

TOWARDS POSTCOLONIAL, PEOPLE-CENTERED, AND INTERSECTIONAL APPROACHES
Considering Feminist Perspectives on Rule of Law Support

Workshop Series
organized by the RSF Hub
Free University of Berlin & Berlin School of Economics and Law



Postcolonial Perspectives on Constitutional Assistance

Workshop Report (November 2022)

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I. Introduction

On November 14th, 2022, the RSF Hub (Research and Knowledge Transfer Hub for Rule of Law Support) organized a workshop with the title “Postcolonial Perspectives on Constitutional Assistance.” It was part of a workshop series leading to a roundtable event in February 2023 to discuss feminist perspectives on the practice of rule of law support. In order to break down the broad conceptual discussion on the overall definition of feminist foreign policy, the workshop focused on analyzing three central fields of rule of law support from the perspective of distinct principles that have been emphasized by critical research for many years.

With the political will to reconstruct the central paradigm of Germany’s foreign policy with feminist perspectives, the practical debate on policies and methods, has now been expanded even further by the notion of postcolonialism. It is no surprise that postcolonial theory has been marginalized or ignored by stabilization and development aid policies for a long time.¹ External interventions concerned with the consolidation of a state’s political foundation – its constitution – raise particularly pressing questions about colonial continuities, power asymmetries and the overall effectiveness of constitutional assistance. Against this background, the workshop aimed to analyze the field from postcolonial perspectives in order to draw possible lessons for a future practice. To what extent is a decolonizing or postcolonial approach to constitutional assistance possible? Whose interests and expertise are included? How to deal with the collusions of normative ideas?

¹ See Sabaratnam, Meera 2017. *Decolonising intervention: International Statebuilding in Mozambique*. Rowman & Littlefield: London, New York.

The workshop was structured in three parts: In the first segment Alicia Pastor y Camarasa and Joseph Geng Akech gave inputs on constitution-building and foreign constitutional assistance, followed by contributions from Amelia Odida and Mohamed Sesay on decolonial analyses, questions of power and domination. Omar Hamady and Jens Koschel provided insights from the perspectives of the funding and practice of constitutional assistance and Ndubisi Obiorah a concluding reflection. The workshop was organized and moderated by Sarah Biecker and Robert Poll on behalf of the RSF Hub.²

II. Constitution-Building and Constitutional Assistance

Constitution-building processes have become deeply transnational affairs. External assistance is one of the defining markers of constitution-building and reform projects in the twenty-first century.³ Despite its omnipresence, little empirical research exists on the actual impact of external involvement or the procedural design as such on the outcome of constitution-building processes.⁴ How constitutions are made, what works and what does not, remains a black box, as Alicia Pastor y Camarasa highlighted in her input.

What do we know about (international) assistance to constitution-building? External involvement comes in a great variety of actors and roles. Next to international organizations, like the UN or International IDEA, foreign governments, international NGOs, political foundations and even law firms can get involved in constitution-building. Depending on the actor and the stage of a process – whether a drafting process has been initiated or finalized – involvement can range from funding to institutional support, mediation, and the provision of expertise. Especially the latter often takes place through informal channels, which raises fundamental questions regarding the transparency of a process that – at least in theory – is imagined as an autonomous expression of democratic sovereignty.

What legitimizes the interference of foreign actors in a matter that could arguably not be more internal for a self-determined state? Alicia Pastor y Camarasa pointed out that it is the external advisor's vision of what constitutions are ought to be. While foreign expertise, in most cases, presents and reflects itself in terms of non-political or neutral support, it is highly depended on the background of the involved expert or the mission they are embedded in. As most constitutional assistance is provided by actors located in the global north, liberal constitutionalism – understood as condition for democracy and political stability – regularly serves as the general baseline of external advice that is shaped depending on the foreign expert's individual background.

In the case of rule of law support funded by the German Federal Foreign Office, it is indeed the stabilization paradigm that guides its policies, but also, as Jens Koschel underlined, a

² We thank all workshop participants for an open und inspiring exchange and Lea Hensch and Katharina von Busch for assisting with the organization of the workshop and the writing of this report.

³ See Saunders, Cheryl 2012. Constitution-making in the 21st century. *International Review of Law* 4: 1-10 (3).

⁴ See Ginsburg, Tom, Zachary Elkins, and Justin Blount 2009. Does the process of constitution-making matter? *Annual Review of Law and Social Science* 5: 201-223 (210).

dedication to contextual, people-centered approaches that seeks to avoid the simple export of legal concepts. In addition, Ndubisi Obiorah highlighted that the United Nations, as the dominant international actor in constitutional assistance has steadily increased the representation of local and regional expertise in its projects.

However, drawing on the experience from South Sudan, Joseph Geng Akech described international constitutional assistance as a specialized field pursuing to export “standards of civilization,”⁵ including a free market, good governance, and rule of law. While international involvement in South Sudan supported the drafting of a robust bill of rights, the failure to design corresponding institutional structures to enforce those rights and the lack of their harmonization with local values and customs resulted in a normatively detached constitution with a strong executive bias.

III. Critical Policy Analysis

Although most constitutions fail,⁶ they have become markers of statehood and governance. From a historical point of view, societies managed to govern themselves long before the first constitution was written. So why do we understand the concept of (western) constitutions as essential for democratic development, peace, and security?

In her presentation, Amelia Odida introduced critical policy analysis as a way to rethink the narrative underlying international constitutional assistance. Following the ‘What is the problem represented to be’ (WPR) approach of Carol Bacchi,⁷ Amelia Odida highlighted the deep historical entrenchment of constitutional assistance in western assumptions of epistemic superiority and imperial control. Analyzing some of the first cases of UN constitutional assistance, the former Italian colonies Libya, Eritrea, and Somaliland, illustrates, how western constitutional ideas created the landscapes of still on-going contemporary conflicts.⁸ One example is the understanding that constitutions had to incorporate an official language – a highly divisive endeavor in multilingual societies.

Today’s UN policies see constitutions and especially constitution-making processes almost as a panacea, calling it a “central aspect of conflict prevention, peacebuilding and the promotion of human rights, the rule of law and sustainable human development.”⁹ It is important to acknowledge that this understanding is embedded in a narrative that portrays non-western

⁵ Cf. Zaum, Dominik 2007. *The sovereignty paradox: the norms and politics of international statebuilding*. Oxford University Press: Oxford, at 114.

⁶ See Scheppele, Kim Lane 2008. A constitution between past and future. *William Mary Law Review* 49:1377–1407 (1406).

⁷ As an introduction see e.g., Bacchi, Carol 2012. *Introducing the ‘What’s the Problem Represented to be?’ approach*, in Bletsas & Beasley (eds.): *Engaging with Carol Bacchi: Strategic interventions and exchange*. University of Adelaide Press: Adelaide, 21-24.

⁸ See e.g., Pelt, Adrian Pelt 1970. *The U. N. and Libya - Libyan Independence and the United Nations: a case of planned decolonization*. Yale University Press: New Haven and London.

⁹ See Guidance note of the Secretary-General on United Nations Constitutional Assistance (2020)

societies as fragile with constrained resources and expertise to break away from an undemocratic past and achieve international legitimacy.

While it is important to highlight the underlying narrative it is also vital to analyze how much constitutional assistance has fallen short of its own aspirations. Omar Hamady outlined a systemic lack of (individual and institutional) accountability and transparency in UN constitutional assistance. Cases included corruption among mediators and extensive outsourcing of substantive political work to institutions abroad, undermining the legitimacy, credibility, and perceived competence of the UN.¹⁰

IV. The Project of Decolonialization

In order to formulate a decolonial critique of the status quo of approaches in external constitutional assistance, we need to define the idea of the decolonial. Mohamed Sesay described the process of decolonialization as consisting of a formal and a structural component: the ending of foreign occupation leading to formal independence, as well as the dismantling of structures of domination, imposition and violence. This means that decolonization is a project of radical transformation, “an agenda for total disorder,”¹¹ which leads some scholars to the conclusion that it is “impossible to establish sustainable peace and development (...) until there is a major shift away from the current colonial-style sociopolitical and economic arrangements.”¹²

Mohamed Sesay suggested that while inspiration can also be drawn from ‘Third world approaches to international law’ (TWAIL)¹³, which are problematizing the colonial origins of international law and the underlying politics of domination behind assertions of universality, we must acknowledge that decolonization, the dismantling of structures, is a project that exceeds what can be done with legal tools. In fact, decolonialization cannot and should not be substituted by legal reforms that de-radicalize transformation by introducing technocratic institutional changes within the same system, legitimizing ruling elites and labeling former colonial powers or other external actors as reformers.

Thinking about radical transformation raises the question of what should be strived for (instead). Mohamed Sesay warns to romanticize what is African, as some indigenous systems, e.g., chieftaincy institutions, are themselves products of colonialization. While there is potential for progressive change from within, decolonization should not only problematize the

¹⁰ See Radeep, Ramesh. UN Libya envoy accepts £1,000-a-day job from backer of one side in civil war. *The Guardian*, 4 Nov. 2015. <https://www.theguardian.com/world/2015/nov/04/un-libya-envoy-accepts-1000-a-day-job-from-backer-of-one-side-in-civil-war>.

¹¹ See Fanon, Frantz 1963. *The wretched of the earth*: Translated from the French by Constance Farrington. Grove Press: New York, at 2.

¹² See Yusuf, Hakeem 2018. Colonialism and the Dilemmas of Transitional Justice in Nigeria. *International Journal of Transitional Justice* 12: 257–276 (276).

¹³ As an introduction see e.g., Ramina, Larissa 2018. Framing the Concept of TWAIL: Third World Approaches to International Law. *Revista Justiça do Direito* 32: 5.

relation with the international order but also the continued colonial-like structures within Africa.

V. Decolonizing Constitutional Assistance?

Is it possible to decolonize constitutional assistance and if so, how? While a conclusive answer was missing, some participants of the workshop suggested that there is a transformative role for constitutional assistance to play, as long as it is a supportive role. Actors in constitutional assistance, just like in the wider field of rule of law support, need to reflect their own colonial path dependencies and be aware of the fact that constitutional assistance can also do harm and reinforce structures of domination and violence.

Working towards decoloniality also means destabilizing the truth claims inherent in contemporary discourses of state- and peacebuilding. As Amelia Odida underlined: the problem of the Western assortment of legal or constitutional assistance is not only that it is often embedded in the assertion of epistemic superiority but that it is considered universally applicable and as the only legitimate way. External actors in constitutional assistance, reflecting their own positionality, must therefore also shift their perception towards a 'pluriverse of knowledge' that includes marginalized forms of knowledge or expertise.¹⁴

Furthermore, it is important to understand, as Ndubisi Obiorah highlighted, that constitution-making processes are inherently elitist. In order for external assistance to avoid being instrumentalized or perpetuating colonial power asymmetries, Katrin Seidel stressed that approaches must not only abstain from the simple export of concepts but also from using narratives of rebuilding or restoring a historic status quo. Instead, projects should engage from the starting point of diversity – both in terms of communities and legal orders within a certain context.

VI. Conclusion

The concept of constitutions does not precede the idea of the state or society, yet it has spread all around the world and is regarded as an essential foundation for statehood and governance. That the global success of the concept itself is largely a product of colonial domination does not make it easier to reconcile constitutional assistance with a decolonizing approach.

Critical policy analysis can help to analyze and rebuild the underlying narrative of constitutional assistance. Essential part of such an endeavor is the acknowledgment of the coloniality of both past and present policy practice and the effort to recontextualize position, knowledge, and purpose of international actors in constitutional assistance (positionality).

Another practical step is the incorporation of marginalized knowledge, such as local experts and societal groups and the maximum transparency of the external involvement. Regarding UN constitutional assistance in particular, Omar Hamady urged state actors to turn away from

¹⁴ See e.g., Reiter, Bernd (ed.) 2018. *Constructing the pluriverse: The geopolitics of knowledge*. Duke University Press: Durham.

a discourse that supports the UN in whatever it does, to using their leverage with the UN to improve its performance, regulation, recruitment, accountability, and transparency.

In addition, more research is needed on the actual impact of external involvement and the relevancy of procedural design on the outcome of constitution-making processes, as well as on the long-term impact of short-term rule of law support. Critical scholarship, such as TWAIL or multidisciplinary research on decoloniality and the geopolitics of knowledge should find their way into the academic repertoire of international actors involved in constitutional assistance.

Workshop Contributors

Alicia Pastor y Camarasa, University of Lausanne
Amelia Odida, SOAS University of London
Jens Koschel, German Federal Foreign Office
Joseph Geng Akech, University of Juba
Katrin Seidel, Max Planck Institute for Social Anthropology
Mohamed Sesay, York University
Ndubisi Obiorah, UN Mission in South Sudan
Omar Hamady, United Nations



About RSF Hub

The RSF Hub is a project-based think tank of the Free University of Berlin and the Berlin School of Economics and Law funded by the German Federal Foreign Office that is fostering knowledge transfer between politics, academia, and field practice in the area of rule of law support and related topics. RSF Hub organizes, in collaboration with various partners, expert talks and round tables. Team members teach at universities and train ministry staff, speak at events, contribute to blogs and publish academically. For more information on the Hub's activities see <http://www.fu-berlin.de/rsf-hub>.

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