

Law & Ethics

The Role of International Experts in Constitution-Making

Myth and Reality

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The creation of new governments in Afghanistan and Iraq has drawn U.S. media attention to American experts who have ventured to these war-torn zones to counsel indigenous actors drafting new constitutions. Some of this attention has fostered the misconception that a pool of entrepreneurial experts travels the globe writing constitutions for recipient populations perceived as incapable of accomplishing the task themselves. A *New York Times* article entitled, "Constitutionally, a Risky Business," asserted that the challenge of constitution-making "has produced a cottage industry of constitutional consultants."¹ The article highlighted the role of American scholars in particular, asserting that they "tend to dominate the constitution-advice business" and "are often seduced by the mythology of their own constitution...as a document that can and should be reproduced around the world."² In discussing the science of constitution-making, the author did include dissenting expert opinions. Nevertheless, such nuances are likely lost to a patriotic reading public predisposed to believe the myth of U.S. experts, acting as modern day James Madisons, recreating models of Jeffersonian democracy across the globe.

This myth stems from a trend in constitution-making prevalent during the period of decolonization, when colonial

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powers played a dominant role in creating independence constitutions, particularly in Africa. This method of constitution-making has become deeply resented; many see it as contributing to

as well.⁴ This new role reflects the evolution of a “new constitutionalism.”⁵ As Vivien Hart, a professor at the University of Sussex, explains in a recent report for the United States Institute of Peace

The memory of post-colonial constitution-writing has led to resistance to foreign involvement in the constitutional process.

the failure of the political regimes it created. The chairman of Eritrea’s Constitutional Commission from 1993 to 1996, Bereket Habte Selassie, explains bluntly: “In the 1950s, Europeans summoned African leaders from twenty-five to thirty countries to capitals like London, Paris, and Brussels and shoved constitutions down their throats.”³ The lingering memory of this post-colonial phenomenon has led to a general resistance to foreign involvement in the constitution-making process. This is evident currently in Afghanistan and Iraq, and may well explain why foreign advisers were largely shut out of the South African process during the three years prior to the adoption of its 1996 constitution. This legacy also explains the distance that sometimes characterizes relationships between local and foreign advisers involved in constitution-making.

Foreign advisers play a dramatically different role in modern constitution-making than the myth suggests. They provide comparative information about a variety of constitutional models while remaining respectful of the sovereign right of indigenous actors to choose among them. Moreover, compared to the past, when foreigners imposed substantive concepts, advisers today offer advice on comparative models of process

(USIP), “Twenty-first century constitutionalism is redefining the long tradition of expert constitution-making and bringing it into the sphere of democratic participation.”⁶ According to this view, “a democratic constitution cannot be written for a nation.”⁷ Instead it must be the product of a “home-grown” process in which the public participates and acquires a sense of ownership. This view has dramatically shaped the role of foreign advisers by encouraging them to adopt a methodology in which they act as resources to indigenous actors when those actors face difficult decisions related to both substance and process.

The role of the international community and public participation in constitution-making are among the themes currently under examination in a project jointly sponsored by the USIP and the United Nations Development Program (UNDP). The project includes eighteen case studies of countries that have undergone a constitution-making process in the past twenty-five years. This article examines the role played by foreign advisers in the last decade in four of those countries and illustrate the evolution of modern constitution-making. This will provide a framework for challenging current myths, correcting prevalent misconceptions, and drawing conclusions about

the role of international experts in constitution-making in the world today.

Cambodia. Cambodia set out to draft its current constitution in 1993, following the 1991 Paris Peace Accords that the international community brokered. The peace process outlined by the Accords established the United Nations Transitional Authority in Cambodia (UNTAC), which was charged with assisting Cambodians in their transition to peace. In the 1993 UN-led general election, Cambodians elected a Constituent Assembly, which appointed a committee to draft a new constitution.⁸

Immediately following the elections, it became clear that the participation of foreign advisers was a sensitive issue. Members of both the Constituent Assembly and the drafting committee were intent on ensuring that the constitution-making process would be distinctly Cambodian.⁹ While UNTAC foreign advisers were available to provide assistance, they had no significant interaction with either the drafting committee or the Assembly.¹⁰ France offered an adviser to the Ministry of Justice, but her role proved to be negligible as well.¹¹ The U.S.-based National Democratic Institute (NDI) and the International Republican Institute (IRI) did hold one seminar in which represen-

increase “constitutional literacy” and educate the population and those involved in the process about international human rights norms and their applications under other constitutions.¹²

At one point during the process, members of the drafting committee began communicating with two American professors sponsored by the Asia Foundation. After several weeks, the Ministry of Justice invited the two professors to work with them. Upon request from the members of the committee, the professors offered a comparative analysis of constitutional models in various substantive areas. Their work with the drafting committee was curtailed, however, when Prince Norodom Sihanouk learned of these activities and forbade all interaction between the committee and foreign advisers. Apparently he considered himself exempt from this policy, for he engaged a French constitutional law professor who prepared a draft for submission to the committee. That draft drew heavily from Cambodia’s 1947 constitution, which was clearly a product of the French constitutional tradition.¹³

All the deliberations of the drafting committee and the Assembly were confidential, and international experts were excluded from the meetings along with everyone else. This exclusion proved to

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tatives from the United States and Bangladesh offered advice on constitutional drafting to Assembly members. In addition, UNTAC’s human rights component offered seminars designed to

be a contentious issue and a source of frustration for local journalists and the nascent civil society, including women’s groups, Buddhist monks, human rights organizations, and others who wanted a

say in the establishment of the new democratic regime.¹⁴ When the constitution was ultimately adopted in September 1993, it called for a constitutional monarchy, and Prince Sihanouk became King under its terms.¹⁵ The influence of the 1947 constitution was palpable, but the charter provided for the establishment of a liberal democracy.¹⁶ It also enshrined most of the human rights guarantees defined by international norms that UNTAC's human rights component had promoted through educational programs.

Eritrea. In April 1993, the people of Eritrea held a referendum to establish the country's independence from Ethiopia following its war of liberation.¹⁷ Over the three years leading to the adoption of its constitution in 1996, Eritrea engaged in a process that some have characterized as "new constitutionalism," a constitution-making process that emphasizes popular participation.¹⁸ Dr. Selassie, who chaired Eritrea's Constitutional Commission, explains that the constitution-making process was conceived in a "post-imperial" consciousness that insisted "on a popularly-grounded basis of consent which accommodates all component elements of a society."¹⁹ The process featured a phased approach that included comprehensive civic education

mission learned the people's views and took them into consideration.

While the process emphasized indigenous participation, international experts were also involved. The commission formed a Foreign Advisory Board, chaired by a law professor from the United States, to provide advice on the constitutional experience of other countries.²⁰ In addition, as the commission began work, it held an international conference in Eritrea where four international experts from Ethiopia, Switzerland, Namibia, and Egypt offered advice on the constitution and government institutions, human rights and the rule of law, social and cultural issues, governance, and economic issues.²¹

Albania. After the fall of communism, the people of Albania decided in 1993 that they were ready to begin preparing and adopting a democratic constitution. Forty-five years of isolation from the international community under communism, however, placed Albania at a disadvantage vis-à-vis other countries engaged in constitution-making at the time.²² Scarcity of local literature on constitutionalism and a lack of experience with democratic institutions and human rights made the participation of foreign advisers inevitable. Nevertheless, these foreign advisers adopted a methodology

In Albania, foreign advisers adopted a methodology that reflected respect for the sovereignty of the local population.

about the constitution's role and the people's potential involvement in its creation. That phase was followed by popular consultation in which the drafting com-

mission learned the people's views and took them into consideration. that reflected respect for the sovereignty of the local population. Scott Carlson, one of the advisers who participated in the process, captured the spirit of that

respect in an article commenting on the challenges of introducing democratic models in a previously isolated Albania:

By definition, the introduction of a new legal system or structure entails challenges. Even a completely tried and tested system or structure may fail when introduced into a new environment. The process of legal transplantation is a delicate one and the host state can reject the introduction of foreign legal concepts for a variety of reasons. Legal and political traditions can serve as both foundations upon which to graft new structures and obstacles to their implementation.²³

The political turmoil that characterized the Albanian constitution-making process underscored the truth of those words. This unrest included frequent conflict between political factions, some of which failed to understand the democratic procedures that were introduced throughout the process. On a few occasions the conflicts resulted in stalemates in which foreign advisers acted as mediators. These conflicts also meant that constitution-making proceeded haltingly until 1997, when a three-member team, composed of two Albanian lawyers and one foreign lawyer, drafted a plan for the process. This plan, which included appointing a constitutional commission and promoting civic education and public participation, resembled that of Eritrea.²⁴

The participation of foreign advisers was well organized and structured. In October 1997, the Administrative Center for the Coordination of Assistance and Public Participation (ACCAPP) opened under the auspices of the Organization for Security and Cooperation in Europe (OSCE). The ACCAPP coordinated the work of the "Albanians and the international community to facilitate

technical assistance, collect and distribute information, provide training, and organize polls and civic education initiatives."²⁵ In addition, the American Bar Association's Central East European Law Initiative and the German aid agency, Deutsche Gesellschaft für Technische Zusammenarbeit, jointly sponsored a symposium addressing the topics of executive, judicial, and legislative powers. Finally, the OSCE, the U.S.-based International Foundation for Election Systems, the EU, and other international actors supported civic education in preparation for the 1998 referendum.²⁶ When the constitutional drafting commission completed its final version, the Venice Commission of the Council of Europe reviewed it and stated that "the draft, in particular the human rights chapter, is in line with European and international standards."²⁷ The November 1998 referendum gave final approval to the constitution.

East Timor. The constitution-making process in East Timor began in 2000, only months after the UN assumed administration over the country in the aftermath of the violence following the August 1999 referendum.²⁸ Although the constitution-making process occurred while the United Nations Transitional Administration in East Timor (UNTAET) was administering the country, UNTAET remained neutral throughout. According to a report submitted as part of the USIP/UNDP study of constitution-making, "during the drafting of the constitution, UNTAET's overt policy was to take a hands-off approach to ensure that the Constituent Assembly did not view the UN as interfering in the creation of the independence constitu-

tion and to ensure that the public did not view the constitution as foreign.”²⁹ UNTAET did, however, establish a Secretariat of the Constituent Assembly whose role was to coordinate the advice provided by foreign advisers and local actors. The Secretariat was elected as part of the constitutional process and provided five foreign advisers, four of whom were Portuguese and one of whom was Canadian.³⁰

In addition, the Asia Foundation provided nine foreign advisers who authored option papers on constitutional issues such as customary law, international law, judicial independence, human rights, and public participation. The foundation also organized a seminar for the Constituent Assembly to discuss methods of ensuring public participation throughout the process, while NDI offered advice on public participation and supported civic education exercises. Virtually all of the foreign advisers, including the UN High Commissioner for Human Rights and UNTAET’s Transitional Administrator, offered advice on human rights.³¹

The FRETILIN party, which dominated the Constituent Assembly, produced a draft at the beginning of the process that was largely based on the Portuguese constitution. East Timor had been a Portuguese colony for more than four hundred years, and many members of that party had ties to Portugal. The text that was ultimately adopted in May 2002 did not vary significantly from the initial FRETILIN draft, and some members of the general public criticized the constitution as being more Portuguese than East Timorese.³²

Conclusions. The review of these cases supports the following conclusions:

First, in response to resistance to heavy-handed foreign intervention in constitution-making, international experts have adopted a methodology which is generally collaborative and respectful of local culture.

Second, international experts continue to provide advice on substantive matters, which commonly include the application of international human rights norms. Experts increasingly provide guidance on the process of constitution-making itself.

Third, there is no monolithic model that exerts a dominant influence world wide, and the national origins of the international experts are as diverse as the constitutional models they present.

Fourth, when writing their constitutions, indigenous actors are more likely to look to models found in their own history than to models that international experts present to them.

Fifth, the role played by international experts is increasingly collaborative and structured, due to efforts sponsored by multilateral institutions and NGOs that organize and coordinate the process.

Sixth, international experts increasingly assist indigenous actors in providing popular civic education on the constitution and organizing public participation in the process.

Finally, by assuming a neutral role, international advisers are often called upon to act as mediators when indigenous actors have difficulty reaching agreement among themselves.

It is difficult to judge the impact of these developments on the overall success of the constitution-making process. This is especially true since, in the context of this new era of constitution-making, the success or failure of a constitution is not likely to be judged by the quantity or quality of the advice provided by internation

al experts, but by assessments of the constitution's legitimacy and sustainability. In addition, criteria such as the level of public participation and transparency, which contributed to the perceived success of the South African constitution, will be used to evaluate the constitution-making process.

These conclusions demonstrate that the role played by international experts in the constitution-making process is less glorious than that suggested in the myth. Nevertheless, those who play this role in the era of new constitutionalism

are convinced that it offers the best strategy for the creation of legitimate, sustainable constitutions for the twenty-first century. If their strategy proves successful, their legacy will be far better appreciated in the long term than that of their post-colonial counterparts. This new spirit of collaboration will allow foreign advisers to share the glory with a new set of indigenous founding fathers that may prove to be as revered in their own societies as the famous archetypes of constitutional history in the United States.

NOTES

1 Felicia Lee, "Constitutionally, a Risky Business," *The New York Times* (31 May 2003).

2 *Ibid.*

3 *Ibid.*

4 Substantive concepts are concepts that relate to the subjects typically addressed in the text of a constitution, such as federalism, human rights, and the structure of the political regime. Issues of process relate to the different processes and procedures that countries have used to develop and draft constitutions.

5 Vivien Hart, "Democratic Constitution Making, Special Report," United States Institute of Peace no. 107 (2003), 3.

6 *Ibid.*, 1.

7 *Ibid.*

8 Steven Marks, "The Process of Creating a New Constitution in Cambodia," in *Constitution-Making, Peace Building and National Reconciliation* (United States Institute of Peace, forthcoming publication).

9 *Ibid.*, 11.

10 *Ibid.*

11 *Ibid.*, 31.

12 *Ibid.*

13 *Ibid.*, 32.

14 *Ibid.*, 21.

15 *Ibid.*, 47.

16 *Ibid.*, 9.

17 *Ibid.*, 21.

18 Hart, 4.

19 Bereket Habte Selassie, "Constitution Making in Eritrea: A Process-driven, Need-based Approach," in *Constitution-Making*

20 *Ibid.*, 26.

21 *Ibid.*, 40.

22 Scott Carlson, "Politics, Public Participation, and the 1998 Albanian Constitution," *Osteuropa Recht* (December 1999), 491.

23 *Ibid.*, 489.

24 *Ibid.*, 494.

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*, 501.

28 Louis Aucoin and Michele Brandt, "East Timor's Constitutional Passage to Independence," in *Constitution-Making*

29 *Ibid.*, 28.

30 *Ibid.*, 29.

31 *Ibid.*, 29-30.

32 *Ibid.*, 28.