



Inclusion of combatants: Afghanistan as a case study

Shamshad Pasarlay

Over the past three to four decades, constitution building has become a common exercise in many countries that experienced conflict or political upheaval. Societies transitioning from civil war or authoritarianism drafted new constitutions, or reformed existing ones, as important tools for the settlement of conflict. In fact, one scholar has remarked that the 'late twentieth century has been an era of constitution-making'.¹ As a large number of transitioning countries adopted new constitutions, a significant body of comparative constitutional scholarship emerged that emphasised the politics, techniques and procedures of constitution-building processes.² Most of the scholarship focused particularly on the importance and value of open, deliberative and participatory constitution-building processes. Participatory constitution building defines a set of clear and all-encompassing drafting procedures to make sure that a new constitution, often resulting from the resolution of conflict, is accepted by a broad cross-section of a polity.³ Other works postulated that deliberative and participatory processes enhance the legitimacy of constitutions and produce rights friendly constitutions.

When it comes to participation in constitution-building processes, a key challenge has always been identifying the actors who need to be involved in the process. Equally important is recognising actors who should not be excluded from the process. As complex as the idea of 'the people' is, most of the existing comparative studies have recognised 'the people' to be involved in preferably all stages of constitution-building processes.⁴ Other studies recognise the need for elite agreement and the inclusion of all politically significant players — actors with guns (or other resources) who have the

¹ Vivien Hart, 'Constitution-Making and the Transformation of Conflict' (2001) 26 *Peace and Change* 153, 153.

² See eeg, Jon Elster, 'Forces and Mechanisms in Constitution-Making Process' (1995) 45 *Duke Law Journal* 396; Sujit Choudhry and Tom Ginsburg (eds), *Constitution Making* (Edward Elgar 2016); Andrew Arato, *Constitution Making under Occupation: The Politics of Imposed Revolution in Iraq* (Columbia University Press, 2009); Andrew Arato, *Post-Sovereign Constitution-making: Learning and Legitimacy* (Oxford University Press, 2016); Tom Ginsburg, Zachary Elkins and Justin Blount, 'Does the Process of Constitution-Making Matter?' (2009) 5 *Annual Review of Law and Social Science* 201; Louis Aucoin and Laurel E Miller (eds) *Framing the State in Times of Transition: Case Studies in Constitution-Making* (United States Institute of Peace Press, 2010); David Landau, 'Constitution-Making Gone Wrong' (2013) 64 *Alabama Law Review* 923; William Partlett, 'The Dangers of Popular Constitution-Making' (2013) 38 *Brooklyn Journal of International Law* 192; Asli Bali and Hanna Lerner, 'Constitutional Design without Constitutional Moment: Lessons from Religiously Divided Societies' (2016) 49 *Cornell International Law Journal* 227; Barnett Rubin, 'Crafting a Constitution in Afghanistan' (2004) 15 *Journal of Democracy* 5; Jamal Benomar, 'Constitution-Making after Conflict' (2004) 15 *Journal of Democracy* 81.

³ Hart, above n 1; Angela M Banks, 'Expanding Participation in Constitution-Making: Challenges and Opportunities' (2008) 49 *William and Mary Law Review* 1043; Kirsti Samuels, 'Post-Conflict Peace-Building and Constitution-Making' (2006) 6 *Chicago Journal of International Law* 664.

⁴ The conception of 'the people' or 'the public' is considerably more complicated than we often understand. An appropriate evaluation of the impact of participatory constitution building 'cannot be made if the concept of 'the people' is not disaggregated'. It is unrealistic to imagine something as 'the people' when in fact, there are women, religious groups, ethnic minorities, youth, indigenous peoples, 'farmers, peasants, capitalists and workers, lawyers, doctors, auctioneers, and practicing, failed, or aspiring politicians, each pursuing his or her own agenda'. These groups often bring diverse levels of understanding and skills to the constitution-building process. See Michele Brandt et al, *Constitution-Making and Reform: Options for the Process* (2011), 84.

ability to credibly threaten a constitutional order if excluded.⁵ However, the involvement of combatants⁶ in constitution-building processes and the consequences of their inclusion remains understudied in the scholarship on constitution-building processes.

Constitutions are largely drafted during times of political upheaval or violent civil war, which always upsets deliberative, participatory and transparent processes.⁷ It is in these contexts of violent conflict that the inclusion of combatants in constitutional negotiations becomes a particularly relevant question. It specifically raises distinctive issues including whether or not combatants should be included at all in the process; the consequences of including or excluding parties who have participated (or actively participate) in hostilities; and how, if at all, combatants can be involved in the constitution-building process. Drawing on the history of the drafting of the 2004 Constitution of Afghanistan, this piece attempts to shed light on these important questions and discuss the broader lessons we might draw from the case of Afghanistan.

The Making of the 2004 Constitution of Afghanistan

Afghanistan has a rich (but mostly unstable) constitutional history. Over the past century, Afghanistan's various rulers promulgated ten different constitutions, but the country has had no opportunity to implement some of the most important aspects of these basic laws.⁸ Almost all Afghan constitutions, except arguably the 1964 Constitution, were produced through an elite driven process rather than a process that was open to the public. Afghanistan's latest constitution, the 2004 Constitution, struck a balance between elite bargaining and pacts and the views of the people. This Constitution was promulgated in 2004 after a massive military campaign, led by a coalition of the United States and its allies in the wake of the September 11 2001 attacks in New York and Washington DC, ousted the Taliban regime. Afghanistan, before the United States' military campaign, suffered from a complex, devastating civil war that pitted the mujahidin (holy warriors who fought the Soviet invasion of Afghanistan) and their allies against each other—a conflict that extracted a high toll in human life. The civil war ripped the country into a hodgepodge of warlordism, violence, lawlessness and chaos.⁹ The situation only got worse when the Taliban movement emerged and became part of this devastating conflict.¹⁰

⁵ Sujit Choudhry and Tom Ginsburg, 'Introduction' in Sujit Choudhry and Tom Ginsburg (eds), *Constitution Making* (Edward Elgar, 2016), xiv.

⁶ Additional Protocol 1 to the 1949 Geneva Conventions defines combatants as members of armed forces of a party to an armed conflict. They are combatants because they have directly participated in hostilities.

⁷ See Darin EW Johnson, 'Conflict Constitution-making in Libya and Yemen' (2017) 39 *University of Pennsylvania Journal of International Law* 293.

⁸ J Alexander Thier, 'The Making of a Constitution in Afghanistan' (2007) 51 *New York Law School Law Review* 557, 559; see also Saïd Amir Arjomand, 'Constitutional Developments in Afghanistan: A Comparative and Historical Perspective' (2005) 53 *Drake Law Journal* 943; Nighat Mehroze Chishti, *Constitutional Development in Afghanistan* (Royal Book Co 1998).

⁹ Ahmed Rashid, *Taliban: The Story of the Afghan Warlords* (Pan MacMillan, 2001, 2nd ed), 21.

¹⁰ During the 1990s, when the civil war in Afghanistan was at its peak, Pakistan and Saudi Arabia had begun to support a new Islamist movement known as the Taliban (literally 'religious students'). The Taliban grew out of communities of Afghan refugees and mujahidin war veterans who had studied in Pakistani Hanafi madrassas that taught a radical form of Hanafi Islam. In a short period of time, the Taliban proceeded to occupy most of Afghanistan. With remarkable speed, they established in large parts of Afghanistan a theocratic state governed by their own distinct version of Deobandi-inspired Hanafi *Sharia* law. Commanders of the former mujahidin parties fought vigorously to resist the Taliban's expansion. Some areas, particularly in the North, thus remained outside Taliban control. Beginning in 1998, the presence of Osama bin Laden in Afghanistan became a major source of conflict between the Taliban and the international community. By giving protection to foreign terrorists like bin Laden, the Taliban had given the world's military superpowers incentive to change the balance of power in the battle between the Taliban and its rivals. On September 11 2001, an act of bin Laden's made such intervention inevitable. On that day, Al Qaeda operatives struck New York and Washington DC in a series of airline suicide attacks. When Mullah Omar rejected a United States ultimatum to expel bin Laden immediately,

The United States' military campaign in Afghanistan put an end, although temporary, to almost three decades of civil war and political turmoil in Afghanistan. At the same time, the military involvement of the United States and its allies in Afghanistan further armed tribal militias, thereby reviving 'factional conflict on a nationwide scale'.¹¹ Commonly known in the west as 'warlords', most of these military commanders controlled different regions within the country, had well-armed militias and took active part in hostilities before and during the Taliban regime. The entire post-Taliban political transition, including the drafting of the 2004 Constitution, commenced under the shadow of threats from these warlords.

Those who initiated the process for the making of the 2004 Constitution and those who participated in it tried to use the process as an opportunity to create a shared vision of the future of the Afghan state. However, post-Taliban Afghanistan was not a place 'where a show of hands at a meeting [could] decide who [would] hold power'.¹² Although the Taliban were violently removed from power and had melted into the countryside to nurse their wounds, the post-Taliban constitution-building process was dominated by the commanders of various armed militias who wanted to use the process to divide the spoils between themselves. This situation frustrated the aim of the process to transform the divided society of Afghanistan from one that had resorted to violence to one that resorts to peaceful political means to resolve disagreements and conflicts. In order to succeed and take hold, the post-Taliban constitution needed to be rooted in agreement not only among the people but also among the most powerful leaders of the warring parties in Afghanistan.

The drafters of the constitution and their international supporters had full knowledge that excluding these ex-combatants (who were still heavily armed and could easily return back to hostilities) carried a real risk of political crisis and created a substantial impediment to the successful completion of the constitution-building process. The process thus not only consulted the leaders of these former combatants but also directly engaged their interests. However, the process chose to include only the victorious combatants—those who had won the war against the Taliban with the help of United States military intervention. The Taliban combatants were considered to be defeated and too weak to be included in the process. The victorious combatants were included in the entire constitution-building process. The makers of the 2004 Constitution consulted the leaders and representatives of these armed militias during the drafting and review process, and they were directly involved during the adoption of the Constitution in January 2004.

Although the constitution-building process gave a great deal of consideration to the inclusion of the victorious militia leaders, there were a couple of serious risks associated with it. First, both the drafters of the constitution and the United Nations Assistance Mission in Afghanistan (UNAMA) feared that the process might become a worthless exercise if it allowed too much room for the leaders of the armed militias and their views. Most of these warlords wanted to influence the constitution-building process to advance their short-term political agendas. Second, UNAMA feared that the leaders of these combatant groups, who were still well-armed, might hijack the public consultation process.¹³ As a result, UNAMA and the Transitional Administration of Afghanistan decided to keep the process secret and only open it for public debate for a short period of time at the final stages of the process. These strategies and the strong presence of the international community saved the constitution-building process from becoming a battleground between the

the United States teamed up with the international community and a coalition of mujahidin and tribal militias. Within one month, the Taliban had been violently removed from power and had melted into the countryside to nurse their wounds.

¹¹ International Crisis Group, *Afghanistan's Flawed Constitutional Process* (Asia Report No 56, 2003).

¹² Rubin, above n 2, 9.

¹³ International Crisis Group, above n 11, 21.

leaders of armed groups who had directly taken part in hostilities against each other during the civil war of the late 1990s.

The Taliban showed interest several times in being included in negotiations for the future of Afghanistan from the start of the post-Taliban political transition. From 2002 up to the adoption of the Constitution in 2004, the Taliban wrote several letters to President Karzai and requested participation in the political and constitution-building processes. However, the international community made a risky bet that it could treat the Taliban as a faction that would be too powerless to disrupt the political order, and so did not need to be included in the constitutional negotiations. In addition, the United States and its allies excluded the Taliban from the process because its leadership had not broken ties with Al Qaeda. Afghan parties who had won the war against the Taliban also resisted the inclusion of the Taliban in the constitution-building process. Their opposition to the inclusion of the Taliban had an ideological flavour – they argued that the Taliban represented a far too conservative version of Islam and the *sharia*, a version that was too harsh and had no place to be implemented in Afghanistan.

Neither Afghans nor their international allies had weighed the real cost of excluding the Taliban combatants from the process. Only six months had passed after the promulgation of the 2004 Constitution when the United Nations Special Representative to Afghanistan, Lakhdar Brahimi, acknowledged this mistake, referring to the absence of the Taliban as the ‘original sin’ of the entire political transition. He believed that the international community should have taken the time to persuade the Taliban to participate in the political and constitution-building processes. The exclusion of the Taliban soon showed its devastating effects. While the majority of the Afghans and the government were celebrating the adoption of the 2004 Constitution, which they viewed as a remarkable achievement, the Taliban were strengthening their military power and ultimately challenged the legitimacy of the 2004 Constitution and the government it established. They refused to play by the rules set down in a constitution in which they had no role.

Since then, the Taliban have become so powerful that the United States began to negotiate in 2018 a political settlement with its leaders in a bid to lure the Taliban away from hostilities. During the initial stages of negotiations, the Taliban labeled the 2004 Constitution as illegitimate and the biggest obstacle to a possible peace agreement. The Afghan government agreed to amend the 2004 Constitution to incorporate the interests of the Taliban. Because of what happened in the 2002-2004 constitution-building process, there is a political consensus in Afghanistan that the leaders of the Taliban combatants should be included in any constitutional negotiations that might take place soon in Afghanistan. Experience has shown that the costs of excluding combatants like the Taliban have been too high.

While the Taliban had initially shown an interest to participate in the political process, another group of combatants, the *Hizb-i Islami Mujahidin* Party (Islamic Party) chose to exclude themselves from the process. The leader of this party, Gulbuddin Hikmatyar, argued that foreign forces had occupied Afghanistan and that the government and the constitution had no legitimacy. They declared *jihad* (holy war) against the military presence of the international community and increased their engagement in hostilities against the government and its international backers. The result was increased hostilities and insecurity in the countryside. In a remarkable development, however, the *Hizb-i Islami* signed a peace agreement with the government of Afghanistan in late 2016, ceased hostilities and joined the political process. They accepted the 2004 Constitution and agreed to contest politics under its rules. Hikmatyar is now a candidate for the presidential elections scheduled for 28 September 2019.

Lessons from the History of Afghanistan

Constitutions drafted during dramatic political transition or during an ongoing civil war are widely viewed as tools for the resolution of conflict.¹⁴ The constitution-building process thus becomes a forum for negotiating solutions to divisive or contested issues that led to conflict. It is in these contexts that the inclusion of all parties with guns is important in the process. Afghanistan's history suggests that if any powerful armed group is excluded, it can create substantial impediments to the successful implementation of a constitution-building process. Under certain circumstances, exclusion of combatants both from the process and from the content of a constitution can derail an entire constitution-building process and push a society deeper into political unrest and civil war.¹⁵

Afghanistan's story suggests that combatants, like other stakeholders, should be included in the process. The costs associated with the exclusion of combatants are just too high. Combatants can be involved at different stages of the process including the drafting, reviewing and adopting stages of constitution-building processes. Like the inclusion of other sections of a polity (eg women, minorities and marginalised groups) the inclusion of combatants can be achieved through the direct inclusion of representatives from combatant groups in the constitution-making bodies, through consultation with their leaders, or preferably a combination of both. In Afghanistan, the latter strategy was employed. The representatives of the victorious warring parties were selected to the Constitutional Drafting and Constitutional Review Commissions as well as the Constitutional *Loya Jirga* (the popular body that adopted the Constitution). In addition, throughout the drafting and review process, the makers of the 2004 Constitution regularly consulted the leaders of the armed militias and sought their advice on key matters in the Constitution (eg the role of Islam and Islamic law). In this way, the process ensured that the most powerful actors had a sense of ownership and that the Constitution was accepted by a broad cross-section of the divided society of Afghanistan.

The process for making the 2004 Constitution was not only inclusive of combatants in terms of the process, but it was also inclusive in terms of the content of the constitutional text produced. In this respect, although the process barred the Taliban from participating in constitutional negotiations, the text does not entirely reject the views of the Taliban— especially on matters of importance to the Taliban such as the role of Islam and the nature of the state. For instance, when it comes to defining the proper role of Islam and its relation to the state, the most controversial and sensitive issue in Afghanistan, the Constitution does not adopt language that prefers the demands of one group at the expense of excluding other groups. Instead, the Constitution uses vague language in a

¹⁴ Jenna Sapiano, *Constitution-Building in Political Settlement Processes: The Quest for Inclusion* (International IDEA Workshop Report, 2015).

¹⁵ The collapse of the process for making of the 1993 Constitution of Afghanistan provides an important example. When the process for the drafting of the 1993 Constitution began, Afghanistan had already descended into a brutal civil war among the parties who had fought the Soviet Union with the support of the United States and a number of Arab nations. Various religious and ideological parties, including those who later took part in the drafting of the 2004 Constitution, fought each other for political power. It was in this situation of civil war that the warring parties agreed to draft a constitution in a hope that the constitution-building process would provide a forum for the negotiation of solutions to the divisive or contested issues that led to conflict. The process for the making of this constitution could be best described as a forum for negotiations of political controversies among combatants. All parties that took part in the process were actively engaged in hostilities. However, the process only included the most powerful combatants, thereby excluding others who later boycotted the process. The ongoing hostilities among the forces of the parties that took part transformed the constitution-building process from conflict resolution to conflict exacerbation. The warring parties put forward in the constitution-making process exactly the same agendas for which they had picked up arms. When one warring party exercised more influence on the process advocating a particular vision of the state, a vision for which the parties were fighting on the ground, the other combatants left the process and the civil war deepened as a result. At the end of the day, the entire constitution-building process collapsed before a final document was produced because too many combatants were left out of the process.

bid to signal to all parties who went to war over the previous decades in the name of Islam that their version of Islam is not rejected. This was arguably one of the main reasons that the *Hizb-i Islam*, a radical religious party, came to terms with the Afghan government and accepted the 2004 Constitution.

In short, a constitution-building process can be inclusive of combatants not only through the process that produces the supreme law of a land but also through its content. Afghanistan's history suggests that under some conditions, the inclusion of all combatant groups in the process is not feasible. In these cases, the constitution might still include factions, who were excluded or those who chose not to participate in the process, through its content. In this way, the constitution can leave room for the combatants to accept the constitution at some point in the future.

Concluding Remarks

It is hard to imagine constitution-building processes during times of political turmoil or civil war that reflect the views and demands of the people through a highly participatory process — one that includes the public as the *pouvoir constituant*. Afghanistan's history suggests that constitutions drafted during turbulent political change should reflect and uphold short-term bargains struck between elites (and combatants) that emerge from peace negotiations or political transition. Constitutions drafted during political unrest might risk exacerbating conflict if they are rooted only in agreement among the people and exclude parties with guns from the negotiation process.

Although excluding combatants from a constitution-building process frustrates peaceful political transition, there is a real and major risk associated with the inclusion of combatants. This risk is much more acute when constitution building takes place during civil war or armed conflict. The inclusion of combatants in constitution-building process during an ongoing civil war risks producing what Darin Johnson has called 'conflict constitution-making'.¹⁶ Conflict constitution-making 'transforms constitution-making processes from zones of conciliation into zones of conflict'.¹⁷ It results in the making of a 'conflict constitution', a document that highlights the sources of conflict rather than ameliorating them.¹⁸ For example, in Yemen, Libya and Syria, where political transitions turned into destructive civil wars, the constitution-building processes turned into conflict venues over the same outcomes that armed combatants sought on the battlefield by force. In these situations, armed combatants basically found a new frontline to seek exactly what they sought through violence and to threaten further violence in case they are not heard.¹⁹

As the experience of Afghanistan during civil war in the 1990s and the more recent experiences of Yemen and Libya indicate, the inclusion of combatants in constitution-building process always does not yield favourable results. It sometimes contributes to the persistence rather than resolution of underlying conflict. Therefore, the inclusion of combatants in the constitution-building process is a delicate task. It must be handled with great care and cautious design. If combatants are included in constitution-building processes, one needs to think about avoiding the worse-case scenario of conflict constitution-making. In other words, constitution building during political unrest should be designed in a way that prevents the transformation of constitution-building processes into a process that contributes to the persistence of civil war and conflict.

¹⁶ Johnson, above n 7, 297.

¹⁷ Ibid.

¹⁸ Ibid, 298.

¹⁹ Ibid.

Shamshad Pasarlay

Shamshad Pasarlay is Assistant Professor 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 LL.M. and Ph.D. in comparative law from the University of Washington School of Law. He has worked in the Law Library of Congress and the United Nations Headquarters in New York. Shamshad Pasarlay's research interests involve comparative constitutional law and Afghanistan's constitutional history. His scholarship on judicial politics, religion and constitution making and constitution-making/design in deeply divided societies has appeared in numerous journals, including the International Journal of Constitutional Law, Asian Journal of Comparative Law, Australian Journal of Asian Law and Washington International Law Journal. He participated in the Melbourne Forum in 2018 and 2019