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978-1-107-06471-3 - Constitution Making During State Building

Joanne Wallis

Excerpt

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Introduction

Since the end of the Cold War, the international community has engaged in a series of state-building operations in new and postconflict states. State building is supposed to help states achieve control over their territories, gain the loyalty of their populations, and build durable, centralized institutions that hold a monopoly over the legitimate use of physical force.¹ Many of these operations have been guided by the “liberal peace,”² which is based on the theory that liberal democratic states are more inclined to respect the rights of their citizens and less likely to go to war with democratic neighbors.³ These operations have consequently aimed at institutionalizing the main tenets of the liberal peace – democratization, the rule of law, human rights, and free-market economies – often via the new constitution.⁴

The results of many liberal peace state-building operations have not been promising, as states have remained weak, or in some cases have lapsed into

¹ The distinction between state building and nation building is addressed in Chapter 1.

² High Level Panel on Threats, Challenges and Change, *Report of the Secretary-General's High Level Panel on Threats, Challenges and Change*, UN Doc. A/59/565, December 1, 2004; ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001).

³ M. Doyle, “Three Pillars of the Liberal Peace,” *American Political Science Review* 99:3 (2005): 463–466.

⁴ O. P. Richmond, “The Problem of Peace: Understanding the ‘Liberal Peace,’” *Conflict, Security & Development* 6:3 (2006): 291–314. Note that Mac Ginty identifies the “risk of overestimating the power and coherence of the liberal peace,” with liberal peace state building “so fraught with contradictions that it is not even consistent in its own support of liberal goals.” R. Mac Ginty, “Hybrid Peace: The Interaction Between Top-Down and Bottom-Up Peace,” *Security Dialogue* 41:4 (2010): 395, 406. Moreover, Chandler questions whether institutionalizing the tenets of the liberal peace is actually the goal of many recent international interventions, and argues that many have instead aimed for “*status quo* aspirations” of stability and security. D. Chandler, “The Uncritical Critique of ‘Liberal Peace,’” *Review of International Studies* 36:1 (2010): 148.

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conflict again. These effects have been most obvious in Afghanistan, Iraq, and parts of Asia, the Balkans, and Africa, where state institutions have struggled to achieve control over, or the loyalty of, their fragmented and divided societies. While liberal democratic institutions evolved gradually in most states that are considered to be consolidated liberal democracies, in new and postconflict states they are frequently delivered before the transition “from feudalism to landlordism and from landlordism to modern democracy”⁵ has occurred. As a result, the capacity of these institutions is often poor and local sociopolitical institutions remain resilient, which means that state institutions are not necessarily embedded in society. How, then, can fragmented and divided societies that are not immediately compatible with centralized statehood best be accommodated and adjust to state structures?

THE ARGUMENT

This book argues that the answer to this question rests in part on the role that constitution making can play in state building. Constitution making can play a central role in state building because a constitution can represent a tangible manifestation of the social contract that creates state institutions, provides a legal framework for the exercise of state power, and establishes the relationship between the people and their government. Therefore, constitution making is an “inherently political,”⁶ “distinctive object of positive analysis,”⁷ because constitutions perform not only the technical role of providing the “operating system” that establishes state institutions and regulates state power,⁸ but also a foundational role by defining the political bond between the people and embedding state institutions in society.⁹ This suggests that the process of constitution making should be viewed not only as a technical exercise conducted by constitutional lawyers, but also as an important political process for political scientists and a practical one for practitioners.

⁵ I. Jennings, *The Approach to Self-Government* (Cambridge: Cambridge University Press, 1956), 3.

⁶ V. Hart, “Constitution Making and the Right to Take Part in a Public Affair,” in *Framing the State in Times of Transition: Case Studies in Constitution Making*, ed. L. E. Miller (Washington: U.S. Institute of Peace Press, 2010), 20.

⁷ J. Elster, “Ways of Constitution-Making,” in *Democracy’s Victory and Crisis: Nobel Symposium No. 93*, ed. A. Hadenius (Cambridge: Cambridge University Press, 1997), 123.

⁸ S. F. Kreimer, “Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing,” *University of Pennsylvania Journal of Constitutional Law* 1 (1999): 640.

⁹ B. Kissane and N. Sitter, “National Identity and Constitutionalism in Europe: Introduction,” *Nations and Nationalism* 16:1 (2010): 1–5; H. Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge: Cambridge University Press, 2011).

As the liberal principle of popular sovereignty holds that ultimate political authority resides in the political will or consent of the people,¹⁰ this implies that, at least in states that aspire to be liberal democracies, people should be given the opportunity to participate in making their state's constitution.¹¹ Despite this, a study of 194 cases of constitution making since 1975 found that only one-third involved some form of public participation.¹² Instead, constitutions have tended to be made by political elites and/or international state builders with little public participation, partly because liberal theorists understand the principle of popular sovereignty in hypothetical terms, as what individuals would agree to if they were acting rationally, rather than as requiring their actual consent.

In new states, the assumptions on which liberal democracy are based require a "shift in the popular sovereignty stories we find plausible."¹³ Inviting the people to participate in constitution making reflects the original intent of the principle of popular sovereignty by recognizing that the state cannot be legitimate without the voices of all of its people being involved in a discussion about its purpose. This book argues that public participation¹⁴ in constitution making can play a particularly important role in state building because it can provide fragmented and divided societies with the opportunity to resolve their grievances, agree upon common values and norms, and work out how they are going to be best accommodated and adjust to the transition to statehood.

Despite the important role that constitution making can play in state building, scholars and practitioners have lamented that there is not enough research on the impact of constitution-making processes. Scholarship in comparative constitutional law and comparative politics has "deemphasized

¹⁰ J. J. Rousseau, *The Social Contract and Other Later Political Writings*, ed. V. Gourevitch (Cambridge: Cambridge University Press, 1997).

¹¹ F. Michelman, "Is the Constitution a Contract for Legitimacy?," *Review of Constitutional Studies* 8 (2003): 101–128.

¹² In just over 30 percent, more than one technique for soliciting views was used, and in 25 percent, consultation efforts extended to remote as well as urban locations. J. A. Widner, "Constitution Writing and Conflict Resolution Project," Princeton University, accessed March 6, 2010, www.princeton.edu/~pcwcr/; J. A. Widner, "Constitution Writing and Conflict Resolution," *The Round Table* 94:381 (2005): 503–518.

¹³ S. Chambers, "Democracy, Popular Sovereignty, and Constitutional Legitimacy," *Constellations* 11:2 (2004): 153.

¹⁴ The term "public" is used to describe popular participation, rather than to denote a distinction between participation that occurs in what are often characterized as the "public" (that is, formal) and "private" (informal) spheres of social life. It would be false to draw such a distinction, given that the line between the two spheres is often blurred and that much participation occurs in what is often considered the informal sphere.

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the constitution-making process itself as an object of study.”¹⁵ As a result, our knowledge of constitution-making processes and their consequences is “cloudy at best.”¹⁶ This is surprising given that a study of every independent state between 1789 and 2005 identified 935 different constitutional systems,¹⁷ which suggests that constitutionalism has become a “globally shared mode of organising socio-political formations.”¹⁸

Our knowledge of the role that public participation can play in constitution making is even cloudier. The literature has not progressed far beyond speculation about what benefits public participation in constitution making may offer, and there have been few empirical studies of the benefits of public participation both during the constitution-making process and in its aftermath.¹⁹ Scholars and practitioners have lamented that “there is too little research on the impact of public consultation in constitution-making processes.”²⁰ Accordingly, this book represents a sustained attempt to examine the role that public participation has played during state building and the consequences it has had for the performance of the state.

The emerging emphasis on popular sovereignty as requiring actual, rather than hypothetical, participation has also generated a growing literature that critiques the liberal peace project and the elite-led state-building operations undertaken in its name. These critiques converge on the emerging consensus that the principle of popular sovereignty requires state builders to engage in “unscripted conversations”²¹ about the design of the state with individuals and communities in the everyday spaces where they live.²² The critical literature posits that holding these conversations will result in a “post-liberal peace” or “liberal-local” approach.²³

¹⁵ D. Landau, “The Importance of Constitution-Making,” *Denver University Law Review* 89:3 (2012): 612; M. Brandt et al., *Constitution-Making and Reform: Options for the Process* (Switzerland: Interpeace, 2011).

¹⁶ J. Blount, Z. Elkins, and T. Ginsburg, “Does the Process of Constitution-Making Matter?” in *Comparative Constitutional Design*, ed. T. Ginsburg (New York: Cambridge University Press, 2012), 31.

¹⁷ Z. Elkins, T. Ginsburg, and J. Melton, *The Endurance of National Constitutions* (New York: Cambridge University Press, 2009).

¹⁸ J. Go, “A Globalizing Constitutionalism? Views from the Postcolony, 1945–2000,” in *Constitutionalism and Political Reconstruction*, ed. S. A. Arjomand (Leiden: Brill, 2007), 90; B. Ackerman, “The Rise of World Constitutionalism,” *Virginia Law Review* 83 (1997): 771–802.

¹⁹ This literature is reviewed in Chapter 1. ²⁰ Brandt et al., *Constitution-Making and Reform*.

²¹ M. Duffield, *Development, Security and Unending War* (London: Polity, 2007), 234.

²² M. de Certeau, *The Practice of Everyday Life* (Berkeley: University of California Press, 1984); O. P. Richmond, “Resistance and the Post-liberal Peace,” *Millennium* 38:3 (2010): 665–692.

²³ O. P. Richmond, “A Post-liberal Peace: Eirenism and the Everyday,” *Review of International Studies* 35:3 (2009): 557–580. Much of the literature on the liberal-local approach aims to achieve “peace-building,” as articulated in Boutros Boutros-Ghali’s *An Agenda for Peace*, which describes operations that look beyond building state institutions and seek to engage in a

This approach recognizes the “hybridity”²⁴ of diverse and competing liberal and local sociopolitical institutions and practices that “co-exist, overlap, interact, and intertwine.”²⁵ Rather than viewing local institutions and practices as spoilers or hurdles to overcome in building a liberal state, this literature focuses on their strength and resilience. From this perspective, it is possible to construct alternative methods of liberal state building that recognize local political agency and work with embedded local sociopolitical practices.

There have been few sustained attempts within the literature on a liberal-local hybrid approach to state building to understand the empirical “dynamics of the relationship between the liberal and the local, and of the interface between the two in terms of everyday life for local communities and actors, as well as for more abstract institutional frameworks” involved in state building.²⁶ Although the connection has not yet been made in the literature, given that much of the state’s apparatus is contained in the constitution, this book argues that the constitution-making process provides one of the most important opportunities for a liberal-local hybrid approach to state building to occur. This book represents the first attempt to understand how a liberal-local hybrid approach can emerge during constitution making, and one of the first attempts to conduct a detailed empirical study of the role played by the liberal-local hybrid approach in state building.

Therefore, this book is an exercise in both comparative constitutional law and comparative politics, as it synthesizes the literature on constitution making and a liberal-local approach to state building to provide a normative justification for public participation in constitution making and a liberal-local hybrid approach to state building. Based on this synthesis, this book proposes the idea of a constituent process, whereby public participation in constitution making plays a positive role in state building by fostering a sense of political community, which is necessary for people to exercise their popular sovereignty, and by producing a constitution that enhances the legitimacy and effectiveness of the state institutions it creates by achieving liberal-local hybridity.

range of political, social, economic, and developmental tasks at both the state and local levels in order to address the multidimensional and multilevel causes of conflict. For the sake of simplicity, and to reflect the involvement of both external and internal agencies and the combination of liberal and local approaches in the case studies, this book uses the term “state building” to refer to all operations in which the institutions of a state are built, regardless of whom they are conducted by and the political ideology that guides them.

²⁴ H. Bhabha, *The Location of Culture* (London: Routledge, 1994).

²⁵ V. Boege et al., “Hybrid Political Orders, Not Fragile States,” *Peace Review* 21 (2009): 17.

²⁶ Richmond, “A Post-liberal Peace,” 576.

WHY GENERATE A CONSTITUENT PROCESS?

This book tests this normative justification on the cases of Timor-Leste²⁷ and Bougainville²⁸ to demonstrate why a constituent process should be generated, in order to identify insights for theory and practice in states and societies facing comparable challenges.

In May 2002, after twenty-four years of Indonesian occupation and almost three years of United Nations (UN) transitional administration, world leaders gathered to celebrate Timor-Leste's independence and declare it a success story of post-Cold War state building. Yet almost four years later, in April and May 2006, Timor-Leste's stability was challenged by a major security crisis that originated between (and within) the police and military but quickly engulfed the wider population. During the crisis, more than one-tenth of the population was internally displaced, many houses and buildings were burned, and thirty-eight people were killed. Although a vastly expanded UN mission and an Australian-led International Stabilization Force were required to restore stability, low-level violence continued and culminated in attempts to assassinate the president and prime minister in February 2008.

Just over three thousand kilometers to the east of Timor-Leste, the Bougainville region of Papua New Guinea signed a peace agreement with the Papua New Guinea government in August 2001 that ended a civil war that had raged since 1989. The war had been partly a secessionist struggle and partly a conflict between Bougainvilleans. The peace agreement gave the region significant autonomy and the right to vote on its political future between 2015 and 2020. With minimal external intervention, between 2001 and 2005 Bougainvilleans built their autonomous government. Since then, they have engaged in extensive reconciliation and have avoided a recurrence of major conflict.

The Timor-Leste and Bougainville cases highlight the challenges and opportunities that arise when new and postconflict states engage in state building. The Timor-Leste state-building operation was chosen for exploration in this book because it was in many ways a paradigmatic example of

²⁷ See Map 2. Timor-Leste is the Portuguese name of the state, which is also referred to in English as East Timor and in Tetum (the local *lingua franca*) as Timor Loro S'ae. Although many English publications use the term "East Timor," as the country is officially designated as the Democratic Republic of Timor-Leste and since the term is now widely used by Timorese people, this book uses the term "Timor-Leste."

²⁸ See Map 3. Bougainville is officially designated in both the Bougainville and Papua New Guinea Constitutions as the "Autonomous Region of Bougainville." It was also previously known as the "North Solomons Province of Papua New Guinea." This book will use the term "Bougainville" since it is now in common usage within the region.

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liberal peace state building,²⁹ from which lessons could be learned for other state-building operations, such as those in Afghanistan and Iraq. Liberal peace state-building operations had previously been attempted in Cambodia and Liberia and were ongoing in Bosnia and Kosovo at the time that the operation began in Timor-Leste in 1999. However, the Timor-Leste state-building operation was the “most expansive assertion of sovereignty” ever assumed by the UN.³⁰ Therefore, in 1999 Timor-Leste arguably constituted the best case in which a liberal peace state-building operation could be expected to succeed.

Bougainville was chosen for consideration as, for the reasons given below, it shares a number of similarities with Timor-Leste, making it an especially suitable comparator. Bougainville is also one of the first instances of a complex self-determination dispute being successfully settled. Lessons learned from the Bougainville settlement have been applied to other, similar disputes, most notably in Kosovo and South Sudan, and are increasingly being considered elsewhere in the Balkans, Caucasus, Africa, and Southeast Asia. Bougainville is also a comparatively rare case of relatively successful state building in a new and postconflict state. Although Bougainville is an autonomous region rather than a sovereign state, it can be characterized as having engaged in state building because it has been given powers that verge on full sovereignty, as well as the option to vote on becoming independent between 2015 and 2020.³¹ Along with Somaliland, Bougainville also offers one of the first examples of a liberal-local hybrid state-building operation, where local political and legal pluralism was brought into a critical dialogue with liberalism from the outset.³² Therefore, the Bougainville case offers guidance concerning how the liberal-local hybrid approach functions in practice and how it may be developed and applied to state building in the future.

Based on its comparative study, this book concludes that the higher the level of public participation involved in constitution making, the more likely it is to generate a constituent process, and consequently to play a positive role in state building. In Bougainville, there was extensive public participation in constitution making, which generated a constituent process that built a

²⁹ J. Wallis, “A Local-Liberal Peace Project in Action? The Increasing Engagement between the Local and Liberal in East Timor,” *Review of International Studies* 38:4 (2012): 735–761.

³⁰ S. Chesterman, “East Timor,” in *United Nations Interventionism, 1991–2004*, ed. M. Berdal and S. Economides (Cambridge: Cambridge University Press, 2007), 199.

³¹ J. Wallis, “Ten Years of Peace: Assessing Bougainville’s Progress and Prospects,” *The Round Table* 101:1 (2012): 29–40.

³² J. Wallis, “Building a Liberal-Local Hybrid Peace and State in Bougainville,” *Pacific Review* 25:5 (2012): 613–635.

relatively strong political community by creating a sense of common identity and by reconciling the most severe divisions between societal groups.³³ In contrast, there was minimal public participation in Timor-Leste, which did not generate a constituent process and consequently did not create a unified political community, and certain societal divisions remain unreconciled, while others have become salient. The constituent process generated in the Bougainville process also produced a constitution and state institutions that make sense to Bougainvilleans, as it achieved liberal-local hybridity. In contrast, the Timor-Leste process produced a liberal peace constitution and state institutions that did not recognize the local practices that regulated most Timorese people's lives, which has challenged their legitimacy. It is hoped that these findings contribute not only to the theoretical literature but also at a practical level. The experiences of Timor-Leste and Bougainville as new, postconflict states are not unique and provide lessons for future constitution-making and state-building processes.

TESTING THE ROLE OF A CONSTITUENT PROCESS

In order to test the role played by a constituent process in state building, this book conducts a comparative case study and adopts the “most similar systems” research design.³⁴ The advantage of conducting a comparative study is that it allows rich qualitative data to be compiled in order to construct a relatively thorough narrative. This can help to clarify the causal link between the level of participation involved in constitution making and the outcomes for state building in more detail than could be achieved by a quantitative analysis. Accordingly, field research, including semistructured interviews with political elites and local leaders and ethnographic observation of local sociopolitical processes, was conducted in Timor-Leste in 2009, 2010, and 2013 and in Bougainville in 2011.³⁵ This book also constructs a strong normative framework against which to test the comparison so that suggestive generalizations can be drawn. Moreover, the aspects of constitution making in Timor-Leste and Bougainville relevant to this study are sufficiently similar to the rest of the population of constitution-making processes that inferences relating to both theory and practice can be drawn from its findings.

³³ However, there are exceptions, as described in Chapter 7.

³⁴ A. M. Przeworski and H. Teune, *The Logic of Comparative Social Inquiry* (New York: John Wiley, 1970).

³⁵ For brevity, references to specific field observations are not individually cited. As Timor-Leste and Bougainville are post-conflict societies, all interviews were anonymous to protect interviewees.

Timor-Leste and Bougainville were selected as they differ with respect to the independent variable (the level of participation involved in constitution making), but broadly match across other potentially explanatory variables. In Timor-Leste, the constitution-making process took one year³⁶ and involved minimal opportunities for public participation. In contrast, in Bougainville, the constitution-making process took over two years³⁷ and involved an extensive program of public participation. Therefore, differences in the outcomes of these state-building processes can be partly explained by differences in the levels of public participation in their constitution-making processes, and consequently whether a constituent process emerged.

Both Timor-Leste and Bougainville fall within Melanesia, one of three geographical and cultural areas in the South Pacific region.³⁸ Consequently, both exhibit similar broad cultural and socioeconomic characteristics. Both have relatively small, primarily rural, subsistence populations. They have similar geography, as they consist of islands divided by mountains and rivers, which makes transport and communication difficult. This has created natural barriers that have kept their populations fragmented into small political and linguistic communities. Despite this, their societies are connected via marriage, trade, and – at least in the past – warfare networks.

The territories of Timor-Leste and Bougainville were demarcated by arbitrary European colonial borders. In the sixteenth century, Timor Island was carved in two, with the Dutch claiming the western half³⁹ and the Portuguese the eastern half (which later became independent Timor-Leste). In 1914, a determination of the Permanent Court of Arbitration formalized this arrangement. In 1960, the UN General Assembly declared that Portuguese Timor was a “non-self-governing” territory. In the nineteenth century, the islands that constitute the contemporary Papua New Guinea and Solomon Islands were annexed by Germany and Britain (which later transferred its colony to Australia). In 1889, Germany ceded all islands in the Solomon archipelago to Britain, apart from Bougainville, which was incorporated into German New Guinea. In exchange, the British transferred sovereignty over Western Samoa to Germany. Australia seized German New Guinea at the beginning of the

³⁶ This is a generous interpretation because it includes preparatory activities. As described in Chapter 3, the drafting process itself took only six months.

³⁷ If the peace process is included, the process took seven years.

³⁸ See Map 1. This classification is contested, but the term “Melanesia” is commonly used. The inclusion of Timor-Leste in Melanesia is controversial, although it is becoming more common in academic and policy practice.

³⁹ With the exception of the small enclave of Oecussi, which was retained by the Portuguese as it was the place they first landed on Timor Island.

First World War and was allocated a “C” Class League of Nations Mandate over it in 1921. After the Second World War, Australia merged the former British and German territories and the UN approved the creation of the combined “non-self governing” Territory of Papua and New Guinea in 1947.

In both cases, the colonial administrations exercised little real control beyond their fortifications until the early twentieth century. Instead, they relied on systems of indirect rule, which allowed indigenous sociopolitical structures to continue relatively undisturbed. Therefore, while colonial penetration disrupted local sociopolitical practices, it did not displace them. Consequently, in both cases state-level institutions are a recent import. However, Portuguese colonizers did attempt limited assimilation by socializing part of the Timorese population to Lusophone culture and language and via intermarriage with local women. While Australia sought to educate Bougainvilleans and to propagate the English language, it was less concerned with acculturation.

After European and Australian decolonization, large portions of the population of both attempted self-determination. However, in 1975 Timor-Leste was occupied by Indonesia and Bougainville was incorporated into Papua New Guinea. Both were then engaged in long – and bloody – struggles, in which their populations sought to exercise their right to self-determination, sometimes in cooperation with each other. There are estimates that at least 10 percent of the Timorese population were killed during the Indonesian occupation, while many more were internally displaced.⁴⁰ Similarly, there are estimates that several thousand Bougainvilleans (from a population of 160,000 people) died as a result of the struggle, while up to 40 percent were internally displaced.⁴¹

These self-determination struggles concluded in 1999 in Timor-Leste and in 2001 in Bougainville, both of which then underwent state-building operations. The Timor-Leste operation was directed by an extensive UN intervention and transitional administration. In Bougainville, the operation was locally led and international intervention was light. In both cases, when these operations began, there were no formal state-level institutions, although

⁴⁰ CAVR, *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste: Executive Summary* (Dili: Commission for Reception, Truth, and Reconciliation Timor-Leste, 2005).

⁴¹ V. Boege and L. Garasu, “Papua New Guinea: A Success Story of Postconflict Peacebuilding in Bougainville,” in *Searching for Peace in Asia Pacific: An Overview of Conflict Prevention and Peacebuilding Activities*, ed. A. Heijmans, N. Simmonds, and H. van de Veen (Boulder: Lynne Rienner, 2004); A. J. Regan, *Light Intervention: Lessons from Bougainville* (Washington: U.S. Institute of Peace Press, 2010).