

## Constitution Making: The Role of External Actors

Muna B. Ndulo

*Cornell University Law School*, [mbn5@cornell.edu](mailto:mbn5@cornell.edu)

Follow this and additional works at: <https://scholarship.law.cornell.edu/sajpd>

 Part of the [African Studies Commons](#), and the [Constitutional Law Commons](#)

---

### Recommended Citation

Ndulo, Muna B. (2014) "Constitution Making: The Role of External Actors," *Southern African Journal of Policy and Development*: Vol. 1 : No. 1 , Article 4.

Available at: <https://scholarship.law.cornell.edu/sajpd/vol1/iss1/4>

This Article is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Southern African Journal of Policy and Development by an authorized editor of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## **Constitution Making: The Role of External Actors**

*Muna Ndulo*

*(Cornell University)*

---

*In the past three decades new constitutions have been developed in many parts of the world, often in the aftermath of conflicts, but also in response to demands for more democratic political systems or for the resolution of institutional crises. In these processes, the international community often plays an important role. This article considers the role that external actors play in the elaboration and development of new constitutions in post-conflict societies. It identifies both the negative and the positive roles external intervention can play and suggests approaches that could be adopted by external actors to maximize their impact while avoiding the pitfalls of external intervention.*

---

### **1. Introduction**

There is a general recognition, reinforced by the UN Millennium Development Goals, that governance is central to all issues relating to security and development. One of the greatest challenges in post-conflict states is establishing a constitutional order and democratic governance. Post-conflict constitution building is about re-building the political community as well as state structures destroyed by conflict. Because constitution making follows the conclusion of a peace agreement, or may even be among the settlement terms of a peace agreement, it is intimately linked to the dynamics of negotiations designed to convince parties to lay down their arms. Often the very process of resolving a conflict is tied to basic understandings of how the state will be restructured and governed. The basic components of a democratic constitutional order include: (a) the establishment of the constitution as the fundamental law regulating and limiting governmental authority; (b) the establishment of procedures for regular elections that are free and fair; (c) explicit legal safeguards for fundamental rights; (e) dispute resolution through constitutionally valid political processes and an independent judiciary; (f) general enforcement of the rule of law, including respect for contracts (Ndulo, 1998-99). An important legal instrument in the establishment of constitutional order and good governance is the national constitution. As Madhuku observed: "a constitution is a political animal; it embraces the key aspirations of people in the area of governance and mapping the relationship between the individual person and the state." Constitution making in any country, let alone a post-conflict one, is a major exercise. It presents a myriad of challenges in terms of expertise, resources and logistical support required for the

process. Invariably in the drafting of post-conflict constitutions external actors play an important role. They can illuminate the constitution making process with lessons from elsewhere, and empower local actors by providing independent and non-partisan support for internationally recognized constitutional principles, such as the separation of powers and the independence of the judiciary (Hatchard, Ndulo & Slinn, 2004). However, external actors can also play a negative role and be guilty of imposing their preferred constitutional models. This article looks at the role of external actors in this process.

## **2. Constitution Making and the International Community**

Constitution making is a major bedrock in rule of law projects. There is widespread international support for democratization processes (UN, 1996; World Bank, 1992). At the level of the United Nations, the UN General Assembly has on several occasions, at the request of member states, requested the Secretary-General to submit reports on the ways in which the UN system could support democratization processes (IDEA, 2012). The United Nations has played a key role in constitution making processes in several post-conflict societies, such as East Timor, Sierra Leone (Ndulo, 2003), Afghanistan (Ndulo, 2003) and Namibia (NDI, 1990). The critical link between democratic governance and development was highlighted at the Millennium Summit, where the world leaders resolved to: "spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms including the right to development" (Millennium Summit, 1995). This resolve includes developing ways and means to contribute to the shaping of a policy framework for democracy assistance at the inter-governmental level and support for the conduct of free and fair elections and constitution making processes (UN, 1992). The desire of governments to promote democratization and to discourage authoritarian rule is explicitly expressed at the regional level as well (AU Constitutive Act; Abrahamsen, 2002). Among regional organizations, the Organization of American States (OAS) officially proclaims that representative democracy is a purpose, a principle and a condition of membership (OAS, 1967). The African Union Constitutive Act firmly enshrines support for democratic governance in articles 3 and 4 (AU, 2000). The Constitutive Act in article 3 lists among its objectives the following: (a) the promotion of democratic principles and institutions, popular participation and good governance; (b) promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments; (c) promotion of good governance through the institutionalization of transparency, accountability, and participatory democracy; (d) promotion of gender equality; (e) respect for democratic principles, human rights, the rule of law and good governance (AU, 2000).

In recent years, the level of involvement of external actors in constitution making has varied considerably, from significant external intervention to administrative support and advice (Miller, 2010). Although it is important that the constitution making process should essentially be a local product and should be driven by local stakeholders, in some situations there is no alternative to major international involvement. Where state institutions have collapsed, there may be no way to bring key actors together in a legislative or constituent assembly without the international community or third parties playing a major role in arranging the logistics and providing funding for

the constitutional process (Hatchard, Ndulo & Slinn, 2004). Through its participation, the international community can encourage the compliance of national constitutions with international human rights norms and standards (UN, 2009), ensure that the international standards are better articulated, provide requisite expertise and resources for a successful constitution making process, help build capacity, knowledge, networks and share best practices with the local people engaged in the constitution making process. As Rana observes with respect to Africa: “while the continent has long been a site for social, scientific, and institutional experimentation, among the most vibrant forms of current knowledge-sharing is the burgeoning domain of constitutional law. Especially since the 1996 adoption of South Africa’s post-apartheid constitution, a new generation of African lawyers and judges have emerged, who have played a central role in spreading legal expertise and in advising new governmental arrangements throughout Africa” (Rana, 2010). Constitution making requires a wide range of expertise to deal with the diverse issues that a constitution addresses. Some substantive issues present special challenges for negotiators and without expert handling by experienced constitution designers these challenges can derail a constitution making process or limit the durability of the texts developed. Among the most frequent points of difficulty are: (a) distribution of power between the legislature and the executive; (b) federalism and decentralization; (c) derogations from rights; (d) gender equality; (e) property rights; (f) status of religion and customary law; (g) abortion; (h) gay rights.

The *United Nations Guidelines on Constitution Making* identify five principles which guide the United Nation’s participation in constitution making processes. These include: (a) seizing the opportunity for peace building; (b) encouraging compliance with international norms and standards; (c) ensuring national ownership; (d) supporting inclusivity, participation and transparency; (e) mobilizing and coordinating a wide range of expertise; (f) promoting adequate follow-up (UN, 2009). The UN policy note also emphasizes that any United Nations assistance will need to stem from national and transitional authorities’ requests (UN, 2009). Accordingly, international actors should engage national actors in a dialogue over substantive issues, explain the country’s obligations under international law and the ways in which they could be met in the constitution. These obligations include the rights that have been established under international law for groups that may be subjected to marginalization and discrimination in the country, including women, children, minorities, indigenous peoples, refugees, stateless and displaced persons. An example worth emphasizing is the principle of equality between men and women which should be embedded in every constitution.

It has to be acknowledged, however, that major foreign involvement can cause problems for legitimacy down the road. Iraq provides an example of a country where overbearing foreign direction of transitional arrangements and constitution making processes significantly hurt prospects for success and legitimacy. An example of positive external involvement is Namibia, which gave a relatively prominent role to foreign actors in its constitution making process. In Namibia the constituent assembly handed the working draft to a panel of three South African legal experts to prepare and refine the final version. However this use of foreign expertise was freely chosen, broadly accepted and in fact favored by most Namibians. Namibians shared a legal tradition with South Africa and therefore while the experts were technically outsiders, they were viewed with much less suspicion than experts from other continents. In other situations positive external involvement can come in the form of administrative and financial support of a domestically

controlled process. An example of this would be the Kenyan 2010 constitution which received support from a variety of organizations.

In addition to legitimacy concerns, several difficulties can arise in connection with the involvement of external actors, if the relationship is not structured correctly. Foreign experts can be very useful, but they might lack knowledge of local issues and conditions and they frequently appear as lobbyists for objectives and models promulgated by their home countries. Furthermore, foreign experts usually go in and out of a subject country quickly and have no sustained communication with local actors. Although the problem may lie partly with the experts themselves, it is too often the case that the organizations that engage experts to give assistance have not carefully thought about the role they want outsiders to play in the process. Often these organizations may represent donor countries, who want to fund their own experts and impact on the process. In some settings the advisers are highly politicized. Much money is wasted in this way, on trying to promote individual objectives. Further, the influx of free foreign experts and the need to brief them on the process at hand drains the time available for more important matters. Also, where there has been strong international community intervention key decisions, important in developing a new constitution, may have been taken outside the country rather than being shaped by the people the constitution is meant to govern. Similarly problematic, external assistance in the form of continued aid may depend on adhering to a pre-determined schedule, respecting terms during the negotiation process or incorporating foreign terms.

For better and more effective engagement, the international community should remain mindful that its role is to *support* the process and as such, it should refrain from being prescriptive. Such an approach avoids the danger of imposing a foreign model and institutions without regard to the local conditions. If there is to be genuine ownership of the constitution, the constitution making process must be geared to the social, political and economic conditions of the people the constitution is intended to serve. It must be remembered that the overriding goal of democracy is: “popular political self-government the people of the country deciding for themselves the contents of the laws that organize and regulate their political association” (Michelman, 1999).

It is important to guard against the uncritical adoption of foreign models. Constitutions must always be context driven. The warning by Nwabueze is apt when he notes that: “the spirit of the laws and institutions of the state, unlike the laws and institutions themselves, is not an exportable commodity; it cannot be packaged and transported” (Nwabueze, 2009). Human laws and institutions never function as well in the importing country as they do in their country of origin, unless the spirit conditioning or governing them there is also imbibed and assimilated. The process of constitution making should therefore be in the hands of those who know the local conditions, the history, the local dynamics and in the end will live with the product.

In this regard foreign experts should participate in the constitution making process as partners with local experts. The value of the expert’s comparative experience is widely acknowledged (Chidyausiku, 1999). Access to comparative experience is particularly useful during a constitution making process as it provides a wide range of information on possible options and lessons on what to do and what not to do. However, the international community has to be mindful that in some situations foreign experts are brought in by a government bent on controlling the process in an effort to provide legitimacy to a flawed process. Where this is the intention, international experts should refrain from participating and should guard against being used for

legitimation purposes. External actors and the international community play an additional role in mobilizing resources for the constitution making process. They often provide money to fund the experts and also a significant part of the budget of the constitution making process. It must, however, be emphasized that local expertise is important for developing a sense of ownership, fostering a culture of service in local institutions and propagating knowledge in the community. Building capacity in a society is an important aspect of constitution building. The influence of external actors is less likely to be resented when it focuses on the *process* rather than on the results; in other words, ensuring that the process is inclusive rather than advocating a particular result.

### **3. Constitution Making Processes**

Developing an effective procedure to prevent the manipulation of the constitution making process by those in power is a considerable challenge (Ndulo, 2010). It is one that would be helped by the articulation of principles and mechanisms that are to govern the process. The articulation of principles would enhance the quality of the process of constitution making and increase the possibility of success. An important way of guaranteeing responsiveness is to ensure that a legal framework is put in place, which insulates the process from manipulation from the government of the day and creates an appropriate institutional framework to facilitate the participation of people in the process. The 2010 Kenyan process succeeded precisely because there was a legal framework that insulated the process from government interference and ensured full participation of the people. The lack of such a legal framework has completely undermined the 2013 Zambian Constitution making process and threatens to derail it. The conditions under which a constitution making process is initiated are important. Before any society launches into a constitution making process, it is highly advisable that the society debates and comes to some sort of understanding as to what kind of society it wants to create. A constitution must be an exercise in building national consensus on the values and provisions to be included in the constitution. Clarity in the type of society to be created enables the process to look at the conditions in the country and the type of institutions and legislation required to transform the society in order to bring about the envisioned society.

A constitution making body must be fully representative of all stakeholders, must take into account the concerns of the widest possible segment of the population, be transparent in its work and make meaningful, effective and properly structured participation by all stakeholders in the country possible. These factors are important to maintain integrity in the process. In addition, participation of the people in the process provides good civic education for the population. Citizens begin not just to understand the process, but, in addition, they begin to appreciate its importance to their lives and communities and they begin to understand the values that the constitution seeks to protect and promote. Furthermore, the draft constitution to be developed by a constitution making body must not be subject to unilateral executive interference. It must be guided by reasonable timeframes. While time does not always guarantee quality, there is no doubt that a truly participatory and consultative process requires sufficient time to give it meaning and to bring alienated interests and communities into the process. A rushed process often leaves many issues

unresolved and leads to quick compromises that do not stand the test of time. Moreover, rushed processes often tend to compromise opportunities to engage in mass education as a way to build ownership around the final constitution.

After the elaboration and development of a draft constitution, the next important issue is how to adopt the constitution. The supreme law of the land should not be adopted using procedures that apply to ordinary legislation. Two common methods of adopting constitutions are: adoption through a two-thirds majority in a parliament and adoption through a national referendum (Hatchard, Ndulo & Slinn, 2004). With respect to parliament adopting the constitution, the important issue is not so much whether parliament has the power to adopt and enact a constitution. Rather, it is how to ensure that the sovereign will of the people, on which the edifice of democracy rests, is expressed in producing a legitimate, credible and enduring constitution. If anything, the process of consulting the people strengthens parliament, as it implies an unequivocal acceptance of the fact that parliament's powers are delegated to it by the people. The relationship between parliament and the people can endure only if this fact is recognized.

The adoption of a constitution through a referendum is one of the most transparent ways of furthering the culture of consultation. Popular democracy demands the institutionalization of a culture of consultation, reciprocal control in law making and the use of power and privilege. This should be entrenched in a constitution as a mechanism for obtaining the mandate of the people on constitutional matters and as a deterrent to amendments. The two-thirds majority requirement is often within reach of the largest party in parliament, making it little different in practice from the simple majority required for ordinary law making. To safeguard democracy, much more should be required to effect a constitutional amendment than the will of the majority party in parliament. Approving a constitution through a national referendum encourages the full participation of the people who can give it their formal "seal of approval". The process can generate wide publicity, engender full public debate and education of the people on the substantive issues covered by the constitution. It increases the chances of the document receiving the sort of critical and objective consideration it deserves. Further, a referendum can counterbalance a presidential or government inspired document being approved by a compliant parliament. Referenda inevitably have their own drawbacks. In particular, the actual wording of the questions may greatly influence the result. Moreover, they are expensive and time-consuming and can be too formal and static. There is also the problem that if a constitution is rejected at a referendum there is often no option than to start the process all over again.

#### **4. Conclusion**

A stable political order can only be achieved by establishing a constitutional order that is legitimate, credible, enduring and which is structurally accessible to the people without compromising the integrity and effectiveness of the process of governance. The stark lessons learned from the various constitutional processes that have taken place in post-conflict states, is that the process of adopting the constitution is as important as its substance and that the process must be legitimate for it to be acceptable to all stakeholders. In order for the process to be legitimate, it must be inclusive. No party, including the government, should control it. A constitution should be the product of the

integration of ideas from all stakeholders in a country, including political parties both within and outside parliament, organized civil society and individuals in society. The international community can play an important role by ensuring that the process adopted by countries engaged in constitution making are inclusive processes. This would be an appropriate context to leverage their financial support to achieve this objective.

## References

Abrahamsen, R. 2002. *Disciplining Democracy: Development Discourse and Good Governance in Africa*. London: Zed Books.

"African Union Constitutive Act", Adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government, Lome, Togo. 11 July 2000.

"Charter of the Organization of American States", Signed 27 February 1967.

Chidyausiku, G. 17 November 1999. "Welcome Remarks", International Democratic Constitution.

Hatchard, John; Muna Ndulo; and Peter Slinn. 2004. *Comparative Constitutionalism and Good Governance: An Eastern and Southern African Perspective*. Cambridge: Cambridge University Press. p. 33.

IDEA. "Overview of Current Situations: Democracy and Global Co-Operation at the United Nations", <http://www.idea.int/publications/democracy>. Supporte by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies, U.N. Doc A/51/512 (196).

Madhuku, Lovemore. 1999. "The Constitution-Making Process in Zimbabwe: The Way Forward", *Legal Forum*.

Michelman, Frank. 1999. *Brennan and Democracy*. Princeton: Princeton University Press.

"Millennium Summit". 1995.

"National Democratic Institute for International Affairs", National Building: The U.N. and Namibia. 1990.

Ndulo, Muna. March 2000. "The East Timor Crisis and International Intervention." *Cornell Law Forum* Vol. 26, No. 3.

Ndulo, Muna. Fall/Winter 2003. "Afghanistan Prospects for Peace and Democratic Governance and the War on Terrorism." *Cornell Law Forum*.

Ndulo, Muna. 2006. *Democratic Reform in Africa: Its Impact on Governance & Poverty Alleviation*. Oxford and Athens: James Currey & Ohio University Press.

Ndulo, Muna. 2010. "Zimbabwe's Unfulfilled Struggle for a Legitimate Constitutional Order." In *Framing the State in Times of Transition: Case Studies in Constitution Making*, ed. Laurel Miller. Washington DC.

Nwabueze, B.O. 10 December 2009. "Strengthening the Foundations & Institutions of Democracy in Africa", Lecture Delivered under the Auspices of the Goddy Jidenma Foundation, Lagos, p.22 (on file).

Rana, Aziz. 2010. "African Constitutionalism and the Limits of Liberal Politics", unpublished.

"Report of the Secretary-General to the General Assembly" at its 46<sup>th</sup> Session (A/46/609/corr/.1 and Add. 1-2).

United Nations Center for Human Rights and Elections. 1992. "A Handbook on the Legal, Technical and Human Rights Aspects of Elections". New York.

"Support by the United Nations System of the Efforts of Government to Promote and Consolidate New or Restored Democracies", U.N. Doc. A/51/512, 1996; World Bank, "Governance and Development", 1992; Economic Commission for Africa (ECA) "Governance Report", 2004.

"The UN Guidelines on Constitution Making". April 2009. United Nations, Guide Note of the Secretary General, United Nations Assistance to Constitution Making Process.