. Principles could even form part of international agreements or UN decisions or resolutions, such as was the case in Namibia and Timor-Leste (Brandt et al. 2011: 61), as well as in Kosovo.

**Table 4.1. Types of document containing guiding principles**

| Type of document                                | Examples   |
|---|--|
| Political or peace agreements                   | Burundi 2000, Mali 2015, Nepal 2006, Rwanda 1992, Zimbabwe 2008  |
| Interim or permanent constitutions              | Angola 1992, Iraq 2004, Madagascar 2009, Mali 2020, <sup>1</sup> Nepal 2007, (South Africa 1993), Thailand 2014* |
| Reports of national conferences or dialogues    | Chad 2018, Chad 2022, Mali 2022, Myanmar 1992*   |
| Executive decree                                | Bhutan 2008,* Fiji 2012,* Bahrain 2001,* Myanmar 2003*   |
| Ordinary legislation                            | The Gambia 2017, Kenya 2009  |
| Internationally sponsored agreement or proposal | Kosovo 2007, (Namibia 1992)  |
| Other   | Morocco 2011* <sup>2</sup>   |

Source: Compiled by authors.

Note: \*Imposed guiding principles (see Table 2.1).

<sup>1</sup> This refers to the 2020 Transitional Charter that, while not containing additional principles, provided a commitment to implement the Algiers Peace Agreement and the recommendations from the national dialogue (ICT 2020). See Box 5.2.

<sup>2</sup> Guiding principles were outlined in a speech delivered by King Mohammed IV on 9 March 2011 (MoroccoTomorrow 2011).

The implementation of recommendations that emerge from a national dialogue process will often depend on the willingness of decision makers and will usually not be considered legally binding. Equally, the implementation of a political or peace agreement will depend on stakeholders' commitment to be bound by it. Sometimes the parties signing a political or peace agreement, or third parties, will want this agreement to become legally binding and incorporated (wholly or in part) into a given legal or constitutional framework (Wittke 2018).

The binding nature of guiding principles, however, will only significantly impact the process of constitution writing when: (a) those principles are detailed enough to be more or less easily transferable to the constitutional text; and (b) a body has been established that is mandated to monitor and evaluate implementation, and perhaps also to verify that the final constitutional draft materializes those principles (see Chapter 5: Mechanisms and institutions mandated to verify or certify their implementation).

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**When an inclusive constitutional reform process is planned, or when such a process aims to help a country's transition to peace and democracy, negotiating guiding principles may be a good place to start.**

In brief, the decision to develop guiding principles, whether the process will be part of a negotiation, the inclusivity of the negotiations, the level of detail of the resulting agreement and whether the agreement will be binding on all stakeholders will all crucially depend on the balance of power between different actors at the negotiating table—whether one or more stakeholders control the process and its outcomes—as well as on the level of uncertainty regarding who will control the levers of power in future (Ginsburg 2010). On the other hand, when an inclusive constitutional reform process is planned, or when such a process aims to help a country's transition to peace and democracy, negotiating guiding principles may be a good place to start. Such a process would help gauge the level of agreement among different societal groups regarding the structural changes needed to achieve their vision for the country's future. If advertised, those principles may also put pressure on decision makers not to retract.

## Chapter 5

# MECHANISMS AND INSTITUTIONS MANDATED TO VERIFY OR CERTIFY THEIR IMPLEMENTATION

Only a few cases include formal mechanisms or institutions mandated to certify the implementation of guiding principles, which then become enforceable. In Namibia, the UN was not formally mandated to certify the constitutional draft, but in July 1990 it did verify that the new constitution complied with the 1982 Constitutional Principles (Brandt et al. 2011: 64). Namibia was an inspiration for South Africa and key to South Africa breaking what had seemed an insurmountable problem concerning when to draft a constitution. In South Africa, the Interim Constitution included negotiated principles and provided that the new text would not come into force unless the newly established Constitutional Court of South Africa certified that it complied with the constitutional principles. This was a safeguard for the outgoing (white minority) government in relation to a constitution-making body—and future parliament—that would be controlled by the Black-majority African National Congress. The Interim Constitution also provided that at any time one fifth of assembly members could refer a draft text, or part of it, for certification by the Constitutional Court. This gave the Constitutional Court a very prominent role in the constitution-drafting process, reinforced by South Africa's strong legal profession and general trust in courts. It was perhaps the first time in history that a court was given the power to review the compliance of a draft constitution with guiding principles (Issacharoff 2004: 1874–75; Ebrahim 1999).

Since the turn of the century, only 4 out of the 19 processes covered in this paper also included a formal certification mechanism, namely Burundi 2005, Fiji 2013, Kosovo 2008 and Montenegro 2006. In Burundi it was also the Constitutional Court that was mandated with verifying the constitutional text against the principles set out in the Arusha Peace and Reconciliation Agreement for Burundi (Protocol II on Democracy and Good Governance, Chapter I: Constitutional Principles of the Post-Transition Constitution, 28 August 2000), but it never came to that. The draft constitution was submitted to the Constitutional Court but withdrawn after the court did not give a ruling in the short time allotted, and instead it was sent directly to referendum. Because

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**Only a few cases include formal mechanisms or institutions mandated to certify the implementation of guiding principles, which then become enforceable.**

the principles were highly detailed, and indeed close to constituting a fully written constitution, decision makers deemed a referendum enough to verify them (Brandt et al. 2011: 64).

In the case of Fiji, the military junta decreed (Decree No. 58 of 2012, part 3, section 21(2)) the establishment of a five-member special tribunal (including at least two international experts) mandated to verify that the guiding principles included in another decree (Decree No. 57 of 2012, part 1, section 3) would be followed by the constitution-making body. However, the special tribunal was never established and the constitution drafted by the constitution commission was discarded before the military junta drafted and enacted a new proposal. Fiji would have been the only process where the constitutional draft had to be certified against imposed, rather than negotiated, guiding principles.

Both the cases of Kosovo and Montenegro may be in a class of their own as constitution making followed their respective declarations of independence from Serbia. In the case of Kosovo, the Comprehensive Proposal for the Kosovo Status Settlement (or Ahtisaari Plan) specified (in Annex I on constitutional provisions) that the constitution had to be consistent 'in all its provisions with this Settlement' (article 1.1), and provided in Annex IX that there would be an International Civil Representative who shall '[b]e the final authority in Kosovo regarding interpretation of the civilian aspects of this Settlement' (article 2.1.a). And indeed, the International Civil Representative certified the constitution before the National Assembly adopted it on 9 April 2008 (Council of Europe 2009). When Montenegro declared its independence from the Union of Serbia and Montenegro in 2006, the constitution-making process was linked to its pursuance of membership in the Council of Europe. The Political Affairs Committee of the Assembly of the Council of Europe, which was mandated to certify whether or not Montenegro's constitution complied with the principles, then proposed to the Assembly of the Council of Europe to recommend that the Committee of Ministers invite the Republic of Montenegro to join the Council of Europe (Gardetto 2007).

A few other processes included mechanisms or institutions without a specific mandate to formally certify the constitution but with a wider mandate sometimes interpreted as giving particular institutions that power. In Angola, the Constitutional Court was vaguely mandated to 'verify and consider non-compliance with the Constitutional Law owing to failure to take the requisite measures to make constitutional rules executable' (article 134). This was interpreted as requiring the Constitutional Court to make sure the guiding principles provided for in article 159 of the 1992 Interim Constitution were upheld. However, the principles' vague nature and the executive's control over the Constitutional Court tainted the certification process (Brandt et al. 2011: 64). In the case of Thailand, it was the military-led National Reform Council that verified that the principles stated in the 2014 Interim Constitution (both in the preamble and in section 35) were appropriately included in the final constitutional text. The Interim Constitution, however, did not specifically give such a mandate to the council.

Stronger verification mechanisms will probably reduce the likelihood of conflict, particularly when guiding principles are difficult to implement, as they can represent an additional constraint on decision makers (see Box 5.1 and Box 5.2).

#### Box 5.1. The Supreme Court of Nepal's ambiguous verification mandate

In Nepal, the 2006 Comprehensive Peace Agreement and the 2007 Interim Constitution of Nepal did not establish an explicit mandatory certification procedure. The Interim Constitution simply granted the Supreme Court of Nepal 'the final power to interpret this Constitution and other prevailing laws' (Interim Constitution of Nepal, article 102.4). One of the most contentious issues during the nine-year constitution-making process was related to the operationalization of the guiding principle mandating the establishment of a federal system (Interim Constitution of Nepal, article 138.1). More specifically, political parties in the two consecutive constituent assemblies disagreed on, among other things, the number and delineation of the future constituent units.

Following devastating earthquakes in April 2015, and amid growing public pressure and a humanitarian crisis, leaders of the three main political parties and a smaller Madhesh-based party (the Madhesi Janadhikar Forum-Loktantrik) signed a 16-point agreement outside the constituent assembly process. This agreement broke the deadlock by deciding on the creation of eight provinces based on identity and capability, postponing the delineation of their boundaries and establishing an ad hoc federal commission to do it within six months of promulgation of the federal constitution. However, leaders from the Madhesi community, who

had advocated for the creation of a Madhesi province, contested this arrangement before the Supreme Court. Plaintiffs argued that this arrangement did not comply with the guiding principle of article 138.3 of the Interim Constitution, which provided that the final decision relating to the structure of the state and federal system must be made by the Constituent Assembly.

On 19 June 2015, the Nepal Supreme Court issued an interim order requiring that all federal issues, including the demarcation of provincial boundaries, be settled by the Constituent Assembly, as required by the Interim Constitution, rather than an ad hoc committee after the promulgation of the federal constitution. The main political parties in the Constituent Assembly initially rejected the Supreme Court's decision and proceeded to adopt the federal constitution without specifying the boundaries of the provinces in the constitutional text (Shakya 2015). Nevertheless, and given the emergency situation in the country at the time, on 21 August political parties in the Constituent Assembly agreed to revise the federal structure and divided the country into seven provinces, with the final demarcation to be proposed by a federal commission (International IDEA 2015; Haviland 2015). A stronger and clearer mandate for the Supreme Court may have reassured some of the groups that felt alienated after the 16-point agreement was signed.

In Kenya, the Constitution of Kenya Review Act (2008) provided for the establishment of the Interim Independent Constitutional Dispute Resolution Court (ICDRC) to receive petitions from '[a]ny person who is aggrieved by a matter related to the constitutional review process as specified under the Act ...' (ICDRC Rules 2010, part III, article 12). This specialized and temporary court was established because the previous process was significantly hampered by litigation and lack of trust in the judiciary (Murray 2022). But this court only heard a few cases and none of them asked the Tribunal to certify the constitutional draft—perhaps because there was no real contestation about the principles (Republic of Kenya 2010).

In Madagascar, the High Court of the Transition was mandated to 'ensure compliance with the provisions of the Transitional Charter' on receiving

### Box 5.2. Weak monitoring mechanism of the Algiers Peace Agreement in Mali

Following an armed insurgency in its northern regions, the government of Mali, an alliance of pro-government armed groups and an alliance of rebel groups (the Coordination of Azawad Movement) signed the Algiers Peace Agreement in June 2015, under strong pressure from the international community. This peace agreement included highly detailed guiding principles providing for greater decentralization to address demands for enhanced autonomy from northern signatory armed groups (see Annex A). Although the agreement established a monitoring committee (article 36) and an independent observer (article 63) with the mandate to evaluate its implementation and publish reports including recommendations on future actions, these institutions did not have the mandate to certify the implementation of the guiding principles in the constitution nor to enforce the agreement, which was disregarded to a large extent (The Carter Center 2020). This weak monitoring structure and the absence of a certification procedure likely facilitated the negotiations over guiding principles. Arguably, the lack of enforcement mechanisms lowered the stakes for the negotiating parties, making it easier for the government to concede to certain demands of armed groups and reach agreement on detailed guiding principles. Conversely, had the peace agreement included a stringent verification procedure, it might have made the negotiations over guiding principles more difficult, possibly resulting in broader, less specific principles—or perhaps even preventing an agreement altogether.

After two consecutive military coups d'état in 2020 and 2021, coup leaders enacted a Transitional Charter and the transitional government organized a national dialogue. This national dialogue, which was boycotted by opposition groups and civil society, recommended the drafting of a new constitution and defined a series of guiding principles for the future constitution. The 2023 Mali Constitution, which significantly expanded powers of the president (Noël, forthcoming 2025), reflects several of the guiding principles defined in the conclusions to the 2021 national dialogue. However, the new Constitution does not reflect the detailed principles providing for greater decentralization included in the 2015 Algiers Peace Agreement, despite commitments included in the conclusions to the 2021 National Dialogue and in the 2022 Transitional Charter to implement the agreement (Transitional Charter of Mali, article 2).

Despite the changing political circumstances between the signing of the Algiers Peace Agreement and the making of the 2023 post-coup Constitution, the case of Mali highlights a takeaway for those negotiating guiding principles. A weak enforcement mechanism, or lack of one, can lower the stakes for the negotiating parties, making it easier to agree on detailed guiding principles, but reduces the likelihood of effective implementation in the ensuing constitutional framework.

petitions from 'the Transitional President, the Prime Minister or one third of the members of the Transitional Congress or the Transitional Superior Council' (article 23). This could have included the two key principles in Title VI of the Transitional Charter (Interim Constitution) guiding the constitution-making process: (1) the president of the republic shall be elected by direct universal suffrage for one five-year term, renewable once; and (2) any reform of the constitution regarding the organization or functioning of public powers, such as the form of the state, would have to be ratified by referendum. Beyond this, Title VI also referred to the fact that the constitutional draft would include the recommendations emerging from the national conference organized by the National Reconciliation Council. The High Court of the Transition, however, did not verify either Title VI or the more detailed recommendations from the national conference.<sup>19</sup>

<sup>19</sup> The recommendations of the national conference (directed by the transitional government) included: highly decentralized unitary state, mixed (semi-presidential) regime, reinstitution of the six former provinces of Madagascar (*faritany*), two presidential mandates, duration of mandate: five years, resignation of the president in office when he is a candidate, resignation: two months before the election, possibility for the president to appoint senators, duration of the mandate of senators: five years, duration of the mandates of deputies: five years, parliamentary immunity (actual report of the conference not available online).

In brief, mechanisms or institutions used in the past to either formally certify or informally verify new constitutional texts against guiding principles include: (a) apex courts; (b) special courts or commissions; (c) intergovernmental organizations or representatives; or (d) executive bodies. Notably, in those cases where there is an institution with a formal mandate to certify the draft constitution, the review of the draft takes place automatically. A more ambiguous mandate to uphold previously agreed rules, such as the 2008 Constitution of Kenya Review Act or the 2010 Madagascar Transitional Charter, is often linked to those institutions receiving petitions for a ruling or advice on the constitutionality of either the process or the substance of the draft. In turn, petitions can often be submitted by the executive or by a certain percentage of members of parliament—one fifth in the case of Angola (Interim Constitution, section III, article 154) and one third in the case of Madagascar (Transitional Charter 2010, section G, article 23)—or by any person ‘aggrieved’, as would have been the case according to the Constitution of Kenya Review Act 2008.

Chile’s 2023 failed constitution-making process is an exception in that negotiations between political parties resulted in the establishment of a 14-member special commission (7 women and 7 men), known as the Technical Admissibility Committee, mandated to decide on whether a provision would either contradict or omit one of the 12 guiding principles agreed at the start of the process. This committee, however, could only act on referral by at least 10 members of each of the two bodies responsible for the development of the constitutional text—the Constitutional Council and the Expert Commission (article 155, 1980 Constitution amended in 2023)—and it was not mandated to certify the constitutional draft after it had been adopted by the elected Constitutional Council. In the end, the committee was never utilized because it had equal representation of individuals linked to both right-wing and left-wing parties, so an agreement across party lines would have been needed for the committee to decide on any given issue. Right-wing political parties had enough representation on the council to adopt the draft constitution without having to bargain with left-wing party representatives. Even if left-wing representatives in the council could refer a case to the committee, it is unlikely that the right-wing and left-wing members of the committee would agree when the members of the council did not. The conclusion that may be derived is that guiding principles and certifying mechanisms or institutions only work as constraints if they are not dependent on the consent of the majority.

Guiding principles are more likely to be reflected in the final text: (a) when they have a certain level of detail that would make further negotiations unnecessary—the more detailed the principles, the easier it is to evaluate compliance of the constitutional text; and (b) when the agreement is binding and there is an accessible domestic compliance institution with a clear mandate. The mandate of South Africa’s Constitutional Court to certify the constitutional draft would stand in stark contrast with, for instance, Mali’s very soft, and internationally led, Independent Observer, Chile’s rather politicized Technical Admissibility Committee or the vague mandate of Nepal’s Supreme Court.

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**Guiding principles are more likely to be reflected in the final text: (a) when they have a certain level of detail and (b) when the agreement is binding and there is an accessible domestic compliance institution with a clear mandate.**



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**Sometimes it may be necessary to create a new institution specifically for the purpose of verifying compliance.**

Given that trust between parties is often low, and the trust of parties in existing institutions is also often low, if compliance or certification mechanisms are to be used, it is important that they are designed with these considerations in mind: (a) sometimes it may be necessary to create a new institution specifically for the purpose of verifying compliance, rather than granting this mandate to an existing institution that may lack legitimacy; (b) to mitigate the risks of controversy and politicization, the mandate of this institution and the legal consequences of its decisions must be clearly defined from the outset; (c) if the certification is not mandatory but is conducted on request, there should be clear standing rules to define who can initiate the verification process; and (d) opposition groups and those stakeholders who participated in the negotiations over the substantive principles should have the right to file a case.

In contrast to this, incorporating guiding principles into a political agreement—rather than a legally binding document—and not establishing a monitoring or certification procedure, may lower the stakes for the negotiating parties, making it potentially easier to agree on detailed principles but reducing the likelihood of effective implementation in the constitutional text.



## Chapter 6

# CONCLUSION

Negotiating guiding principles presents not only significant advantages but also some challenges. One of the primary advantages of negotiating guiding principles is the potential to build trust among stakeholders, particularly in post-conflict or conflict-affected settings. By agreeing on fundamental principles, sometimes parties can be assured that their core interests will be protected, which can foster a sense of security and commitment to the constitution-making process. In this way, guiding principles can also provide protection to minority groups that their rights and interests will be safeguarded, reducing the likelihood of their opposition to the process. Ideally, establishing guiding principles can offer a clear framework for the constitution-making body. This can streamline the drafting process by setting out elements that must be included, thereby reducing the scope for contentious debates and potential deadlocks later in the process. Beyond this, when the process of negotiating guiding principles is inclusive, principles can enhance the legitimacy of the constitution-making process. Broad-based agreement on these principles can signal to the public (and the international community) that the process is fair and balanced, increasing the likelihood of acceptance and support for the final constitution. In some contexts, guiding principles can serve as a tool for the international community to exert positive pressure on the regime or negotiating parties. This can help ensure that the process aligns with international norms and standards, potentially attracting international support and resources.

On the other hand, guiding principles may be imposed by a dominant group or external actors, rather than being genuinely negotiated. This can lead to perceptions of illegitimacy and may prompt boycotts or resistance from excluded groups. Furthermore, while guiding principles may provide a clear framework, they can also constrain the flexibility of the constitution-making body. This rigidity can be problematic if the principles are too detailed or if they fail to account for evolving political dynamics and new insights that emerge during the drafting process. Conversely, if the guiding principles are too vague, they may offer little practical guidance to the constitution-making

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**One of the primary advantages of negotiating guiding principles is the potential to build trust among stakeholders, particularly in post-conflict or conflict-affected settings.**

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**Without robust mechanisms for enforcement, there is a risk that the principles will be ignored or inadequately reflected in the final constitution.**

body. This can lead to varied interpretations and potential conflicts over their implementation, undermining the intended purpose of providing a clear direction. At the same time, ensuring that guiding principles are adhered to can be challenging. Without robust mechanisms for enforcement, there is a risk that the principles will be ignored or inadequately reflected in the final constitution. This can diminish trust in the process and lead to further disputes.

## Chapter 7

# KEY QUESTIONS

Often stakeholders involved in developing principles rush to get to an agreement. However, experience shows that giving more consideration to the way in which principles will be applied goes a long way in ensuring their implementation. A number of key questions can therefore be raised, including the following.

### **What advantages can guiding principles provide?**

Constitutional negotiations must start somewhere, and often the way the process unfolds and is structured is determined by context, including the positions and interests of the parties. However, in transitions from conflict to peace, guiding principles can serve to build a minimum level of trust among warring parties and also provide some guarantees for minority groups in terms of parameters for the ensuing constitutional negotiations and resulting text. Such principles can also be helpful to communicate to domestic and international constituencies the broad intentions of the responsible authorities, signposting key priorities, red lines and the overall direction of travel for the constitutional project.

On the other hand, principles developed in non-inclusive processes, particularly when those principles are very detailed, may perhaps unduly constrain constitution-making bodies and, subsequently, delegitimize the process and any resulting text.

### **How does the level of inclusion affect the formulation of guiding principles?**

Ideally, negotiations over guiding principles should, at a minimum, involve the main stakeholders, including key conflict parties for whom the constitution-making process is a significant element of the peace process, but also political forces and civil society organizations representing various segments of society. This would ensure that a wide range of opinions are considered or at least heard. At the same time, these negotiations are complex, and often including all relevant stakeholders will mean that guiding principles might be less detailed.

In cases where processes are controlled by one group, principles will often be devised and imposed by the same group. These principles may be a signal of intent in terms of where the constitution-making process will go. However, they may also be used to shroud intent and seek to gain short-term legitimacy for the constitution-making project. On the other hand, sometimes authorities—especially those that have not come to power through elections—may seek to broaden inclusion at an early stage, while still maintaining control over the process. In this regard, they may seek to establish national conferences or national dialogues where other groups can voice their opinions on the formation of guiding principles. While the dominant group will still control the final text of the constitution, such occasions may present opportunities for those other groups that are included to raise their interests and priorities at the level of guiding principles. In certain contexts, these openings can help galvanize public opinion and mobilize international support, as well as create some level of pressure on the regime to accommodate minority interests.

#### **What are the issues commonly covered in guiding principles?**

Guiding principles often cover a range of issues aimed at shaping the content of a new constitutional framework. These principles can reflect key aspects of the historical context in which the constitution-making process is taking place, as well as international norms and standards. They can often include more or less broad declarations related to the independence, territorial integrity and national unity of a country, as well as the defence of fundamental rights and freedoms, the protection of the rule of law and political pluralism. They may also include specific elements of the future political system or a new state structure. In some cases, one might also see detailed provisions related to specific issues that have been contentious in the past, such as exclusion and discrimination, transitional justice issues or the fight against corruption.

#### **What level of detail do guiding principles contain?**

The scope and level of detail of the principles are often influenced by factors beyond the control of any single actor. Detailed principles can serve to protect some fundamental interests of minority groups, as well as significantly constrain the constitution-making body, offering less margin for interpretation and greater assurances to negotiating parties that what they agreed upon will be reflected in the new constitutional text. However, agreeing on details is always difficult, especially after violent conflict, and even detailed principles can be subject to different interpretations.

Vague or abstract principles may be easier to agree upon and may serve to initiate dialogue and foster trust between warring parties. But higher levels of abstraction also provide less assurance to those parties that may be affected. At the same time, broad guiding principles can also drive radical constitutional shifts, as they may articulate necessary and significant changes to past constitutional frameworks, orienting the drafters in particular directions, such as a change from a one-party system to a multiparty democracy or, like in Nepal, from a centralized monarchy to a federal republic.

### **What elements contribute to the effective implementation of guiding principles?**

Several factors may have an impact on the adherence to guiding principles and their operationalization in the constitutional text. Some stakeholders try to incorporate these principles into a legally binding document but, as mentioned above, those principles will only impact the constitution-making process if they are sufficiently detailed and there is a mechanism or institution mandated to verify their implementation. For these types of institution to have a meaningful impact, though, their legitimacy is key. Sometimes this may mean that a new specialized institution needs to be established rather than granting this mandate to an existing institution. At the same time, to mitigate the risks of controversies and politicization, the mandate of this institution and the legal consequences of its decisions should be clearly defined from the outset. Additionally, if the certification is not mandatory but is conducted on request, there should be clear standing rules to define who can initiate the verification process, and opposition groups and those stakeholders who participated in negotiations over the substantive principles should have the right to file a case.

However, as mentioned above, incorporating guiding principles into a political agreement—rather than a legally binding document—and not establishing a monitoring or certification procedure, may lower the stakes for the negotiating parties, making it potentially easier to agree on detailed principles but reducing the likelihood of effective implementation in the constitutional text.

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# Annex A. Examples of guiding principles in comparison

## Where to find constitutions

The constitutional texts referred to in this publication, unless otherwise stated, are drawn from the website of the Constitute Project, <<https://www.constituteproject.org>>.

Table A.1. State structure and decentralization

| Country/<br>year     | Guiding principles  |
|----------------------|---|
| South Africa<br>1996 | <p>Guiding principles contained in the 1996 Interim Constitution included:</p> <ul style="list-style-type: none"> <li>• the establishment of three levels of government: the national, provincial and local level;</li> <li>• democratic representation at each level of government;</li> <li>• a list of powers to be granted to provinces, including the right to adopt provincial constitutions;</li> <li>• a list of criteria for the division and allocation of other powers between the different levels of government;</li> <li>• a commitment to provide lists of exclusive and concurrent powers for the national and provincial levels of government;</li> <li>• the possibility of delegation of powers between the national and provincial levels of government;</li> <li>• provincial boundaries;</li> <li>• special procedure for constitutional amendments that alter the powers, boundaries or institutions of the province, which should require the approval of a special majority of the legislatures of the provinces or alternatively, if there is such a chamber, a two-thirds majority of a chamber of parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces; and</li> <li>• establishment of a financial and fiscal commission.</li> </ul>   |
| Mali<br>2023         | <p>Guiding principles contained in the 2014 Agreement for Peace and Reconciliation in Mali resulting from the Algiers Peace Agreement process included:</p> <ul style="list-style-type: none"> <li>• a state structure based on decentralized entities, with organs elected by universal suffrage and with extended powers;</li> <li>• effective management by populations, particularly those of the northern regions, of their own affairs based on the principle of free administration;</li> <li>• a list of policy and fiscal responsibilities that would need to be devolved to the regions;</li> <li>• allocation of 30 per cent of resources raised by the central government to the regions, based on an equalization system focusing in particular on the northern regions;</li> <li>• transfer from the central government of a percentage of the revenues from exploitation of natural resources to decentralized entities;</li> <li>• establishment of a development zone in the northern regions funded by central government sources and international contributions;</li> <li>• establishment in each region of a regional assembly elected by direct universal suffrage to which a large number of competences, resources and appropriate judicial, administrative and financial powers shall be transferred;</li> <li>• election of the President of the Regional Assembly, who is also the Chief Executive of the Regional Administration, by direct universal suffrage;</li> <li>• election of deliberative organs for the cercles and communes (a <i>cercle</i> council and a communal council). These will be managed by offices with an executive function with a president of a <i>cercle</i> council and an elected mayor at their head;</li> <li>• appointment by the central government of a representative in the decentralized entities to safeguard the general interest;</li> <li>• greater representation of the populations of northern Mali in state institutions and the administration; and</li> <li>• the setting up of a second chamber in the national legislature.</li> </ul> <p>Guiding principles contained in the conclusions from the 2021 National Consultations on Reforming the State included:</p> <ul style="list-style-type: none"> <li>• maintenance of the unitary decentralized form of the state;</li> <li>• increasing the state's contribution to the financing of decentralized entities;</li> <li>• operationalization of the transfer of powers and financial and human resources from the central state to decentralized entities;</li> <li>• reorganization of the territory on the basis of population, economic, socio-cultural and geographic potential; and</li> <li>• establishment of a senate.</li> </ul> |

Table A.1. State structure and decentralization (cont.)

| Country/<br>year | Guiding principles  |
|------------------|---|
| Nepal<br>2015    | Guiding principles contained in the 2007 Interim Constitution included: <ul style="list-style-type: none"> <li>• restructuring of the state into a progressive democratic federal system.</li> </ul>  |
| Chad<br>2023     | Guiding principles contained in the recommendations of the 2022 Inclusive and Sovereign National Dialogue included: <ul style="list-style-type: none"> <li>• use of the 1996 Constitution as a basis for reflection and improvement of certain of its provisions; and</li> <li>• organization of a single referendum on the question of the form of the state and the revised 1996 Constitution.</li> </ul> |

Table A.2. Equality before the law, including access to justice and anti-discrimination

| Country/<br>year        | Guiding principle   |
|-------------------------|---|
| South<br>Africa<br>1996 | Guiding principles contained in the 1996 Interim Constitution included: <ul style="list-style-type: none"> <li>• 'The Constitution of South Africa [will have a] democratic system of government committed to achieving equality between men and women and people of all races.'</li> <li>• 'The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.'</li> <li>• 'The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.'</li> </ul> |
| Rwanda<br>1992          | Guiding principles contained in the 1992 Arusha Accords (Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Rule of Law) included: <ul style="list-style-type: none"> <li>• 'National unity entails the rejection of all exclusions and any form of discrimination based notably on ethnicity, region, sex and religion. It also entails that all citizens have equal opportunity of access to all the political, economic and other advantages, which access must be guaranteed by the State' (article 3); and</li> <li>• 'equality before the law' (article 6).</li> </ul>  |
| Fiji<br>2012            | Guiding principles contained in Decree No. 57 of 2012 included: <ul style="list-style-type: none"> <li>• 'a common and equal citizenry'; and</li> <li>• 'elimination of discrimination'.</li> </ul>   |

Table A.3. Separation of powers

| Country/ year        | Guiding principle  |
|----------------------|--|
| Angola<br>2010       | <p>Guiding principles contained in the 1992 Interim Constitution (article 159: Amendments to and approval of the Constitution of Angola) included compliance with:</p> <ul style="list-style-type: none"> <li>• ‘(d) Universal, direct, secret and periodic suffrage for the appointment of the elected office holders of sovereign bodies and local government’; and</li> <li>• ‘(f) The separation and interdependence of the courts.’</li> </ul>  |
| South Africa<br>1996 | <p>Guiding principles contained in the 1996 Interim Constitution included:</p> <ul style="list-style-type: none"> <li>• ‘There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.’</li> </ul>   |
| Burundi<br>2005      | <p>Guiding principles contained in 2000 Arusha Peace Accord (Protocol II: Democracy and Good Governance) included:</p> <ul style="list-style-type: none"> <li>• provision ensuring that the government shall function in respect of ‘the separation of powers, the rule of law, and the principles of good governance and transparency in the management of public affairs’; and</li> <li>• specific articles detailing the make-up of the bicameral legislature (article 6), the executive (article 7) and the judiciary (article 9).</li> </ul> <p>The accord sets up a presidential system of government in detail.</p> |

Table A.4. Constraints on executive power

| Country/ year      | Guiding principle   |
|--------------------|---|
| Burundi<br>2005    | <p>Guiding principles contained in the 2000 Arusha Peace Accord (Protocol II: Democracy and Good Governance, article 7: The Executive) included:</p> <ul style="list-style-type: none"> <li>• ‘3. She/he shall be elected for a term of five years, renewable only once. No one may serve more than two presidential terms.’</li> <li>• ‘4. In the exercise of her/his functions, the President of the Republic shall be assisted by two Vice-Presidents. They shall be appointed by the President of the Republic, who shall previously have submitted their candidacy for approval by the National Assembly and the Senate, voting separately, by a majority of their members. The President of the Republic may dismiss the Vice-Presidents. They shall belong to different ethnic groups and political parties.’</li> <li>• ‘8. The President of the Republic may be impeached for serious misconduct, impropriety or corruption by resolution of two-thirds of the members of the National Assembly and the Senate sitting together.’</li> </ul> |
| Madagascar<br>2010 | <p>Guiding principles contained in the 2009 Interim Constitution of Madagascar (Title VI on ‘the making of the new constitution’, article 35) included:</p> <ul style="list-style-type: none"> <li>• the president of the republic is elected by direct universal suffrage for a five-year term, renewable once; and</li> <li>• any revision of the Constitution affecting the organization or functioning of public authorities or the form of the state must be ratified by referendum.</li> </ul>  |
| Chad<br>2022       | <p>Guiding principles contained in the recommendations of the 2022 Inclusive and Sovereign National Dialogue included:</p> <ul style="list-style-type: none"> <li>• a five-year term limit for the president of the republic, renewable only once; and</li> <li>• a more explicit provision that states the prohibition of the use of the justice system by the executive ‘to settle political scores’.</li> </ul>  |

Table A.5. Independence of the judiciary

| Country/<br>year        | Guiding principle   |
|-------------------------|---|
| Angola<br>2010          | Guiding principles contained in the 1992 Interim Constitution (article 159: Amendments to and approval of the Constitution of Angola) included compliance with: <ul style="list-style-type: none"> <li>• '(f) The separation and interdependence of the courts.'</li> </ul>   |
| Burundi<br>2005         | Guiding principles contained in 2000 Arusha Peace Accord (Protocol II: Democracy and Good Governance, article 9: The Judiciary) included: <ul style="list-style-type: none"> <li>• '2. The Judiciary shall be impartial and independent and shall be governed solely by the Constitution and the law. No person may interfere with the Judiciary in the performance of its judicial functions.'</li> <li>• '9. The President of the Court of Appeal, the presidents of the High Courts, the public prosecutors and the state counsels shall be appointed by the President of the Republic following nomination by the Judicial Service Commission and confirmation by the Senate.'</li> </ul> |
| South<br>Africa<br>1996 | Guiding principles contained in the 1996 Interim Constitution (article VII) included: <ul style="list-style-type: none"> <li>• 'The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.'</li> </ul>   |

## About the authors

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The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with 35 Member States founded in 1995, with a mandate to support sustainable democracy worldwide.

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Constitution making during transitions often involves a delicate balance between political deals and entrenched interests. This policy paper looks at the important role of guiding principles—key agreements that help shape the content of new constitutions. Using examples like South Africa's post-apartheid process, it shows how these principles can build trust, reassure minority groups and encourage open dialogue.

At the same time, the paper examines the challenges of making such principles stick and the risks that come with top-down approaches, such as boycotts or a loss of legitimacy. By exploring different ways of developing these principles—from national talks to executive decisions—it offers practical insights into how to design frameworks that are inclusive and flexible enough to adapt to shifting political contexts.

Aimed at policymakers, negotiators and others involved in constitutional reform, this paper highlights how guiding principles can connect opposing sides while ensuring meaningful constraints on constitution-making bodies.