



‘External Assistance to Constitution Building and Culture: The case of Afghanistan’

Shamshad Pasarlay

This was a wonderful workshop, which touched on one of the key aspects of constitution-building – that is, the interaction between culture and constitutional processes. It has to be noted, however, that the conception of culture carries different, and often competing, meanings in divided societies like Afghanistan. In these societies, what is one’s culture (as defined for this purpose of this workshop) might not be the others’ culture. This might create serious problems during times of constitution making and unmaking. In this respect, a key question is *how should we design constitution-building processes in a way that resolves these competing conceptions of culture?*

The experience of Afghanistan suggests that competing visions of culture in divided societies might be mitigated by designing constitution-building processes in way that ensures all conceptions of culture are recognised. Constitutional deferral and incremental constitution-building are useful tools in achieving this goal.

[What role did external actors play in constitutional building processes in Afghanistan?](#)

Constitution building processes are primarily considered a national political enterprise, but in recent years they are increasingly internationalised. In countries that emerge from conflict, constitution-building processes tend to be influenced by various international and foreign factors. The United Nations, other multilateral institutions and foreign governments have involved themselves in domestic constitution building processes in different and increasingly complex ways. The role of external actors in national constitution building processes has expanded even more over the past years, involving issues of process and substance.

Afghanistan has a rich, but a considerably unstable, constitutional history. The country has had 14 different constitutions over the past 95 years. External actors (foreign advisers and external assistance providers) were involved in most constitutional processes (albeit playing different roles in different constitution building episodes). For instance, in drafting Afghanistan’s first written constitution, King Amanullah Khan (1919-1929) sought the advice of French and Turkish advisers. Similarly, Afghanistan’s most celebrated 1964 Constitution was drafted with advice from French constitutional experts.

External actors became much more involved during the drafting of the current 2004 Constitution. They played a determining role in setting up the timelines and the procedures through which the negotiation, actual drafting and implementation of the Constitution would take place. Similarly, they

dictated the substance by setting ‘hard lines’ on many key constitutional issues.¹ They even had a say on who would prepare the first draft of the Constitution as the United Nations Assistance Mission in Afghanistan (UNAMA) presented a list of potential drafters to the President Hamid Karzai to form the Constitution Drafting Committee. Karzai in fact chose nine individuals from the UNAMA list to prepare the first draft of the current constitution. There is no space in this response to elaborate in more details the role that external actors played, but it should be noted that they shaped almost each stage of the drafting process and certain outcomes from the initial framework to the final approval of the 2004 Constitution.

How important was it for external actors to understand local societal and constitutional culture as it impacts on the process and substance of constitution building?

Although constitution-building processes have recently become globalised and subject to external influence, there is no doubt that the process and substance of constitutions are still viewed as sovereign national properties. To be successful, constitutions must get off the ground through a national drafting process and the substance must reflect the values that the people hold dear. Any constitution which is separated from local societal culture and values will likely be, what Adrian Vermeule calls ‘self-defeating’.² Furthermore, as Mark Tushnet notes, the key questions that determine the substance of constitutions are the local ‘political’ considerations not some international best practices.³ Importantly, in countries like Afghanistan where local culture and national values are embedded in the people’s life, this becomes significant. In these contexts, any successful foreign assistance and advice must be well suited to local societal and constitutional cultures. Otherwise constitutions are likely to fail.

Most of the external actors (specifically foreign advisers) involved in the drafting of the 2004 Constitution did understand that culture is important to Afghans and that it has always impacted constitutional processes and outcomes. This helped them play a much more constructive role. It also assisted them to work as a bridge between those external actors (assistance providers), who had hard lines on controversial constitutional issues such as the role of religion, and local actors. On many occasions, they helped build compromises and avoid deadlocks. For instance, most of the external actors, including the United States, American church groups and the United Nations, initially attempted to marginalise the role of Islam and Sharia in favor of liberal rights and freedoms.⁴ However, understanding that Islam and Sharia are entrenched parts of Afghan constitutional culture, foreign advisers such as Yash Ghai and Barnett Rubin, who were directly involved in the drafting process,

¹ For example, the United Nations, the United States and other transnational entities were impinging on constitution-making process, forcing policy preferences on hot-button issues like the role of religion, the structure of the political system, the structure of judicial review and women’s rights questions.

² Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers* (2006) 75 Fordham Law Review 631.

³ Mark Tushnet, *Some Skepticism About Normative Constitutional Advice* (2008) 49 William and Mary Law Review 1473.

⁴ Noah Feldman, *Imposed Constitutionalism* (2005) 37 Connecticut Law Review 857. When the first draft of the 2004 Constitution was prepared, articles 1, 2, and 3 contained provisions that revealed the dominant role of Islam in the Afghan legal and political culture. Feldman states that the formulation of the constitutional text in these articles did not please external actors and accordingly, they began to exert pressure on the process to keep Islam ‘at bay’. Foreigners delayed the proceedings and did not reveal the draft prepared by the drafting committee to the public. Feldman reports that ‘Neoconservatives in the United States were extremely concerned about the dominant role of Islam in the Constitution of Afghanistan’.

apparently convinced external assistance providers to stand aside and leave Afghans to make choices on these sensitive constitutional questions.

Similarly, understanding Afghan culture helped foreign advisers to assist the drafters of the 2004 Constitution to make realistic and informed decisions. For instance, most of the drafters wanted to guarantee the rights of women unconditionally and protect the rights and freedoms of religious minorities. Foreign experts, however, advised that these issues are too sensitive in Afghanistan and that the post-Taliban Afghan society was not ready to implement these rights. They feared that if the Constitution made any such promises, it would force conservative elements of Afghan society to demonstrate their disobedience and reject the process and the resulting document altogether as they had done previously. Instead, they advised that the 2004 Constitution should protect women's rights and the rights of religious minorities incrementally – a choice that turned out to be the most realistic thing to do.

Did an understanding of the limits of external actors' understandings of culture affect the role that external actors play?

Culture is an embedded part of the Afghan constitutional tradition. It has played a key role in both constitution-making processes and in the substance of constitutions. For instance, all Afghan constitutions have been adopted by a Loya Jirga, which in Afghan political culture functions as a constituent assembly. Afghan constitutions that deemphasised the role of culture did not last long. Understanding this matter was important not only to external actors but also to those Afghans who were empowered by external actors to satisfy specific objectives. Afghanistan's history drafting the 2004 Constitution provides evidence that lack of knowledge about local culture does affect the role of external actors. In a perfect world, external actors might have wanted to be more directly involved in negotiations on key constitutional issues (eg the role of Islam and judicial review), but a limited understanding of the local Afghan societal and constitutional culture forced external actors to stand aside on sensitive constitutional questions and leave Afghans the choice to decide the outcome.

As in any constitutional processes, external actors came with their own 'international toolboxes'. These toolboxes are often prepared in accordance with 'international best practices', which do not take a country's specific constitutional needs into account. Lack of knowledge about local constitutional culture, which in most cases including Afghanistan might contradict international best practices, does appear to affect the role of external actors. If external actors have limited understanding of local societal and constitutional cultures, they might choose to exert influence on almost all aspects of a constitution. This carries the danger of producing constitutions that are separated from the local order and are unlikely to succeed. This fear in Afghanistan apparently set the limits of the role of external actors. It was in fact for this reason that the original constitution-building platform that the international community finalised in Bonn, Germany, was contested and re-negotiated in favor of a process that did allow local actors room during the drafting process.

What methods or techniques have been used, or might be used, to assist external actors to understand local culture?

The experience of Afghanistan and many other countries reveals that understanding local societal and constitutional culture is important for anyone involved in constitution making projects. The following techniques might be helpful in assisting external actors to understand local culture.

1. *Pick foreign advisers who understand the culture of the country advised:* Ideally, external actors do not simply provide expert advice or logistical support to constitution-building processes, but they also serve as mentors to local counterparts to enable them do the job. This requires external actors to have skills in transferring knowledge and a good understanding of the local context (history and culture). In Afghanistan, most foreign advisers were recruited by the government in close negotiation with the constitution-drafting committees. The Afghan government sought those foreign advisers who were familiar with Afghan culture (they were either scholars of Afghan political history or had provided advice on constitution building in Afghanistan previously). My previous research has revealed that the drafters of the constitution were much more 'comfortable' working with the advisers (like Guy Carcassonne and Barnett Rubin) who understood Afghan culture.⁵
2. *Familiarise external actors with local culture:* If the first choice to help external actors understand local culture is recruiting country experts, the second option might be familiarising external actors with local culture. This should not just be reading books and papers to research the historical, political and cultural contexts in which they are working. They should also seek assistance from the national staff they work with in an effort to better understand local context and how it may best be taken into account to improve the effectiveness of their work. Foreign advisers were provided with a number of workshops in an effort to help them understand Afghan constitutional culture. This can be emulated elsewhere too.
3. *Take local constitutional culture as starting point:* Experience has shown that external actors often tend to advertise their own constitutional solutions without taking local culture as starting point. Taking local culture as starting point might force external actors to make sense of the local culture first before prescribing their own constitutional solutions – solutions that are inspired by the experiences of Western liberal democracies. Discussion and exchange of views with local actors might be a useful technique to help external actors understand local culture.
4. *Organise external assistance on a case by case basis:* Another option in this respect will be organising external assistance on a case by case basis and avoiding a one procedure fits all situation. This will help incentivise external actors to familiarise themselves with the culture of the society for which they are about to provide assistance.
5. *Determine the nature of assistance required:* One of the other key methods that might be used to assist external actors is determining the nature of foreign assistance. In most contemporary cases of external assistance, neither external actors nor domestic players have a clear picture of the type of assistance sought. What we commonly see is claims that external actors provide 'technical' support, however we do not have an explicit definition of the so-called technical support. It often looks more like a mixture of technical, procedural and substantive support for constitution building. It will surely help if both external and national actors understand the type of support provided. It will further assist foreign actors to know their role.

⁵ Shamshad Pasarlay, *Making the 2004 Constitution of Afghanistan: A History and Analysis Through the Lens of Coordination and Deferral Theory* (PhD thesis, University of Washington, 2016).

To what extent do international guidelines and standards that have been developed for external assistance to constitution building projects and related activities by the United Nations and other actors leave sufficient room for culture to be taken appropriately into account?

International guidelines for external assistance to constitution-building processes do provide information, though considerably little, on engaging with local players. However, it appears that these guidelines do not take local 'culture', as this Forum defines it, seriously. Most of the international guidelines for assistance to constitution building are deeply rooted in international norms and the practices of Western democracies. As such, they tend to pay insufficient attention to national culture of countries (including those that emerge from years of conflict and political turmoil) for which external assistance is provided. Having said that though, it seems that there is room in these guidelines for culture to be taken into account. Recent academic and policy scholarship on external assistance to constitutional-building processes has pressed for the need to take local culture into account. In many cases, international assistance has overrun its channels, leading to dangerous situations, because it failed to negotiate local constitutional culture. This has forced a reconsideration of international guidelines for constitution building. In short, there is definitely room in international guidelines for external assistance to constitution building for culture to be taken into account. How appropriately? This is a question that needs to be explored. We need to do some work in this respect. The Melbourne Forum is a wonderful initiative and a fine venue to explore this question.

Shamshad Pasarlay

Shamshad Pasarlay is lecturer at Herat University School of Law and Political Sciences in Afghanistan. He holds a bachelor's degree from Kabul University School of Islamic Law and an LLM and PhD from the University of Washington School of Law (2011–2016). His research interests involve comparative constitutional law and Afghanistan's constitutional history. His scholarship on judicial politics, religion and constitution-making, constitutional reform and constitutional interpretation in Afghanistan has appeared in numerous journals, including the International Journal of Constitutional Law, Asian Journal of Comparative Law, Washington International Law Journal and Michigan State Law Review. His current research focuses on the role of Islam and Sharia in Afghanistan's Islamist draft constitutions of 1993.