

Advice on Applying Mediation Fundamentals in UN Constitutional Assistance



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Advice on Applying Mediation Fundamentals in UN Constitutional Assistance

Sumit Bisarya¹
November 2022

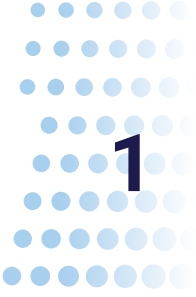
¹ Sumit Bisarya heads International IDEA's Constitution-Building Programme. He worked at the Department for Political and Peacebuilding Affairs (DPPA) as senior constitutions adviser in 2020–2021. The views expressed in this paper are his alone and do not necessarily reflect the positions of DPPA or any other UN entity.



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1 Introduction

Constitution making is often a central element of conflict transformation and democratization processes. The United Nations (UN) emphasizes the importance of national ownership of constitution making. At the same time, the United Nations is frequently called upon to provide related assistance to national stakeholders, including advice on the process by which a constitution is drafted and on the design of constitutional text.

This paper captures key lessons learned in my two-year secondment to the Department of Political and Peacebuilding Affairs (DPPA) Policy and Mediation Division, Mediation Support Unit, during which I supported constitution-making processes and provided advice on handling constitutional issues. It also reflects my broader understanding of this field, based on more than a decade of experience providing constitutional assistance outside the UN.

The Secretary-General's Guidance Note on UN Constitutional Assistance provides overarching principles regarding the UN's role in constitution making.² Since it targets all UN actors at a strategic level, however, there is need for more granularity on the actual delivery of constitution-making assistance in mediation settings. For example, additional, practical guidance is needed to respond to the following questions: Under what circumstances and how should the UN provide support? What kind of profile, expertise and skills are needed? What kind of assessment is necessary to understand the context before providing advice? How can the provision of external advice be balanced with respect for national ownership of the process?

The answers to these questions depend on the context. To help advisers arrive at them, this paper identifies key issues that require consideration before and during constitutional assistance work.

Constitution-making processes have an “obvious link” to peace processes, notably because constitutional issues – such as access to public power and resources, autonomy for ethnic groups and the struggle against authoritarian rule – are often root causes of conflict.³ As a result, constitutional issues tend to surface during peace negotiations, such that constitutional assistance has become an increasingly important part of conflict mediation. Transitional political arrangements, which are frequently negotiated as part of peace agreements, are themselves constitutional in nature since they delineate governing institutions and have significant implications for the process and content of any new constitutional order.

Given the relevance of constitutional assistance to mediation settings, this paper explores how the core principles of mediation – namely the eight “fundamentals” identified in the United Nations Guidance for Effective Mediation – apply to constitution making.⁴ Sections 3–10 offer advice and further reading on each of the fundamentals: preparedness

- consent
- impartiality
- inclusivity
- national ownership
- international law and normative frameworks

² Guidance Note of the Secretary-General on UN Constitutional Assistance, 2020, <https://peacemaker.un.org/node/3553>.

³ Berghof Foundation and DPPA, *Constitutions and Peace Processes: A Primer* (Berlin: Berghof Foundation, 2020), https://peacemaker.un.org/sites/peacemaker.un.org/files/2021_ConstitutionsPeaceProcessesPrimer_EN.pdf.

⁴ United Nations Guidance for Effective Mediation, 2012, <https://peacemaker.un.org/guidance-effective-mediation>.

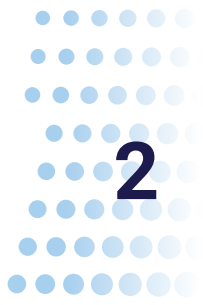
- coherence, coordination and complementarity of the mediation effort
- quality peace agreements.

Much depends on the goals, actions and political will of the stakeholders – both those at the table in constitutional negotiations and the broader public. The actors involved inevitably make their own decisions and may not always follow advice, regardless of its merits. Nevertheless, providing advice to constitution-making processes is a heavy

responsibility, not least because constitutional reform can constitute a critical moment in a country's history, particularly if it helps to bring about an end to violent conflict or a sustainable foundation for peace, stability and democratic governance. By paying due regard to the fundamentals, advisers can minimize the potential for error and help ensure national actors are proceeding based on the best information available.

FURTHER READING AND RESOURCES

- Constitutions and Peace Processes: A Primer (Berghof Foundation and DPPA, 2020)
- Guidance Note of the Secretary-General on United Nations Constitutional Assistance, United Nations, 2020
- UNDP Guidance Note on Constitutional-Making Support, United Nations Development Programme, 2014
- United Nations Guidance for Effective Mediation, United Nations, 2012



2 On constitution-making assistance and mediation

This paper takes the Secretary-General's Guidance Note on UN Constitutional Assistance as a point of departure. The Guidance Note covers all kinds of contexts and all forms of support at the strategic level, encompassing a wide variety of situations.

This paper complements that approach by focusing on technical constitutional assistance in mediation settings. Such assistance may involve the provision of expertise on the process of constitution making, on the design of constitutional text or in the mediation of elements of peace agreements that touch on constitutional issues.

As noted above, the paper uses the fundamentals of effective mediation as a frame. It also references – and builds on – the Guiding Note's six principles and strategies:

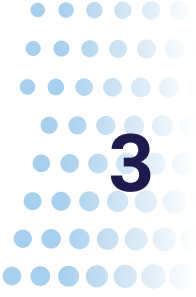
1. Foster peacebuilding and sustainable human development
2. Ensure national ownership and reflect local context
3. Promote international norms and standards
4. Support inclusivity, participation and transparency

5. Mobilize and convene a wide range of expertise

6. Promote effective implementation.

This paper seeks to flesh out, and fill some gaps between, these principles. In some settings, tensions may arise between certain principles, such as between ensuring national ownership and promoting international norms. This paper proposes considerations that can help to resolve this type of tension during the provision of constitutional assistance.

The advice presented in this paper is principally aimed at individuals involved in providing constitutional assistance, whether as part of UN special political missions or peacekeeping operations, as resident coordinators or peace and development advisers, or indeed as representatives of the UN's peace and security pillar in contexts where assistance to constitution making is on the agenda. At the same time, it is also relevant for personnel of regional and subregional organizations, international non-governmental organizations and national entities who are engaged in mediation work on constitutional issues.



3 Preparedness

On the personnel required to provide constitutional assistance; the profiles of constitutional advisers or a constitutional assistance team; and the preparations and assessments of context before assistance begins.

Constitution-making processes are complex and can have consequences that are long-lasting and difficult to reverse. The UN thus places a premium on ensuring it has the highest quality of personnel with the right profiles to provide quality constitutional assistance. Advisers who prepare thoroughly are most likely to provide inputs appropriate to the context while ensuring that their advice does no harm.

A preliminary question is when to think about constitutional assistance. A general answer is as early as possible, but certainly at the stage when transitional political arrangements are being considered as part of a peace agreement. Expert constitutional advice is not sought frequently enough during this phase of peace negotiations, as it often precedes the “formal” constitution-making process. In practice, however, these arrangements have a great impact on the constitution-making process and on any constitutional settlements. Moreover, they are usually negotiated at a point when quality UN input could make a significant difference.

Qualifications

In terms of personnel and profile, it is helpful to bear a few considerations in mind. First, it is not enough to select “a lawyer”. Lawyers rarely, if ever, study or practice constitution making or why certain constitutional design choices are made, yet advisers require precisely these areas of knowledge to provide useful input. A legal background may be relevant but not as valuable as an understanding of constitutional design and constitution-making processes, preferably based on extensive experience in constitution making – either as a participant or as an adviser – in multiple relevant contexts.

Second, “soft skills” are as important as knowledge. These skills include the ability to build close relationships of trust with national actors, humility regarding one’s own capacity to advise, sensitivity to political complexities, a strong sense of responsibility with respect to providing constitutional advice, and the willingness to seek additional expertise and opinions when appropriate.

A third qualification is familiarity with the local context (including political history, legal system, politically-salient demographics, conflict drivers and regional dynamics). Such familiarity may stem from prior experience in the country or areas with a of similar context. If an adviser’s familiarity is weak, thorough assessments take on additional importance (see below).

A fourth consideration is language. Much of an adviser's work consists of reading texts, clarifying complex constitutional concepts, conducting presentations in workshop settings and writing memorandums. The more this work can be done without translation or interpretation, the better, as much nuance can be lost in translation. Those who are fluent in the local language can also more easily immerse themselves in the daily news and events linked to the constitutional process, resulting in a deeper understanding of the context.

A final qualification is impartiality – both real and perceived (see Section 5). Those fluent in the language of only one party may be perceived as closer to that side of a conflict, for example. In such situations, a support team may be necessary to provide the required balance.

Few if any individuals meet all these criteria. It may thus be necessary to build a constitutional support team or to ensure the principal adviser has access to additional experts and resources.

Assessment process

Not unlike physicians, who examine their patients' history before offering medical advice, it is advisable also for constitutional advisers to prepare by thoroughly assessing relevant constitutional history. It is inaccurate to speak of a single assessment; what is required is an assessment process that continues throughout the period of constitutional assistance.

The following list can help constitutional advisers structure their preparatory work, although the precise ground to be covered – and the exact questions to pose – vary across contexts:

- **A study of current and recent constitutions.** While national stakeholders already have a “constitutional memory” of past and current constitutional arrangements, external

advisers usually need to familiarize themselves with those texts and their operation. In practice, successive constitutions tend to be characterized by a high degree of “stickiness”, meaning that much of an existing or previous constitution is likely to be maintained in an emerging one. It is not unusual for individuals engaged in constitutional negotiations to hark back to previous constitutions or even call for their restoration. In the ongoing peace processes in both Libya and Syria, some constitutional negotiators have referred to constitutions of the 1950s. A high level of familiarity with previous and extant constitutional arrangements allows advisers to speak the same “constitutional language” as national actors.

- **The operation of constitutions in practice.** Beyond the text, it is important to also understand the key elements of past constitutional experiences. What conventions or important court decisions have been issued? If the constitution has been ignored or manipulated, are there arrangements that might mitigate such practice under a new constitutional dispensation? Which elements of previous constitutions have led to particularly problematic outcomes?
- **Previous constitution-making processes.** Prior experiences with constitutional change typically inform the choices regarding the design of new constitution-making processes. In Libya, for example, the regionally based composition of the Constitution Drafting Assembly established in 2014 recalled the 1950 Constituent Assembly. In Indonesia, previous tumultuous experience with wholesale constitutional change influenced the decision to set about constitutional reform in incremental steps between 1998 and 2002.
- **The political and electoral landscape.** The operation of a constitution depends a great deal on a country's political landscape. Understanding how constitutional arrangements have worked in practice requires asking a series of questions such as: What have

been the electoral results under the current constitution? What has been the level of government stability? How do political parties behave and what drives citizens to vote for a certain party or candidate?

- **Political analysis of the constitutional moment.** What is driving the calls for constitutional change? How is the constitutional process linked to the overall political or conflict-to-peace transition? What are the contentious issues whose resolution is paramount to the overall political settlement? Which parties or groups are likely to be involved in the constitutional negotiations, what are their interests in terms of constitutional change and what is the balance of power or representation among them? Which groups are not directly involved in the mainstream constitution-making or mediation process, what are their interests and to what extent can they influence the process?
- **The governing framework for constitutional change.** The framework may include amendment provisions of the existing constitution, arrangements on constitution making in a peace or political agreement, and a particular law or decree on constitution making.

In short, constitutions are largely shaped by historical experience, the immediate dynamics of politics and power and the current governing legal framework. Advisers who develop a good understanding of these areas will provide better advice. While time is generally a constraint, advisers are encouraged to undertake desk reviews as well as in-depth discussions with a diverse selection of national and external actors who have a deep knowledge of the context.

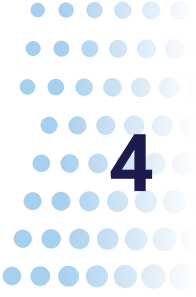
Lastly, an oft-missed aspect of preparation and assessment is consideration of what happens if the constitution-making process stalls or collapses. In recent years, parties in numerous fragile and conflict-affected states have been unable to arrive at a constitutional settlement, for various reasons. Such stalemates can trigger a recurrence of conflict, while also presenting challenges for moving out of the transitional period, for which elections based on a new constitution are often the exit door. Advisers can usefully conduct scenario planning for the possibility that a constitution-making process fails to reach its objectives.

ADVICE ON PREPAREDNESS

- Engage with constitutional expertise at an early stage, in particular if transitional political arrangements are being discussed.
- Take the time required to find the right people to provide constitutional assistance.
- No single adviser is likely to meet all the ideal requirements. Consider using a constitutional assistance team or providing for additional resource persons to support a main adviser.
- Engage in a thorough assessment process – one that encompasses constitutional history as well as current political and conflict dynamics – to provide more informed advice.
- Carry out a risk assessment regarding ways in which the constitution-making process might retrigger conflict. Conduct scenario planning for the possibility that the constitution-making process stalls or collapses.

FURTHER READING AND RESOURCES

- On constitutions and peace processes generally: *Constitutions and Peace Processes: A Primer* (Berghof Foundation and DPPA, 2020)
- For information about constitutional assistance provided by DPPA: Mediation Support Unit and Constitutional Assistance
- For a step-by-step guide to different elements of a constitution-making process in post-conflict contexts: Michele Brandt et al., *Constitution-making and Reform: Options for the Process* (Interpeace, 2011)
- On assessing previous and current constitutions: *Assessing the Performance of the South African Constitution* (International IDEA, 2016, pp. 17–25)
- On the importance of context: Sumit Bisarya, “Unpacking context: what exactly do we mean by context-driven constitutional assistance”, *UN Constitutional Newsletter*, Iss. 5, Summer 2016, pp. 5–6
- To see, compare and download current constitutional texts: The Constitute Project
- To request historical constitutional texts, contact the Comparative Constitutions Project
- For sample terms of reference for a senior constitutional adviser post, contact the Senior Mediation Adviser for Constitution Making at DPPA’s Mediation Support Unit
- For additional guidance materials on constitution-making processes and constitutional design: the Constitutions section of [Peacemaker.un.org](https://www.peacemaker.un.org) and [ConstitutionNet](https://www.constitutionnet.org)



4 Consent

On consent as a basis for providing constitutional assistance.

In most cases, constitution-makers embark on a process of constitutional change for the first and last time in their lives. There is no education or training programme for constitution-makers. While many general-knowledge resources are now freely available online, constitution-makers often require additional, bespoke guidance to identify relevant resources and adapt general advice to their own context.

By and large, the UN provides assistance in response to a request. In some situations, the mandate for doing so is sourced in a UN Security Council resolution. In some cases, it may not be entirely clear who represents the sovereign will of a requesting member state. Whatever the case may be, assistance is best provided following the agreement of prospective constitution-making actors and groups. Assistance that is forced on unwilling actors is likely to be rejected outright, while potentially also delegitimizing the UN's political efforts in other areas.

Consent can be partial or incremental, as national authorities may agree to some forms of assistance but not others. By outlining the full panoply of forms of support, advisers can help national actors understand their options. Over time, as trust grows, assistance activities may expand in scope. For example, parties could initially limit UN engagement to convening sessions in a "hands-off" manner; in due course, they may become more open to facilitation, training, advice or other forms of support.

It may also be possible for UN agencies to provide support to their national partners in the context of ongoing programming. UN Women, for instance, works with women constitution makers; similarly, the Office of the UN High Commissioner for Human Rights and the UN Development Programme

collaborate with local civil society actors. Alternatively, UN representatives can explore whether assistance could be provided through other organizations and actors whose role may be more acceptable to national authorities. In this respect, regional organizations are becoming increasingly important actors in constitution-making processes.

In discussing consent for constitutional assistance, UN interlocutors are strongly encouraged to stress that national ownership is a core principle of UN constitutional assistance. National actors tend to have misgivings about external actors' support for constitution-making processes, such that their default position is usually one of caution. Over the past two decades, the nature of UN constitutional assistance has evolved markedly; the UN and the international community more broadly now place far greater emphasis on national ownership, reflecting an understanding that imposing constitutional design choices on national actors is counterproductive. By conveying this point to national authorities in the clearest of terms, constitutional advisers are more likely to foster trust

Two additional questions are related to the concept of consent. First, whose consent is necessary? This question is discussed in the section on national ownership (see Section 7). Second, must the UN always agree to provide constitutional assistance upon request? The discussion on international law and normative frameworks offers some suggestions on this difficult issue (see Section 8).

ADVICE ON CONSENT

- Provide constitutional assistance based on consent; do not impose unsolicited advice.
- When responding to requests for constitutional assistance, always reaffirm the UN's principle of national ownership over constitution making, both in words and in actions that make it clear that national actors are the decision-makers.
- Inform national stakeholders of the range of areas for potential support, bearing in mind that consent is not static and can sometimes be partial or incremental.
- If consent is not forthcoming, consider how the UN can facilitate useful support from other actors within or outside the UN system.

FURTHER READING AND RESOURCES

- On external support generally: Andrew Ladley, "Constitution building after conflict: external support to a sovereign process", International IDEA, 2011
- On the theory of consent in constitution making: Richard Albert, Xenophon Contiades and Alkmene Fotiadou, eds., *The Law and Legitimacy of Imposed Constitutions* (Routledge, 2019)



5 Impartiality

On maintaining impartiality – and the perception of impartiality – among parties and groups in constitution-making processes and on accounting for natural adviser bias in favour of particular constitutional systems and concepts.

Impartiality

In the provision of constitutional assistance, just as in mediation more generally, impartiality – both actual and perceived – is fundamental. It takes two forms. The most important is the constitutional adviser's impartiality with respect to the parties. If one or more parties or groups feel that the adviser is favouring another side, the integrity of the provided assistance may be damaged. Rather than counselling one group or another on how to gain an advantage in negotiations, a UN adviser's role is to maintain impartiality by helping all parties to reach an informed, deliberative and inclusive consensus on a constitutional framework. As with any aspect of a mediation process, this work may involve talking to groups separately. In such cases, advisers can prevent suspicion by ensuring that the assistance process is acceptable to all stakeholders.

Stakeholders also expect advisers to maintain impartiality regarding contentious constitutional issues. Advice is received in a contested political arena, in which articulated positions about such issues can be used as leverage. A case in point involves an international adviser who was not from the UN. A political party that was aiming to change the amendment provision of a constitution asked the adviser whether the constitution in question was "the most difficult in the world to amend". The adviser responded that he thought so. In the next

day's newspapers, the political actor was quoted as saying that "international expert X agrees that the amendment provision is too rigid". As a result, the adviser was no longer perceived as impartial. By exercising caution when expressing positions on contentious issues, advisers can reduce the risk that parties will use statements as political leverage in the public domain.

This is not to say that UN constitutional assistance is neutral. As discussed in the following sections, and in line with the UN Guidance for Effective Mediation, constitutional advisers have an obligation to uphold certain universal values and to make them known to their interlocutors. Further, as per the principles and strategies set out in the Secretary-General's Guidance Note on UN Constitutional Assistance, the UN is committed to promoting inclusivity, for example by facilitating the participation of minorities and other marginalized groups in constitution-making processes (see Section 6). A principle of impartiality would not prevent advisers from seeking to bring additional groups to the negotiating table; however, it could preclude the UN from advocating the interests of particular groups in constitutional negotiations, unless such advocacy is necessary to promote UN norms and values (such as guarantees of non-discrimination or fundamental civil and political rights).

Bias

Related to impartiality is the issue of bias regarding constitutional design. The golden rule of constitutional design is that since no two contexts, and no two constitutions, are the same, each constitution must be tailored to, and emerge from, its unique context. While constitutional ideas do migrate between constitutions, such migration calls for a process of careful deliberation, understanding and adaptation, rather than a blind “copy and paste”. As discussed in Section 7 on national ownership, the role of advisers is not to “push” particular models of constitutional design. Instead, they can highlight

options from other countries’ constitutions for national stakeholders to discuss, think through and perhaps adapt, but not adopt wholesale.

Regardless of how much constitutional advisers refrain from pushing other constitutional systems, they invariably harbour natural, unconscious bias, typically in favour of systems in which they have lived, worked or studied, or with which they are otherwise familiar. Such bias is particularly acute when it comes to differences between civil and common law systems. To counteract unconscious bias and overcome associated confusion, advisers who are active in systems that differ markedly from their own can work with a team and consult peers who understand the system at hand.

ADVICE ON IMPARTIALITY

- Focus on facilitating an informed, deliberative and inclusive consensus among the parties. Avoid advocating for the interests of particular groups, unless doing so is essential to upholding UN norms, such as inclusivity.
- Be extremely cautious when making explicit statements on contentious issues, as parties may use such statements for political leverage and thereby damage confidence in adviser impartiality.
- Avoid advocating particular models of constitutional design in a manner that is blind to the local context.
- Be aware of natural bias regarding particular systems or families of constitutions; seek additional input when working in different contexts.

FURTHER READING AND RESOURCES

- For a collection of essays about international influence on constitution-making: Gregory Shaffer, Tom Ginsburg and Terence C. Halliday, eds., *Constitution-Making and Transnational Legal Order* (Cambridge University Press, 2019)
- For reflections on the dangers of constitutional transfer and “transplants”: Günter Frankenberg, “Constitutional transfer: the IKEA theory revisited”, *International Journal of Constitutional Law*, vol. 8, Iss. 3 (July 2010), pp 563–579



6 Inclusivity

On the importance of inclusivity in a constitution-making process; different forms of inclusion; and the tension between inclusion and consensus.

Whereas peace agreements are signed by conflict parties, constitutions (at least in democracies) are made in the name of the people. A strong argument can therefore be made that the composition of the bodies involved in constitution making should reflect and represent society as a whole. Numerous studies show that more inclusive constitutional settlements lead to more stable and enduring constitutions.

A critical element in many peace processes is the provision of advice on designing the process through which a constitution will be made and potentially amended. Expert constitutional advice is best sought as early as possible, in advance of the formal establishment of a constitution-making body, such as a constituent assembly or constitutional review commission. Determining the composition of such bodies and designing the different institutions and phases of the overall process is fundamental to the legitimacy and overall success of any constitutional transition.



Promoting inclusivity



Principle four of the Secretary-General's Guidance Note on UN Constitutional Assistance provides that the UN should "support inclusivity, participation and transparency". In this context, inclusion refers to "key political and social groups participating directly both in decision-making concerning the design of the constitution-making process and in drafting the constitution".

In practice, UN advisers thus promote both political and social inclusion in the constitution-making process. The former relates to the inclusion of representatives from all sides of the political divide; the latter concerns the participation of social groups that may not be adequately represented in politics, such as women, young people, people with disabilities and ethnic minorities. In all such processes, advancing inclusion requires sensitivity to the context at hand.

Before a constitution-making body can be elected, stakeholders decide on an electoral system to be used. Although such decisions require careful consideration, they are often rushed. With support from colleagues who have expertise in relevant electoral systems and election management, UN advisers can advocate for careful, informed deliberation.

In situations where members are to be appointed – rather than elected – to a constitution-making body, constitutional advisers can support thorough consideration regarding the body's legitimacy, for example by asking relevant questions. Would appointees have the authority to represent their purported constituents and to commit them to any constitutional bargain that emerges from the process? The legitimacy question is particularly difficult in locations where elections have not been held in a long time.

In many contexts, expert commissions conduct consultations and develop a first draft for deliberation by a political body. While it is useful to keep such constitution-making bodies to a manageable size, inclusion considerations – such as gender

balance – can help to ensure that stakeholders perceive both the commission and the draft it develops as legitimate.

Advisers are encouraged to take the risk of exclusion, including self-exclusion, very seriously. Groups that are not included in the constitution-making process can act as spoilers of a potential constitutional bargain, particularly if they have enough numbers and influence. Advisers are well placed to find ways to accommodate such groups without damaging the integrity and objectives of the constitution-making project.

It is also worth bearing in mind that inclusion is not limited to seats at the table. Leadership positions in constitution-making bodies and any smaller committees also require consideration, as do rules for decision-making, including for adopting the final draft constitution. A key challenge in designing the constitution-making process is reaching agreement on rules that encourage inclusive consensus beyond a mere majority and without blocking wider decision-making.

Resolving the tension between inclusion and consensus

There is often a tension between inclusion and consensus, as more inclusion inevitably means more potential veto players. Many constitution-making processes stall or fail because consensus cannot be reached on the final constitution. In this regard, advisers are encouraged to bear the following considerations in mind.

First, it pays to review all available methods for ensuring that the interests of particular social groups are included in the constitution-making process. These methods can take the following forms:

- **“Upstream” constraints** on the constitution-making body include mechanisms for member selection and means for establishing

binding principles, which are negotiated before a constitution-making body is established.

- **“Downstream” constraints** can involve the use of a popular referendum to ratify a constitution.
- In some settings where inclusion in decision-making bodies has remained elusive, processes have conferred an **institutionalized role** on advisory boards or reference groups comprised of civil society or women’s groups, so that they may provide inputs into constitutional negotiations.
- Many constitution-making bodies use targeted **consultations** to hear the views of particular groups.

Second, a common mistake is to think that the constitution-making process must instantly resolve all disputes among political and social groups. If consensus is to be reached, it may be necessary to limit a constitution’s scope:

- It is not uncommon for countries to limit a constitution’s temporal scope. An interim constitution, for example, provides for governance arrangements in a transition and outlines a more inclusive process for making a new constitution. Stakeholders may accept a lower level of inclusion in the process of making an interim constitution, based on the promise of a more inclusive process in the future. Interim constitutional arrangements tend to be “sticky”, however; they are often replicated in the final constitution or last far beyond their original deadline.
- If stakeholders intend to alter a constitution through specific amendments – as opposed to “re-founding” a completely new constitution – then interest in the constitution-making process is likely to be less broad than where the constitution is replaced wholesale, with less need for broad social inclusion. Political inclusion and some form of broader consultation is likely to be necessary in all cases, however.

Third, if an inclusive process leads to deadlock, advisers may utilize any of a number of process mechanisms and drafting techniques to encourage consensus and compromise. For more information on deadlock breaking, see the further reading list below and Section 10 on quality constitutions.

Finally, inclusivity is also a consideration with regards to the scope of assistance, which should reach beyond the constitution-making body or the groups or parties that are formally engaged in constitutional deliberations and negotiations. UN assistance may also encompass stakeholders outside the formal constitution-making forum, such as civil society organizations, including women's groups.

ADVICE ON INCLUSIVITY

- As a first step, examine the context and consider the degree of inclusion needed to support the legitimacy of the process. Consider carefully the tension between inclusivity and consensus, and means to attenuate this tension.
- Using the body of evidence from studies of constitution-making processes, promote an inclusive constitution-making process, explaining its advantages from both a normative and instrumental perspective.
- Think about inclusion in leadership positions and in decision-making rules, not just in terms of seats at the table.
- Broaden UN assistance to include relevant stakeholders beyond the bodies and parties involved in the formal constitution making bodies.

FURTHER READING AND RESOURCES

- On particular issues facing elections and appointments to constitution making bodies: Kimana Zulue-ta-Fülscher and Sumit Bisarya, (S)electing Constitution-Making Bodies in Fragile and Conflict-Affected Settings (International IDEA, 2018)
- For a discussion on the tension between inclusion and consensus: Donald Horowitz, "Inclusion and consensus", in Constitutional Processes and Democratic Government (Yale University Press, 2021, ch. 5)
- On deadlock breaking:
 - Nicholas Haysom and Sujit Choudhry, "Mechanisms for resolving divisive issues in constitutional negotiations", Interpeace, 2010
 - Sumit Bisarya and Thibaut Noel, "Constitutional negotiations: dynamics, deadlocks and solutions", International IDEA, 2021



7 National ownership

On sensitivities concerning national ownership; the framing of advice to promote deliberation, reflection and the expansion of constitutional imagination; and the presentation of comparative approaches.

Underscoring respect for national ownership

Until the mid-twentieth century, it was not unusual for external actors to draft constitutions, either in part or in full. In more recent times, external actors sought to dictate certain constitutional design choices to national actors, for example by insisting on a particular system of government. Nowadays national actors are rightly sensitive to any notion that decisions over their country's constitution should be taken by foreign actors. International advisers are more effective if they are cognizant and respectful of this sensitivity.

Advisers thus do well to stress from the outset that national ownership is a core tenet of constitutional assistance and that they do not seek to infringe on the role of national constitution-makers. They can usefully emphasize that their role is purely advisory or offer to serve only as a sounding board, based entirely on the request of national stakeholders. The need for respect of national ownership cannot be overemphasized, especially with respect to the early stages of an assistance process, when advisers begin to build relationships with stakeholders.

Constitutional advisers are encouraged to exercise particular caution when formulating public announcements regarding assistance, for example on websites or social media posts. Such statements

can create a perception of foreign interference; moreover, spoilers can potentially use them in efforts to delegitimize the constitution-making process. In most cases, announcements are best avoided. If they are inevitable, for example in the context of a press conference by the head of mission, careful and clear wording can serve to highlight the principles of UN constitutional assistance – and especially the UN's respect for national ownership.

Choice architecture

Even when constitutional advisers frame their assistance as advice, they can damage their relationship with national stakeholders by coming across as overly prescriptive. The principal task of an adviser is to help stakeholders identify and think through questions regarding their own constitution. What has worked and what has not? What objectives does constitutional change serve? Encouraging national actors to discuss questions such as those outlined in Section 3 on preparedness can promote reflection and deliberation, while keeping the focus on national ownership.

Under some circumstances, however, constitutional advisers may need to provide input to help stimulate deliberation among stakeholders. Rather than offering opinions based on supposed “best

practice” or models, they can usefully lay out relevant approaches from similar contexts and describe the potential consequences of each. The objective is not to present a simple menu of options to choose from, but instead to encourage stakeholders to reflect on what might work in the context at hand, ideally by prompting them to think “outside the box” and to explore possibilities without being strictly limited by the existing universe of constitutional design practices. Taking such an approach can increase the chances of consensus on contentious issues, notably by increasing the number of options on the table and expanding stakeholders’ “constitutional imagination”, as one UN Special Envoy put it. This approach also allows advisers and national stakeholders to take advantage of their respective expertise. The former may know more about different approaches from other contexts, while the latter have the knowledge and experience to identify what will work best in their context.

Going further, the process of providing and explaining options based on comparative practice is more complex than acting as a neutral database of constitutional provisions from other contexts, however. Thoughtful advising involves presenting relevant options according to a “choice architecture”, based on a thorough assessment of the local context (see Section 3). This involves the careful identification and presentation of options that are in line with international norms and values of the UN; that take into account the political ramifications of each option; and that can be illustrated by thoughtfully-selected country examples which are likely to be well-received by the national stakeholders.

National owners

Lastly on the issue of national ownership is the question of who are the national owners? As an organization of independent states, the UN respects the authority of duly accredited members of Governments to speak for their citizens in interactions with the UN, including when it comes to constitutional assistance. At the same time, Article 25 of the International Covenant on Civil and Political Rights provides for the right to participate in public affairs; through General Comment 25, the Human Rights Committee has interpreted the article as giving citizens the “right to choose the form of their constitution or government”.⁵

In practice, the primary interlocutors for UN constitutional advisers tend to be Governments, political parties, conflict groups and civil society actors. In these interactions, advisers can work to reinforce the idea that popular sovereignty belongs to the people, whose interests as individuals, as groups and as a whole rank foremost in processes of constitution making.

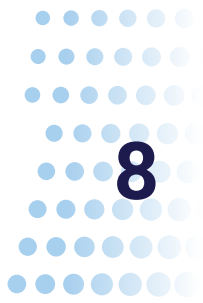
⁵ Human Rights Committee, General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, CCPR/C/21/Rev.1/Add.7, 27 August 1996, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.7&Lang=en.

ADVICE ON NATIONAL OWNERSHIP

- Emphasize the importance of national ownership from the outset. Ensure that all advice is given in a way that acknowledges local actors as the decision-makers.
- Exercise caution in formulating any public announcements regarding constitution-making assistance.
- Avoid being prescriptive when offering advice. Rather, seek to create opportunities to stimulate deliberation on needs and objectives.
- When providing examples of relevant approaches from other contexts, avoid presenting a simple menu of options from which to choose. Consider carefully which examples to discuss, and present them in a manner that is conducive to reflection and deliberation about the context at hand, rather than the adoption of foreign ideas.

FURTHER READING AND RESOURCES

- On national ownership:
 - Michele Brandt et al., *Constitution-making and Reform: Options for the Process* (Interpeace, 2011, especially pp. 10 and 327)
 - Cheryl Saunders, “International Involvement in Constitution Making”, Melbourne Legal Studies Research Paper Series, No. 839 (2019)
- On choice architecture: Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (Yale University Press, 2008)



8 International law and normative frameworks

On the relevance of international law and norms to constitutions; the inclusion of women and participation of citizens in constitution-making processes; and the appropriateness of UN assistance.

Role of international law and norms

While constitutions primarily govern the national level, constitutional advisers do well to consider aspects of international law and norms with respect to the content of a constitution, the process through which a constitution is made and the process of providing assistance.

Firstly, with respect to constitutions themselves, advisers are encouraged to familiarize themselves with the relevant international legal commitments, including international human rights commitments. While there is no obligation for a constitution to stipulate these rights, its language should not weaken them. In some regional contexts (for example, in countries that are members of the Council of Europe or the Economic Community of West African States – certain supranational norms apply to States’ constitutional texts also beyond rights provisions.

Secondly, there are important norms with regard to participation in constitution-making processes, as highlighted in Article 25 of the International Covenant on Civil and Political Rights (see Section 7). The Secretary-General’s Guidance Note on UN Constitutional Assistance states that “ensuring constitutional processes are participatory should

be a main goal of UN constitutional assistance”. International advisers can advance this commitment by making it known to national stakeholders.

Further, advisers can also point to Security Council resolution 1325 (2000) and General Assembly resolution 70/304, which demand that the representation of women be strengthened “at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management and resolution of conflict”. This commitment covers national constitution-making bodies and also applies to UN personnel providing assistance. A narrow reading would limit these obligations to countries emerging from conflict, yet a broader reading would recognize that as constitutions in all contexts have a function of channeling social and political conflict through politics, resolution 1325 applies to all constitution-making processes.

Additional international agreements and norms to bear in mind with reference to inclusivity in constitution making are the Charter of the United Nations, General Assembly resolutions, UN rules and regulations, and the precise wording of relevant Security Council resolutions.

While some form of participation of citizens is a norm, how much public participation there should be, and in what form(s), are questions to be determined based on the context at hand. Local civil

society groups usually press for participation and contribute to the way in which participation is carried out. In addition to highlighting that participation in public affairs is a right in and of itself, advisers can help national actors think carefully about the purposes of public input in order to determine the form and scope of public participation programmes.

Determining the appropriateness of assistance

Under what circumstances is it not appropriate for the UN to provide constitutional assistance?

The Secretary-General's Guidance Note states that "the UN is available to provide assistance in all contexts" but also commits the organization to doing so "in a manner that [...] promotes democratic values and international norms for which the UN stands" (emphasis added). In its summary, the Guidance Note further specifies that "the UN is committed to supporting Member States strengthen legitimate and stable constitutional orders" (emphasis added).

Reconciling these statements may require complex, ad hoc political and normative judgments that factor in elements such as the breadth of national support for UN constitutional assistance and whether such assistance has already been mandated by the

Security Council or General Assembly. To be able to make these potentially difficult decisions on as informed a basis as possible, the UN may need to analyse the risk, benefits and advisability of providing constitutional assistance in a given context, including in relation to UN norms and values, particularly from a gender and human rights perspective.

If the UN considers it appropriate to support a particular process, the next step is to engage with the relevant authorities – including parties and groups in opposition – to understand their vision for the scope and objectives of the constitutional reform and, once agreed, the extent and breadth of political and broader civic support for the proposed design of the process. During these interactions, UN advisers can clarify the parameters for UN assistance – including respect for democratic values and international norms, as set out in the Secretary-General's Guidance Note.

If providing direct constitutional assistance would lend legitimacy or support to constitutional processes that are likely to undermine its values and norms, the UN may not be able to oblige. Communicating this position in response to a direct request for assistance can be difficult. It may be prudent to find other forms of relevant assistance, such as facilitation of political dialogue around constitutional change or support for public awareness campaigns, so long as they do not risk compromising the UN or the values for which it stands.

ADVICE ON INTERNATIONAL LAW AND NORMATIVE FRAMEWORKS

- Be familiar with the relevant international commitments which are relevant for the constitution, including regional agreements.
- With regards to inclusive, participatory processes: refer to the General Comment 25 of the Human Rights Committee, Security Council resolution 1325 and General Assembly resolution 70/304.
- When determining whether and how the United Nations can respond to requests for assistance, consider carefully the extent of broad-based support for (or opposition to) constitutional reform and take time to conduct in-depth initial consultations with relevant stakeholders to better understand their objectives.
- Where the objectives for reform are not aligned with UN norms and values, consider other forms of assistance which may bring about more inclusive, democratic reform – such as facilitating dialogues between political and societal groups.

FURTHER READING AND RESOURCES

- General Comment 25 of the Human Rights Committee can be found [here](#). Security Council resolution 1325 and General Assembly resolution 70/304 can be found [here](#)
- On the participation of women in constitution making: Nanako Tamaru and Marie O'Reilly, *How Women Influence Constitution Making after Conflict and Unrest* (Inclusive Security, 2018)
- On public participation:
 - “Public Consultations: A Constitution-Making Primer”, United Nations, 2014
 - Erin Houlihan and Sumit Bisarya, *Practical Considerations for Public Participation in Constitution-Building: What, When, How and Why?* (International IDEA, 2021)
 - Abrak Saati, *The Participation Myth: Outcomes of Participatory Constitution Building Processes on Democracy* (Umeå University, 2015)
 - Todd A. Eisenstadt and Tofiq Maboudi, “Being There Is Half the Battle: Group Inclusion, Constitution-Writing, and Democracy”, *Comparative Political Studies*, vol. 52, Iss. 13-14 (2019)



9 Coherence, coordination and complementarity of constitutional assistance

On coordination between UN and non-UN actors; the UN's role as convenor and coordinator; partnerships; and the difference between coherence and uniformity.

The increasing number of actors involved in constitutional assistance specifically – and mediation in general – renders coherence, coordination and complementarity of assistance both essential and challenging. These actors provide general assistance in a variety of areas related to constitution making, from the process and the design of a constitution, to related issues or interests, such as human rights, gender equity and agency, security sector reform, the rule of law, minority rights, natural resources, fiscal arrangements and economic development.

Such crowded spaces call for structured efforts at coordination, with the minimum aim of sharing information on each actor's activities, or a more ambitious goal of ensuring a degree of coherence across different efforts. It may be useful to establish a UN coordination group that brings together various UN actors and agencies, such that all can benefit from each other's expertise and promote a "One UN" approach. Similar advantages can be secured by coordination groups that include non-UN actors active in the areas of constitutional assistance. In the context of processes that involve elected constitution-making bodies or a referendum, priorities include early information sharing and coordination between those leading constitutional assistance and UN electoral experts, including advisers in DPPA's Electoral Assistance Division.

The UN as coordinator

In the majority of cases, the most suitable candidate for organizing or chairing such coordination groups are special political missions or peacekeeping operations, particularly if they have a Security Council mandate to provide constitution-making assistance or to support the overall political transition of which the constitutional process is an integral part. The universal membership of the UN also makes it a prime candidate for helping wider coordination efforts with non-UN actors, including international and national providers of constitutional assistance.

However, it is useful to establish mechanisms to prevent a coordination body from taking on a "gatekeeper" function. If allowed to take root, gatekeeping tends to cause frustration and resentment, while denying national stakeholders access to potentially helpful assistance. Strategies for avoiding this risk include selecting a co-chair or having a rotating chair. Establishing terms of reference for the coordination group can also help to manage expectations among members.

The composition of coordination groups depends on their goals and local context. Whether or not national actors – who could include representatives of the constitution-making body, the government

and/or civil society – are included in such coordination groups depends on the context and the objectives of the group.

Once stakeholders agree to a constitution-making process and the relevant groups are established, the UN can encourage the constitution-making body to task one or more of its members with the coordination of external assistance, although doing so does not necessarily eliminate the need for pro-active coordination among outside actors.

Partnerships and timing

As discussed in Section 3 on preparedness, it is unlikely that any individual (or organization) has the requisite expertise, experience and relationships to deliver quality assistance on all aspects of constitution making. Collaboration and partnerships between the UN and other actors can bring added value and fill knowledge gaps. Consultation with regional or subregional organizations is particularly advisable.

Coordination of constitutional assistance is most effective if it begins as early as possible and ideally before the formal constitution body is established.

Very often, stakeholders make consequential decisions – such as on the constitution-making process or parameters for the future constitutional text – during the negotiation of peace agreements or interim political arrangements. Any poor decisions they make during these stages can create challenges for constitution making later on. Thus, it is important that whenever mediation efforts touch upon constitutional issues, mediation actors coordinate and consult with those with constitutional expertise.

Coherence versus uniformity

Coherence of assistance does not mean uniformity. Constitution making is more art than science and it may be the case that reasonable, knowledgeable individuals and organizations disagree over a particular issue. While it would be ideal to avoid conflicting advice, disagreement is sometimes inevitable. At a minimum, coordination efforts can ensure that there is a forum in which to discuss challenges and ideas, that opportunities for partnership and synergies are seized, and that information is shared to avoid duplication of efforts.

ADVICE ON COHERENCE, COORDINATION AND COMPLEMENTARITY OF CONSTITUTIONAL ASSISTANCE

- Consider convening constitutional assistance coordination groups, both within the UN family and with actors from outside.
- Discuss with the constitution-making body whether a focal point for constitution-making assistance can be appointed.
- Seek to prevent constitution-making authorities from perceiving the UN as a gatekeeper.
- Actively look for partnerships and ways in which other organizations can provide added value where the UN cannot, in particular with regional and subregional organizations can be particularly important.

FURTHER READING AND RESOURCES

- For examples of other organizations that commonly provide constitutional assistance, see:
 - International IDEA
 - the Venice Commission (European Commission for Democracy through Law (Venice Commission))
 - Max Planck Foundation for International Peace and the Rule of Law
 - the Public International Law and Policy Group (PILPG)



10 Quality constitutions

On the difficulty of defining “quality” constitutions; on clarity; on levels of detail; and on balancing short- and long-term interests in constitutional design.

Assessing the quality of constitutions

What constitutes a “quality” or “good” constitution is a difficult question to answer. In general terms, a good constitution is one that is likely to provide democratic and accountable government and protect fundamental rights in the country concerned. To what extent a constitution delivers on these goals inevitably comes down to context. In other words, the “quality” of constitutional elements – with the possible exception of bills of rights – is invariably based on their ability to perform a delicate balancing act when applied to the real world.

Consider the objective of constraining power, for example. Democratic constitutions organize public power by delineating the responsibilities of different institutions and establishing checks and balances that prevent any individual or group from wielding too much power. At the same time, however, a constitution should not fragment public decision-making to such a degree as to render governance deadlocked or ineffective.

Similarly, amendment rules are designed to strike a balance between potentially conflicting requirements. By establishing rules for their own amendment, constitutions maintain flexibility to respond to the evolving needs of state and society. At the same time, an amendment rule must be

rigid enough to ensure a degree of stability and to establish a high enough threshold to avoid unilateral change that lacks broad support.

Whether these and other constitutional design choices successfully perform the required balancing acts depends largely on context, including the political landscape, cultural dynamics and historical experience. Given that the sheer variety of factors at play makes it very difficult to assess a constitution, it may be best to avoid categorizations of “good” and “bad” in both general and abstract terms. A more useful approach is to assess the details of the constitutional design and to attempt to assess the degree to which they will enable effective, legitimate and accountable government.

Clarity, length and short-term versus long-term thinking

With respect to the quality of constitutions, three further issues often arise in constitutional assistance when discussing the qualities of constitutions: clarity, length and short-term versus long-term thinking.

The general aim is for constitutions to be drafted with as much precision and clarity as possible, so that confusion – and conflict – over the constitution-makers’ intentions may be minimized. Some issues inevitably remain open to interpretation, however, and constitution-makers may even be intentionally vague in the formulation of a provision

or set of provisions. Such cases arise when two or more parties can agree on a particular issue only if the relevant phrasing is general or ambiguous. An ambiguous provision may enable agreement, while also allowing parties to claim to their respective constituents that their demands have been met. In such a scenario, the exact meaning of the provision tends to be worked out over time, as the courts and legislators respond to evolving dynamics in the country.

Constitution-makers may also grapple with the question of whether to include a certain issue in a constitution or leave it to legislation. There is no one-size-fits-all answer to this question. That said, a clear global trend is that constitutions are increasing in length and are covering an increasing number of issues and in greater detail. In countries that are characterized by a low level of trust between parties, there are often demands from minorities for more issues to be constitutionalized, and for them to be stipulated in great detail, to avoid being left at the mercy of political majorities' laws and policies. In such settings, constitutional consensus may be possible only if the constitution lays out in considerable detail the issues that parties consider contentious. A constitution that is overloaded with too much detail, however, can make reaching consensus more difficult, while also preventing legislatures and courts from adapting constitutional norms to changing circumstances.

Linked to both clarity and length is the balancing of short- and long-term interests. In many situations, elections mark the end of a transition period, but they cannot take place until a new constitutional framework has been established. In such cases – and especially in post-conflict contexts, where a constitutional settlement is critical to the cessation of mass violence – the drive to reach consensus can be overwhelming, both for the parties and for the international community. Constitutional advisers

can usefully underscore the need for constitutions to endure beyond the immediate elections and, potentially, for generations to come.

Relatedly, to the extent that advisers have any agency in influencing this balance, the value of gradual change should not be underestimated. Sometimes, reaching broad and deep consensus on a full constitutional framework may not be possible initially. In such cases, finding sufficient consensus (involving the main parties) or settling for a provisional or interim constitution can keep the momentum of the transition moving forward, and lessen the risk that the transition stalls or reverses.



Managing expectations of constitutional reform



By drawing national actors' attention to the limitations of what constitutions can do, constitutional advisers can help to temper expectations. The past few decades have witnessed a trend of increasing reliance on constitutions – to resolve violent conflict, to bring about national reconciliation, to strengthen good governance, democracy, the rule of law and human rights protections, and to boost socio-economic development. Rarely, if ever, are such expectations met.

Constitutional advisers can highlight that a new or amended constitutional text is not likely to bring about desired change by itself, without significant advances in many other aspects of legal and political life. Constitutional reform may be necessary, but by itself it is rarely sufficient to effect significant and lasting change.

Further, if national actors have yet to decide whether to reform the constitution, advisers can urge them to think carefully about whether constitutional change is the best, or only, way to achieve their objectives.

ADVICE ON QUALITY CONSTITUTIONS

- Avoid speaking about “quality”, “good” and “bad” constitutions in general or abstract terms.
- Focus on institutional detail, rather than on abstract principles. For example, it is more helpful to speak about whether the president has the discretion to dissolve the legislature or the ability to bypass the legislature through unilateral referendums and broad decree powers, than it is to speak generally about a “lack of separation of powers”.
- Encourage nuance in thinking about constitutional design objectives. Clarity or ambiguity, whether to include a particular issue in the constitution or not, how much detail the constitution should provide on a particular issue: none of these objectives has absolute, objective value and all depend on context, often requiring delicate balancing depending on the interests of the parties.
- Be conscious that the impact of constitutional change may be limited and communicate this message to national actors.

FURTHER READING AND RESOURCES

- On the characteristics of democratic constitutions:
 - Elliot Bulmer, “What is a constitution: principles and concepts”, International IDEA, 2014
 - Russell Hardin, “Why a constitution?”, in Denis J. Galligan and Mila Versteeg, eds., *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013, pp. 51–72)
 - Cass Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press, 2001)
- To access an International IDEA series on various aspects of constitutional design, see: *IDEA Constitution-Building Primers*
- On incremental versus wholesale constitutional change: 2017 Melbourne Forum – From Big Bang to Incrementalism: Choices and Challenges in Constitution Building, Melbourne University Law School, n.d.
- On some of the limitations of constitution making as a vehicle for conflict resolution: Christine Bell, “Bargaining on Constitutions: Political Settlements and Constitutional State-building”, *Global Constitutionalism*, vol. 6, Iss. 1 (March 2017), pp. 13–32

