



Constitution Making in Contexts of Conflict: Paying Attention to Process

Andy Carl

Thematic Paper

IMPRINT

Carl, Andy 2019. Constitution Making in Contexts of Conflict: Paying Attention to Process.
Berlin: Berghof Foundation.

PUBLISHED BY

© Berghof Foundation Operations gGmbH
Lindenstraße 34
10969 Berlin, Germany
www.berghof-foundation.org
order@berghof-foundation.org
twitter.com/berghoffnd
facebook.com/berghoffoundation

2019
All rights reserved

Language editing: Sohaila Abdulali

Design and layout: AMBERPRESS, Katja Koeberlin, Gosia Warrink

Disclaimer

The views expressed in this publication are those of the author and do not necessarily reflect the views and opinions of the Berghof Foundation or its partners.

Acknowledgement

The project and its publications were made possible by funding from the German Federal Foreign Office.



Auswärtiges Amt

Constitution Making in Contexts of Conflict: Paying Attention to Process

About this publication

This publication is part of the project *Towards Sustainable Peace: The Nexus of Peacemaking and Constitution Building*, implemented by the Berghof Foundation, in collaboration with the United Nations Mediation Support Unit – Department of Political and Peacebuilding Affairs. It was generously supported by the German Federal Foreign Office.

The project explored how peacemaking – particularly mediated peace negotiations – interfaces with constitution building in practice, a so far understudied area. It identified the challenges and opportunities at this ‘nexus’, the lessons learned, and policy options and their implications on sustaining peace.

To this end, a number of thematic and field studies were commissioned, desk studies were conducted, and expert roundtables, interviews and peer exchange were organised involving scholars and practitioners from the fields of mediation and constitution building. The following publications capture the insights from the project on crucial processual and substantive issues at the nexus, which are expected to be valuable for practitioners.

Key output

- ≡ Key considerations for practitioners working at the nexus of constitutions and peace processes

Case studies

- ≡ Burundi [French and English]
- ≡ Guatemala [Spanish and English]
- ≡ Republic of (North) Macedonia

Thematic studies

- ≡ From armed intra-state conflict to a functioning constitutional order: reconciling principles of third-party support – a reflection
- ≡ Constitution making in contexts of conflict: paying attention to process
- ≡ Critical substantive issues at the nexus of peacemaking and constitution building
- ≡ The imperative of constitutionalizing peace agreements

The publications are available online at www.berghof-foundation.org/pmcb.

About the author

Andy Carl is an experienced peacebuilding practitioner with a career of leadership in the international NGO sector. He currently works as an independent consultant and advisor to groups, governments and organisations engaged in working on peace, justice and social change processes. He is from Northern California where he studied English Literature at the University of California at Berkeley. He also holds an MPhil from Trinity College, University of Dublin. He helped establish International Alert in 1989, and in 1994 co-founded Conciliation Resources where he was Executive Director for twenty-two years. He is now an Honorary Fellow of Practice at the University of Edinburgh and a Senior Research Associate at the Overseas Development Institute in London and a trustee of Impunity Watch (Netherlands) and the Rift Valley Institute (Kenya). He is currently leading on the development of the Pax Spiral initiative, which seeks to find new ways to strengthen the influence of peacebuilders in the global crisis of unresolved armed conflicts. He also co-curates the information stream [Peace Talks](#).

Contents

7	Introduction
8	Starting Points for Understanding
8	We do not have a solution problem; we have a process problem
8	We need to consider the wider picture
9	When and where to start?
10	Emergent leadership
11	Common Myths and Challenges
11	Hubris
11	Constitution making involves experimentation
12	No such thing as a comprehensive constitutional settlement
13	Lessons Learned from Working in Different Contexts for Project and Process Design
13	Early experience in South Africa
13	Working in Fiji
16	Learning by doing in the Somali region of Ethiopia
18	Advice and guidance on ‘process design’ in constitution making processes
18	When constitution making is conflict resolution
19	Recommended reading
21	Concluding Reflections

Introduction

Behind the headlines of reformed and newly written constitutions lie the often-forgotten histories of complex and dynamic processes. These are populated with prominent and less prominent actors engaged in formal and many informal initiatives. When successful, these actions add up to a purposeful dynamic of accommodation and the assertion of a new law-based order. In some contexts, this transformative change emerges out of the counter-currents of powerful and self-perpetuating economic, political and social systems of conflict. When such constitution making processes work less well, conflict dynamics can persevere, sometimes with the new or revised constitution “pasted on top”.¹

What do we know about how such change processes work? What can we learn from those deliberate, planned and implemented projects and interventions? This paper seeks to set out a series of framing issues and concepts. It shares a few narratives from practice, and it offers some concluding reflections for those facing comparable challenges on how to approach the task.

This draws on over 30 years of experience in the emerging field of peacebuilding, where I played very practical roles managing or leading a number of initiatives, some of which contributed to constitution making. Looking back over this period and at risk of sounding like a Forrest Gump-like character, I realise how fortunate I was to have witnessed so many significant turning points.

These included accompanying a Guatemalan civil society organisation (CSO) in the opening of the Grand National Dialogue in Guatemala (1989) – an early stage of a peace process whose agreed outcomes failed to be embedded in the constitutional and legislative reforms that followed. In the early 1990s I led an initiative for International Alert supporting a comparative learning initiative for the National Peace Secretariat in South Africa. This Secretariat was tasked with supporting local, regional and national structures implementing the National Peace Accord thereby creating a conducive environment for the CODESA (I & II) – the process that led to the Constitutional Assembly.

In my 22 years with Conciliation Resources, I was fortunate to play roles in supporting peace processes, many of which involved or led to constitutional reform processes. This involved successive and sustained work in Fiji, supporting local efforts to return the country to a constitutional democracy following a series of coups. I was also privileged to lead the organisation when it played a role as a member of the International Contact Group supporting the Malaysian mediation in the Government of the Philippines’ negotiations with the Mindanao Islamic Liberation Front. This process led to the Bangsamoro Organic Law, providing for a new autonomous entity, signed into law and recently ratified in referenda. We worked on many other initiatives and documented many more in our Accord series on peace initiatives around the world.

1 Written comment from Dr Christina Murray.

Starting Points for Understanding

We do not have a solution problem;
we have a process problem

In all contexts, a well-informed conflict analyst can see what a political settlement could look like. No doubt, there will be multiple proposals available. The bigger challenge is getting there from where one stands today. Living and studying in the UK and the Republic of Ireland since the mid 1980s and taking an interest in the conflict centred in Northern Ireland, I read several proposals of what resolution options could look like well before the agreement was signed in 1998. These were carefully considered and thoughtfully written. Crafting (the shape and content of) the Good Friday agreement was in itself an act of enormous political and legal imagination. However, in the mid-1980s, the urgent need for political and moral imagination was for creating an environment conducive to the conflict parties and their constituencies changing their relationships and actions. Such an environment would enable them to even begin to craft the new political settlement.

Of course, the practice of working with diverse parties on crafting proposals and even draft constitutions (successfully and unsuccessfully) can be meaningful processes and outcomes in themselves. Even without the full endorsement and involvement of the main conflict parties, such initiatives can be a significant and de facto Track II initiative. They can create important opportunities to build essential relationships. They can act as a kind of lab generating important ideas and formulations – perhaps most importantly showing a vision that peace is possible. We have many examples of such forward-looking scenario planning initiatives.²

We need to consider the wider
picture

The notion that Track I processes, including those that ultimately lead to the production of a new constitution, while of enormous and central significance, are independent of other interventions, processes and dynamics has been challenged. The pyramid metaphor for society and the parallel layers of peace interventions from those working with communities up to and including the (implicitly) most important and elite processes have been replaced with a more animated metaphor of looking at conflicts as complex systems of social, cultural, political and economic relationships. It has been argued that change initiatives are better described as navigating adaptively by a pole star and guiding star(s) rather than running along the hierarchical ‘tracks’ of formal and informal diplomacy.

To meaningfully understand what is happening and what may or may not be effective strategies for change, it is important to try to have a more holistic picture of the ways some actions and interventions are (or are not) moving the context out of conflict (and in other directions!). This implies that to understand how change works, you cannot start and end with a reflection on a single intervention towards a shared goal, not even one as important as a new national constitution, without risking missing other essential information from the conflict system. Collaborative Learning Projects (CDA) has done important work asking how these multiple interventions add up to having collective and systemic influence and impact.³

2 In 2003, the Swiss government supported the ‘Geneva Initiative’ to reconvene members of the Camp David process. They worked together until they reached the putative agreement they failed to reach in the first instance. This draft ‘settlement’ was known as the ‘Geneva Accord’ and was then shared widely throughout Israel and the occupied territories (www.geneva-accord.org).

3 *Collective Impact in Peacebuilding: Lessons from Networking Efforts in Multiple Locations* Peter Woodrow and Diana Chigas, 2018, CDA.

They came up with useful insights including the value of considering what they called specific “domains of progress” (i.e. change) for purposes of planning and understanding. Effective project planning for national change processes requires that we move away from seeing context through the privileged lens of our intervention and our institution. We need to get better at considering the implications for the design and management of a project (be it one of constitutional review or national dialogue) by seeing it in its context of complex and dynamics inter-relationships among multiple interventions.

This reflection piece takes as foundational that, whatever our role is in national processes of constitution making, whether we are living within the context or operating within it temporarily, it is essential to consider the wider dynamic picture and how our actions operate within it and are affected by it. It is okay and even essential to acknowledge our uncertainties. When it comes to looking for guidance on how to play more successful and constructive roles in such processes, it is important to be wary of qualitative, quantitative and comparative researchers who suggest that we have evidence on how to proceed. While there is a great deal of excellent research and writing on process issues in constitution making, anyone working in such a process is inevitably faced with doubt, uncertainty and some sense of just not knowing enough for the task at hand. Practitioners inevitably need to proceed with a sense of responsibility but also with a sense of enquiry; as Bruno Latour wrote, “This is why we should paradoxically take all the uncertainties, hesitations, dislocations, and puzzlements as our foundation.”⁴

When and where to start?

If we could track current ongoing constitution making processes, we would find that some are taking place in conflict contexts well before a meaningful political settlement. This has certainly been an important part of the roles played by the UN’s independent mediation standby team (Standby Team of Senior Mediation Advisers) as we can see by their emphasis on recruiting constitutional experts, and also by the role of UN special representatives and experts brought in by UNDP. While there may be specific and legitimate questions about the efficacy and value for money of some of these interventions, the fact that international donors are investing in such experimental work is welcome. It seems appropriate that in response to such complex peacebuilding challenges, governments supported more trial and error initiatives. We need even more.

In my experience, most official ‘Track I’ processes (including those focused on negotiating a new constitutional arrangement) were enabled and complemented by multiple unofficial initiatives and various attempts to kick-start a process. It can take years of such work before the ground is prepared and the timing is right for a formal process to get underway. The domain of many of my experiences was in the antechamber to the big events, where I was as preoccupied with project management as process management, working with and at the invitation of local NGO leadership, cooperating with civil servants and donor governments. We can gain important comparative insights from considering the efforts of the many hands that lie behind national constitution making processes, to better understand how change really happens.

While some processes assume the qualities of a mandated, planned and implemented project, any complex conflict operating across multiple domains and geographies has a system of actors, all of whom have a stake in the processes and their own interests in its outcomes.

4 In *Reassembling the Social – an introduction to Actor-Network Theory*, 2005, Oxford University Press, pg. 47.

The Chair, Mediator or Coordinator of the process needs to have the authority, power and capability to manage a process even if she or he will be unable to manage all the actors. The information accessible is likely to be contradictory at times. Complex contexts do not lend themselves to prediction and prescriptive solutions, but instead require adaption and decision-taking as close to the sources as possible. Care needs to be exercised to recognise the difference between aspirational and actual roles. It is not helpful to call someone a mediator in a conflict context when they do not hold that authority or that role in the eyes of the conflict parties. UN HQ and their agencies, funds and programmes, and powerful member states seem to require systems with one recognised national leader, one leader of the opposition, one mediator in the peace process, one national coordinator, or one chair of the constitutional commission. More complexity tends to confound the ‘best-laid plans.’

Emergent leadership

Emergent leadership is another idea getting more and more traction in the peacebuilding sector. I was recently involved in a report for the UN on the implementation of the Security Council Resolution on Sustaining Peace (2282) where this issue arose. As part of the research team I led two case studies, on Liberia and Kyrgyzstan. In both contexts there were multiple UN agencies, funds and programmes as well as INGOs and Bretton Woods institutions working with state, national and local organisations on the broadly shared goal of building and sustaining peace. Despite the presence of UN Development Assistance Frameworks (UNDAFs) (i.e. nationally agreed plans and priorities) and the 2005 UN policy commitment to “deliver as one”, it was clear that these multiple actors did not operate in concert with one another. Despite the authority of the government, the Special Representative of the Secretary General, and/or the Resident

Coordinator, there was no one leader. No one was conducting the ‘orchestra’ of actors, and there was no shared agreement on the priorities for building peace.

The recent resignation of Staffan de Mistura (and that of Lakhdar Brahimi and Kofi Annan before him) and the recent rounds of attempted dialogues in Geneva, Sochi and Astana are reminders of the enormity of the challenges of offering leadership without the power and mandated authority to lead all the stakeholders. Effective leadership in such contexts comes back to recognising one’s part in the wider ecology of actors and intervenors.

Emergent leadership requires, further to good conflict analysis, paying attention to what George Kembel calls “design thinking”⁵. This means promoting change and a new order by paying attention to who and what relations are working best. What are the ‘self-organising’ behaviours? And in recognising them, we can find ways to enable the “elements of the system to work together, discovering each other and together inventing new capacities.” And because all good things do not necessarily go together (look at the tensions between elections and political accommodation in constitutional change processes), it means promoting as much alignment of goals and values amongst actors in the system as possible, and being prepared to manage the differences that arise. It is not about leading from the front or the back. It is about creating a conducive environment.

5 See: www.youtube.com/watch?v=shbnxcajZfA.

Common Myths and Challenges

Hubris⁶

This is a particularly live issue, especially for the UN and the member states of its Security Council. Grand designs, like UN Country Development Assistance Frameworks are obviously enormously useful and powerful on their own terms, but they are of course only a plan and often one of several. They are less useful for those groups and organisations operating outside the framework, and too often fail the test of promoting enough alignment between actors to enable real shifts in the system. They tend to be strong on what many bureaucracies are good at (planning, grant-writing and project management) and weak on what many bureaucracies are weak at (experimentation and creative innovation, paying attention to the emotional and psychological needs of the people involved). Deeply embedded organisational cultures, incentives and interests mean it is hard to do constitution making differently, and to move away from the tendencies that reinforce competitive and siloed ways of working.

Constitution making involves experimentation

Despite the high levels of competencies and professionalism, and the multiple methods tried and tested for reviewing and writing a constitution, it is clear that contemporary constitution making initiatives are still aspirational and experimental in nature. A national dialogue will not necessarily deliver the drafting principles for a new and accepted constitution, nor will an independent review process necessarily result in the framework for a stable constitutional settlement. Given that constitution making in practice is so relatively experimental, and given the complex contexts in which it takes place, there is a strong case for less rigidly following a results-based and logical framework methodology for project planning for these processes. It would be more suited to the adaptive management programme methodologies currently being piloted in the development and peacebuilding sectors. These place a premium on understanding rapidly changing environments, and the value of taking a trial-and-error approach that pays attention to recording outcomes, but also the importance of having periodic ‘pause and reflect’ strategy testing sessions that lead to changed plans, and generally valuing in-process learning and innovation.

6 Hubris = Overestimating and overstating the power and influence to control outcomes and processes.

No such thing as a comprehensive constitutional settlement

The Accord series run by Conciliation Resources, which I first developed in the early 1990s, was designed to be a source of comparative learning on both peace process and the texts of those agreements. This was at a time when they were not easily accessible on the then new global tool, the “worldwide web”. We soon saw that many agreements ended in failure, none were fully implemented and all were followed by successive processes and agreements on outstanding or unresolved issues. There is no such thing as a comprehensive and final constitutional settlement, nor do we have one team on it from beginning to end. But do we work on the creation of a new or amended constitution informed by this understanding, that processes ultimately take place over time, that there will be a change of participants from those that consult to those that draft to those that implement and deal with future crises? Do we approach planning and management in a way that assumes this principle of turnover and handover?

We realised then that collapsed agreements were not entirely forgotten, but on the contrary, successor agreements were often constructed “out of the ashes” of the preceding “failure”. How is it that areas that are no longer considered intractable are brought forward in the new constitution? We certainly saw this in the 2013 constitution in Fiji that followed on from the earlier proposed constitution from the Ghai Commission, where many of the provisions, including those related to the proposed language in the Bill of Rights, were brought forward. In the Philippines, the Aquino government ran out of time in its administration and failed to get the provisions of the peace agreement reached with the MILF through Congress as a new basic law.

This was a source of enormous concern that the hard-won detail of the agreement would be lost or unravelled in any new process under President Duterte and the new Congress. Sceptics have been surprised to see that the new Organic Law respects and contains so many of the previously negotiated provisions. It would be an exaggeration to describe constitution making as an industry, but it certainly is a social network with its characters and ways of working.

One of the unintended consequences of this network is that of recycling of ideas and language. I have suggested that it would be interesting to run all new peace agreements and constitutional amendments through a software programme akin to those academics use to seek out evidence of plagiarism. I would expect that we would see numerous specific examples of where text in one context informs the formal political settlement in another. I have also seen how, like papers drafted and not presented, bright ideas rejected in one constitution making process still take some space on the hard drives and memory sticks of travelling international constitutional experts.

I was told how a very creative idea for developing a constitutionally mandated ‘civil assembly’ that had been considered and rejected on one continent came to be considered in a draft of a constitutional review on another. This was allegedly because the text was available on the expert’s laptop, and it seemed to correspond to the concerns raised in a conversation with a member of the public. I guess that constitutional experts, like all architects, not only reflect on their clients’ needs, but inevitably bring in their own ideas and creativity. Negotiating the two has its risks, challenges and benefits.

Lessons Learned from Working in Different Contexts for Project and Process Design

Early experience in South Africa

Working with International Alert in 1991 and 1992, I had the opportunity to meet and exchange experiences with a number of the leading members of what was then probably the world's most vibrant community of peacebuilding professionals working with the parties, popular movement, NGOs, CSOs and academia. The National Peace Secretariat had recently been established by the National Peace Accord (1991). Its role was to implement the ambitions of the Accord, including a continuing dialogue with business and faith leaders, and to directly address the political violence through supporting a national network of local and regional 'peace committees' that themselves were mostly formed out of pre-existing local conflict resolution activists and organisations. It was the period of extremely high levels of tension and violence and coincided with the period of the first and second Convention for a Democratic South Africa (CODESA) and, later, the following Multi-Party Negotiation Process. At the request of the National Peace Secretariat, we organised an international review on how to help the Secretariat strengthen its competencies in supporting local peacebuilding and mediation through a sustained two-way comparative exchange with peacebuilders from Colombia, Northern Ireland, Sri Lanka, and Cambodia. We also had with us Neelan Tiruchelvam, the eminent constitutional lawyer from Sri Lanka (who was later assassinated by the LTTE).

It is not clear that anyone ever seriously expected the implementation of the national peace accord to help clear the complementary space for a non-violent and inclusive constitution making process (in the form of CODESA). Nevertheless, despite

a spike in violence, it appeared to have, over time, a modest but important influence on local conflict prevention and management. In South Africa at the time, through social networks and the structures of the political parties, unions and churches, there was not a stark divide between those engaged in peace and constitution making processes; at least that was how it appeared. So the complementarities appeared important, although just as the national peacebuilding infrastructures were adapting to play more consistent roles as there was progress on the constitution making front, the national peace secretariat opted to wind down. The local and regional organisations in receipt of funding for peacebuilding had to adapt to new donor priorities. Of course, ever since, the export of South African constitution making and peacebuilding expertise and narratives, forever entwined, has had a significant influence on peace and political settlements around the globe.

Working in Fiji

After the 2006 coup in Fiji, Parliament was suspended, and opposition career politicians had few resources and little capacity to challenge the military administration. While they remained intact, political parties outside of Parliament were fish out of water and failed to find ways to mobilise their constituencies. It is a small country, with a population at the time of under 900,000, but the role of engaging with and educating the public and with the military to promote a return to civilian constitutional rule fell to a small number of organisations and activists working in difficult circumstances. Fiji is unusual for having developed an articulate and well-organised NGO sector that complements and sometimes clashes

with even stronger traditional, indigenous and faith-based institutions (notably the Methodist Church). When schoolchildren in Fiji study its modern history, they learn about the role of NGOs defending democracy and the rights of the people (where else can this be said?). One local pro-democracy organisation was the Citizens' Constitutional Forum (CCF), founded in response to the coups of 1987. The CCF did many things, but they were quick to realise that, without a basic understanding of constitutional issues, those members of the public who had insights to share did not see any value in engaging with local and national dialogue and process. They were not the only organisation to undertake work in public education; the media to some degree also sought to inform the public. But the CCF led the way in working in local communities and on national debates.

One of their most important initiatives was inspired by and adapted from South Africa, when, in cooperation with CR, they produced and widely distributed a simple cartoon-illustrated guide to the 1997 Constitution in Fijian, Hindi and English. It was a strategic intervention, one tool amongst others, which helped raise the level of constitutional understanding amongst both the public and parliamentarians. In my view, the initiative was successful because not only did it draw on a proven success in South Africa, it was also locally produced, written in plain speech and carefully translated into the national languages. When that constitution was overturned and Fiji eventually had the opportunity of having over 700 public hearings as part of the constitutional review process, the degree of participation and the quality of the public's submissions was, at least in part, a testament to the value of public education in enabling meaningful participation.

Conflict resolution in Fiji's constitutional review process

In 2011, following the 2006 coup, the military government of Fiji (belatedly) chose to mandate an independent Constitutional Review Commission, led by a balance of international experts and

influential nationals, chaired by Professor Yash Ghai. The choice of Yash Ghai and the concept of the Commission was, in part, enabled by the relationship he enjoyed with the then Attorney General as his former law professor. Conciliation Resources, having worked on constitutional and peacebuilding issues in Fiji in support of local activists and organisations since the early 1990s, was invited to play a complementary role setting up and running the operations for the review and the national consultation process. This was a role that was to be taken by UNDP, but antagonistic inter-personal relations between the Fijian PM and the UNDP Administrator meant this was simply not possible at that time.

The detailed history of the experience of the Review Commission should be essential reading for anyone planning or participating in a similar initiative. It also needs to be appreciated in the context of the arc of the last the 30 years of Fiji's history to make any meaningful assessment of its successes, innovations, failures and mistakes. On the one hand, the Commission ended with the theatrical finish of the government's decision to confiscate and burn the first printed copies of the new draft Constitution and their declaration of the Chairman as *persona non grata*. But the national experience of the review should also be remembered for the unprecedented public participation in the process, the fact that from beginning to end the Commission held onto its independent credentials, and for the legacy of that draft as it informed the government's 2013 draft that framed Fiji's gradual return to constitutional democracy. It is yet another important example of where an incumbent political and military power, holding power over all challengers with the use and threat of forces, is engaged in a process that transforms the political settlement with the ultimate voluntary handover of power. This, albeit gradual, transition (which continues to this day) was not the result of national or international coercion or sanctions. It is an important example for those engaged in processes working for transformative change when there are no prospects of 'winning' either in the battlefield or at the negotiation table. It was the result of the cumulative influence of multiple interventions,

including that of the Review Commission. In one sense, it would be fair to say that while the Commission lost its battle, it was an integral contributor to the peaceful transition out of military rule.

How good working relationships and communication were *sine qua non*

I would like to tell just one story to illustrate the case for Fiji ‘not having a solution problem but having a process problem’. The Commission under the leadership of Professor Ghai was mostly very savvy about paying attention to the intensely political role he was playing, engaging with and listening to as many parties and stakeholders as he felt to be logistically possible. The Commission was very creative in finding ways to do this, including inviting national ‘experts’ into the secretariat to provide detailed and substantive briefings on critical and often contentious issues. Members of the Commission also briefed and debriefed the government, the military, the media and opposition party members. They also put in enormous time and effort to travel the length and breadth of the country and hear public submissions. From their first days of operation, they defended their independence when the government announced that whatever the outcome of their recommendations, any future basic law would involve impunity for those involved in the country’s last coup. It was never easy, but the real collapse of the process happened before the flames were lit.

There was a critical moment in the process (one of many) when the Chairman of the Commission was no longer talking to the Attorney General or the Prime Minister. The military, under the authority of the Land Force Commander, had put together their own detailed submission for reform to the Review Commission. Given the fact that they were running the government, this may seem an extraordinary acknowledgement that the process of reform and transformation had a momentum and legitimacy of its own. But the military missed the deadline for submission set by the Review Commission. With the absence of good lines of

communication, Professor Ghai wanted to press on with the drafting. I was then part of a small mediation intervention along with Koila Costello, the Director of a national NGO, the Pacific Centre for Peacebuilding. Costello had trained at Eastern Mennonite University, and had her own social and cultural links with the military as her NGO had been working on a social welfare and counselling programme for military families. It is important to reiterate the point that as centrally significant as it was, the Constitutional Review Commission was not the only organisation or intervention working for a transformation of the crisis in Fiji. There were many less high-profile CSOs and NGOs working on rights, democracy, public education and reconciliation, and social development.

“We’ve got sushi!”

But back to the narrative: at this time of high drama and high stress, and with support within the Commission, I appealed to Professor Ghai to meet with the PM to resolve the issue of the military’s submission. He agreed with a high degree of reluctance, having felt that he had been deeply disrespected by both the Attorney General and the PM. Costello and I went into a meeting with the PM’s Permanent Secretary (PS), who heard our appeal for dialogue. He made it clear that the relations were broken, and that no meeting would be possible. It seemed we were at an absolute impasse, and, with so much work done, and so much seemingly at stake, we all felt exhausted and crestfallen. Costello, in her wisdom, had suggested earlier that we buy and bring a sushi lunch to be shared with the Permanent Secretary. She acknowledged the PS’s efforts, but suggested that we have lunch together. In Fijian Methodist tradition, a prayer was said before lunch was shared, which gave Costello the opportunity to reflect on what was at stake for the people of Fiji with the constitutional review process, especially those most vulnerable. Her remarks were well made and moving. The PS, who was personally very committed to the review process, was clearly moved and announced that he would make sure the PM met with the Chair to have the opportunity to iron out their differences of opinion.

The PM and the Chair later spoke, and while there were many reasons and dynamics that kept the process moving forward to its ultimately unsuccessful outcome, this small intervention brought home to me that paying attention to relationships and communications are *sine qua non* for the successful outcome of a constitution making process. Perhaps, if more attention could have been paid to resourcing and putting forward these intermediary roles, things might have turned out differently. It certainly seems that sometimes, even third parties benefit from having third parties. Perhaps all transition processes can do with ‘Friends of the Process’?

International interventions have come and gone. Fijian third parties, peacebuilders, facilitators and rights activists (first and second generation) continue to pursue their interventions. But just to be clear, the fabric of Fiji’s social cohesion has been torn and tattered by this series of coups. The divisions between communities were mirrored in Fiji’s communal politics and in its indigenous and religious institutions, but in a much smaller way in its NGOs. While there were and continue to be important platforms and coalitions, the effectiveness of pro-democracy and pro-equality groups was not so much in the ways in which they collaborated with one another but perhaps more in how they worked in their own ways with their own constituencies but with a coherent and largely shared agenda. This and a propensity within Fijian societies to ultimately tolerate one another’s diversity meant that the collective and successive interventions have had collective, cumulative and whole-of-system impacts. Fiji, knock on wood, over the decades, seems to have come out of its cycle of coups and has returned to parliamentary democracy with an active and independent media and civil society.

Learning by doing in the Somali region of Ethiopia

The Fiji story is a brief view into how an intervening third party needs to pay attention to relationships and be supported in doing so. But what about process considerations for the successful participation of the challenging conflict party in processes relevant to constitutional reform? For most governmental and multilateral actors, their point of entry into a constitution making process will be in support of the ‘legitimate’ and recognised government. Of course, in contexts of an absence of an authority with the monopoly over state authority and power, things may be more complicated for the official actors, but their roles will still have to be at least tolerated by the dominant power(s). Part of the privilege of state authority is access to international resources and international expertise. As made clear above, I have spent my career working in the non-governmental space. Working in support of local CSO groups has its own challenges and opportunities, as does working in support of international third parties. I would like to offer a reflection and an experience from working with a non-state armed actor in a different part of the world.

A provisional peace agreement was very recently reached between the Federal Government of Ethiopia (represented by a high-ranking member of the military) and the Ogaden National Liberation Front (ONLF). The ONLF have been engaged in a low-level armed conflict since 1984, when the then national government objected to holding a referendum on the secession and arrested the leaders of the state government. Ethiopia of course has one of the few constitutions in the world with a provision for autonomy up to and including independence. The conflict parties have been preparing for these negotiations for a number of years. Both parties were supported by a group of Kenyan Somali statesmen endorsed by the government, and they in turn, along with the ONLF were provided training and technical advice from Conciliation resources.

Early on in the process, the Federal Government made a pre-condition to any talks process that the ONLF should clearly accept the legal authority of the 1987 Constitution of Ethiopia. The ONLF doctrine was founded on the premise that the Somali population never consented to being part of the Ethiopian state. They had taken up arms to defend this right of choice, and the parties that had governed Ethiopia had failed to uphold the letter of both federal and state constitutional law. The ONLF were at first unsure whether accepting the constitutional order would involve a de facto renunciation of their cause. International experts, including former members of other self-determination movements elsewhere, took part in workshops with their negotiating team offering comparative insights on how they had overcome a similar dilemma. Language (in Somali and English) was carefully crafted that appeared to satisfy the concerns of all members of the negotiating team and the wider executive committee.

This was not a simple pedagogical knowledge-transfer process. It required serious attention paid to trust-building, showing due deference to the sensitivities present and the sense of sacrifices made. It was also a process of learning for all concerned. The key turning point for the ONLF leadership was not when they agreed to sign off on the key sentence as agreed and written on a flip chart and distributed. Participants said they only felt that they had really made the compromise of holding onto their rights to self-determination while acknowledging the realities of the current putative constitutional order when, in workshop format, they each rehearsed presenting and explaining the position in their own words and in Somali. It was only in speaking the key words aloud that the shift or clarification of the movement's position became real. Though perhaps a small moment, it illustrates the constant risk of a gap between the written language of compromise and concession, and the first steps of real commitment. Third parties can pay attention to these, helping the stakeholders to consolidate their difficult transitions and find creative ways to bridge them.

Advice and guidance on ‘process design’ in constitution making processes

When constitution making is conflict resolution

While not all constitutions are written in response to crises and conflict, those that are, whether they follow a peace agreement or represent that formalised political settlement, clearly constitute a formal (‘Track I’) conflict resolution process. It is therefore a missed opportunity, when deploying teams of people to support and lead such processes, that the skills of peacebuilding, facilitation, dialogue and mediation are not valued as highly as the skills of comparative constitutional law. When facing the prospects of a difficult birth, one might want both a qualified midwife as well an obstetrician-gynaecologist – both have their roles to play and their skills to bring to bear amongst many others. So where are the experienced peacebuilders in constitution making processes? Perhaps this is particularly a challenge in processes where internationals ‘help’ constitution making, often cautious of overstepping in the sovereignty of a process? In South Africa, for example, the constitutional review process was clearly understood to be a political negotiation, and considerable (local) negotiation and peacemaking skills were brought to it.

The profiles and experience of most of the world’s leading comparative constitutional lawyers, including those who have authored important policy-informing papers and books, confound any assumption that international constitutional experts do not understand peace processes and the peacebuilding sector. The simple answer is that some do, and some do not, to different degrees. Even those with extensive political experience have been known to show a lack of understanding of process considerations that has led to dramatic political failures. The reverse is also true. Mediators and other professionals in the peacebuilding sector sometimes poorly understand the demands of a constitutional process. Increasingly, we see many leading experts with a breadth of crossover and hybrid skills and experiences. Many professionals working in the mediation and mediation support space (including with the UN’s mediation standby team) have a constitutional law background and bring all their talents to bear. But of course there are differences between the training, priorities and approaches that can result in blind spots that create tensions to be managed. While I would argue that mediation, facilitation and peacebuilding skills could only enhance the capabilities of a constitution making expert, perhaps a peacebuilding professional needs to possess only a basic level of constitutional literacy and more important, know when ‘expertise’ is needed.

Again, while it is useful if the leader of a constitutional review or reform process has strong mediation skills, the case is not only about the importance of having even more expert polymaths but about valuing the skillsets and experiences from peacebuilding, negotiation and mediation in the process support team.

In most contemporary constitution making processes that occur after conflict, national actors draw on comparative materials. For those looking to learn from experts, there is no shortage of research and comparative experience on constitutional review processes, many of them deeply insightful and well prepared.⁷ Guidance has been written and developed by practitioners with not only deep and substantive expertise in constitutional law, but also with extensive first-hand experience at the heart of navigating these processes. Despite this, some of the material advice fails to capture the multi-layered, interdependent and diverse nature of constitution making processes and actors.

Those seeking to translate research on constitution making processes into guidance for future practitioners and policy makers naturally tend to come from the supply side of knowledge sharing, and, as such, need to consider how to frame the issues so that their audiences can make best use of it. There is also the recurring problem of thinking of peace processes as single, integrated processes (whereas they are not). Even the framing of this enquiry into process consideration as one of process *design*, unintentionally (perhaps), suggests the possibility of having a shared vision for such a process for the diverse set of actors (which too rarely happens) whereby all initiatives can somehow inter-articulate and can successfully lead to a new formalised constitutional settlement.

Recommended reading

Of course, processes can be conceptualised and usefully diagrammed. A good example of this is the summary of the ‘mediation process design’ in the brilliant ‘Basics of Mediation’, in the Peace Mediation Germany’s Fact Sheet series. The relevance of this policy guidance and the short illustration for constitution making processes is clear, and it usefully goes beyond a long list of concepts and case studies and brings its insights into a form that maps out the likely aspects of a planned process.

Guidance, tools and approaches are clearly useful for the spectrum of roles and projects that may (or may not) directly or indirectly contribute to constitution making (c.f. Berghof Foundation’s National Dialogue Handbook). Though these are often initiative- or function-focused, they do not necessarily promote a mechanistic metaphor for constitutional change. This particular handbook, highlighting the complexity of the peacebuilding responses, avoids supercharging expectations from formal leadership role-holders.

“Constitution Making and Reform: Options for the Process” by Brandt, Cottrell, Ghai and Regan is probably the most comprehensive published resource on what the authors call “participatory constitution making”. It is a tour-de-force by a group of the world’s leading experts and deserves to be closely read for the way it sets out the sheer scale and complexity of what is or could be involved in a constitution making process. It is full of truly practical insights. Particularly useful are the summaries of key issues that need to be considered when planning initiatives, and strategy challenges at the various stages of the process.

7 Some of the best resources include the following:

- Horowitz, D. (2000). Constitutional Design: An Oxymoron? *Nomos*, 42, 253-284
- Federal Foreign Office and Peace Mediation Germany. Fact Sheet: Basics of Mediation: Concepts and Definitions (2017) page 4
- UN Department of Foreign Affairs Guidance on Gender and Inclusive Mediation Strategies (2017) part IV
- Swisspeace. Mediation Process Matrix
- Berghof Foundation. National Dialogue Handbook: A Guide for Practitioners (2017) Chapter 3
- USIP. Democratic Constitution Making page 4
- Interpeace. Constitution making and Reform: Options for the Process
- Yash Ghai. “Chimera of Constitutionalism”

The authors consistently address the perspectives of three different types of readers:

- Power-holders and their counterpart power-contesters (incumbent, elite and belligerent),
- Those with a significant stake in the outcome but little power to determine it (challengers, excluded, underrepresented and marginalised groups), and
- External (governments, multilaterals and NGOs) with their own interests to support parties, the process and/or its outcomes.

Of course, these readerships contain plenty of contested diversity. Different policy actors will see the implications of and priorities for process considerations differently. Constitutional lawyers, diplomats, peace-builders, human rights promoters, security and development and commercial actors all bring with them their competencies and their interests and their ways of seeing and modelling. The tensions between these different ‘good process projects’ cannot be eliminated but must be managed.

It is perhaps unfair to single out areas still under-developed in a 400+ page document but these point to an agenda that requires further research and articulation. Despite the volume’s attention to questions of structure, planning and even costs, the specific needs and functions of the multiple bureaucrats and workers (state and non-state) enabling these processes is under-recognised and their skills and roles perhaps undervalued. There are passing references to public servants and to ‘secretariat’ infrastructures, but what they do, how they work and what they require to play their part successfully in these processes remains something of a black box.

Beyond this under-estimation of the importance of paying attention to requisite bureaucracies is the larger challenge of connecting with the people. Despite the author’s emphasis on the importance of participation, the approach to constitution making is still too static. The under-explored challenge is how to build connection and maintain good relations between the formal process and the multiple (local, national, regional and international) related processes around it. In producing future guidance for realising the potentials of these multiple initiatives, it may be useful to flag some of the factors required for these kind of short-term or even ‘pop-up’ infrastructures of support.

The authors recognise the multiplicity of actors and interests in what can at times feel like a ‘crowded field’ of constitution making. Given the multiple examples of failed reform process more lessons from these apparent failures are needed. These include the importance of paying attention to not just solving problems and resolving disputes but to the challenges of (360 degree) engagement across the complex context of actors, and the importance of paying attention to relationships, and containing the anxieties that are part of any such process.

There are also the questions of when and whether the case studies of reform processes were working, and what could be considered requisite scale (and how is that understood and recognised). Perhaps a more challenging question is whether these constitution making initiatives were designed and pursued in a way that enabled cumulative and systemic change across the context? The volume also leaves under-explored the challenges of ego for those in leadership roles and the attendant risks. Various sections of the volume highlight multiple vulnerabilities in processes and strategies, but perhaps more documentation and research needs to be done on how the essential capabilities in the very different but complementary domains can be strong enough to add up to change.

Concluding Reflections

A recurrent theme in this reflection is the importance of seeing process considerations not as an exercise in the design of a process and grand strategy whereby all initiatives can somehow inter-articulate and can lead to a new formalised constitutional settlement. Instead, effective practice is about paying attention to the whole of the complex system, how you deliberately navigate within that and the importance of paying attention to the right relationships and the requisite support that will be required to operate at scale.

Constitution making processes are the result of a multiplicity of roles and interventions and will be followed by more. With developments around the world in peacebuilding, it is no longer the case that those with a deep and substantive expertise in constitution law do not also have an understanding of navigating these processes and the peacebuilding skills of facilitation and mediation. But the incentives and default diplomatic practices still tend to aspire to a chair or a mediator with the authority, power and capability to manage a process. They are still confounded by unmanageable complexity where there is a system of actors, all of whom have a stake in the processes and their outcomes.

As said above, different policy actors will see the implications of and priorities for process considerations differently. Constitutional lawyers, diplomats, peace-builders, human rights promoters, security and development and commercial actors all bring with them their competencies and their interests and their ways of seeing and modelling. The tensions between these different 'good process projects' cannot be eliminated but must be managed.

Appreciating process considerations means appreciating the specific needs and functions of the multiple bureaucrats and workers (state and non-state) enabling these processes, and their undervalued skills, roles and needs. This means local organisations, UN agencies and NGOs. In contexts following a coup or an attempted coup and other forms of emergency law, public servants can continue to play vital and instrumental roles. But civil servants are challenged working in these contexts, and while they may be used to working with multilateral organisations, they tend to have far less experience of working with CSOs and INGOs. Their work in contexts of emergency and conflict is fraught with insecurity and personal and institutional trauma. For many, coping with these challenges can result in a culture of risk aversion that can get in the way of adaptive and effective practice. Of course, while public servants remain accountable to the powers that be, they do not live segregated from society nor are they immune or unaware of the consequences of crises and conflict. There is a risk of underestimating the importance and the needs of process infrastructures and all those who staff them.

Finally, in constitution making there is never a last chance and one comprehensive political settlement. We must guard against forgetting. Our mistakes and success provide opportunities to change and experiment with new means of designing and managing more effective processes.



Berghof Foundation

Operations gGmbH

Lindenstraße 34
10969 Berlin
Germany

www.berghof-foundation.org
info@berghof-foundation.org
[Twitter@BerghofFnd](https://twitter.com/BerghofFnd)
[Facebook/BerghofFoundation](https://facebook.com/BerghofFoundation)