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INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE

Interim Constitutions

Peacekeeping and Democracy-Building Tools

PolicyPaper

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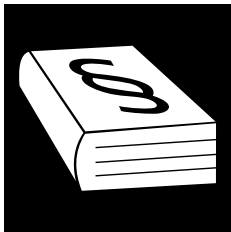

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The objectives of the Institute are to support stronger democratic institutions and processes, and more sustainable, effective and legitimate democracy.

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- More inclusive participation and accountable representation
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Interim Constitutions

Peacekeeping and Democracy-Building Tools

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Key recommendations

1. Understanding a country's context—specifically, the nature and drivers of conflict, the political landscape, the constitutional and political history, and the role of the international community—is a necessary preliminary step towards appreciating the need for (and the parameters of) an interim constitution.

2. Post-conflict interim constitutions can serve similar functions as peace agreements, but they should focus more on principles and values, and on the organization and powers of state institutions during the transitional period. While peace agreements and interim constitutions are sometimes conflated, ideally they should be part of a staged process in which interim constitutions consolidate the previously agreed peace.

3. Due to the contexts in which they are drafted, interim constitutions will commonly be drafted without the full participation of the broader society. However, the process should include as many politically salient groups as possible in order to avoid potentially negative consequences, such as the creation of new spoilers.

4. In general, the scope of interim constitutions is narrower than that of final constitutions. This reflects the limited representation of societal interests when drafting interim constitutions, as well as the remaining enmity among negotiating parties. The content of interim constitutions should therefore be limited to what is necessary to bind the parties to the agreement, and should avoid alienating sectors of society that are not represented at the table. The content may also prove to be 'sticky'. Stakeholders should be aware that constitutional design choices have inertia, and that change will prove more difficult than maintaining the status quo in the final constitution.

5. Provisions related to drafting the final constitution should be as detailed as possible, include more diverse participants in the process and incorporate deadlines (as well as procedures to follow if they are missed). Setting a deadline for the expiration of an interim constitution (and including provisions for extending it) are good practices.

6. Due to the fluid nature of transitional processes and the (often low) level of participation in the initial stages, procedures for amending interim constitutions should be included, and should not require an excessively high threshold for agreement.

7. The supreme legal status of the interim constitution is crucial to avoiding ambiguity regarding its binding status and deterring violations. The role of courts as guarantors, particularly regarding the constitutional process, should be carefully considered. Using the courts in this way may be desirable where they have a high degree of trust and legitimacy, but may be ineffectual or lead to their overpoliticization in other contexts. A number of formal and informal mechanisms can help overcome parties' unwillingness to compromise—for instance, the dissolution and reformation of the constitution-making body, ambiguity or by-law clauses, reducing the threshold for legislative approval, sunset clauses, and engaging in mediation or seeking external advice.

8. Where the international community has played a dominant role in the broader peace process, an interim constitution can, and should, serve as a mechanism through which control over constitution-building is handed over to national authorities while providing a degree of assurance regarding political inclusion and democratic governance.

Executive summary

An interim constitution should serve as a bridge during a transition from one constitutional order to another (or in some cases, the lack of any constitutional order and the birth of a new order). Interim constitutions provide both a temporary institutional structure for government and a framework for negotiating the final constitution. They can be formally defined as constituent instruments that assert 'legal supremacy for a certain period, pending the enactment of a contemplated final constitution' (see Section 2 for a full discussion of this definition).

Peace agreements are usually understood as contracts between contending parties designed to end a violent conflict through either a ceasefire or the design of new political and legal structures. While they share some commonalities with interim constitutions—since they may include interim arrangements in their provisions—peace agreements have a contested or uncertain legal nature, and are different from interim constitutions because they do not necessarily set the stage for the follow-on constitution-building process (Bell 2006; Easterday 2014).

Interim constitutions have become increasingly common since the end of the Cold War, particularly in post-conflict or conflict-affected settings. Since 1990, 30 interim constitutions have been adopted worldwide, 20 of them in conflict-affected settings (Uppsala Conflict Data Program n.d.). One reason for this increase is that the nature of conflict has radically changed from interstate to intrastate wars. This explains the search for legally enforceable agreements that also offer enough space and time for competing elites to negotiate until they reach enough of a consensus to clearly move beyond the conflict.

Interim constitutions differ from final constitutions in both their objectives and their contexts, as certain premises and concepts related to general constitution-building processes do not apply. Further, as they constitute the nexus between peace agreements and final constitutions, interim constitutions warrant interdisciplinary analysis involving the fields of peace and conflict studies, state-building and rule of law.

In terms of the overall peace process, interim constitutions are usually preceded by peace agreements—although peace agreements may constitute de facto interim constitutions. Sometimes there is no peace agreement at all, but an agreement for the transitional period, while the conflict is still ongoing, for example in Afghanistan, Iraq and Libya. If the interim constitution is not able to stop the conflict, the peace agreement has to follow, as was the case in Chad, the Democratic Republic of the Congo and Togo. While a majority of interim constitutions put in place a process to create a final constitution—taking between a few months and 10 years—nine interim constitutions adopted since 1990 are still in force, most of which were drafted in conflict-affected settings.

If an interim constitution's success is defined as the ability to end violent conflict, they have not been very successful, at least since the end of the Cold War. However, ending large-scale violence is a difficult task that requires not only a well-planned, inclusive and thorough constitutional process, but also the willingness of all parties to engage in the broader peace process. If there is no such willingness to compromise, an interim constitution might only aspire to (a) scale down the conflict; (b) incentivize

some political actors to follow the rules; and (c) give the parties enough time to resolve their differences in an increasingly inclusive manner (Hirschl 2009; Ludsin 2011).

Interim constitutions' chances of success will depend on the nature of the conflict and the sociopolitical context. Key elements of the context include the level of prior conflict, the fragility of the peace agreement, the number and diversity of politically salient groups, the presence and capacity of state institutions, the feasibility of holding elections and the presence of a viable guarantor, for example a regional organization or the United Nations. Responding to specific circumstances, interim constitutions can vary quite significantly in their scope and process.

Two broad areas of interim constitution design warrant attention—depth and breadth. First, it is important to consider the amount of detail—whether it is 'thick' or 'thin'. A highly detailed interim constitution risks establishing a complete system of government without taking all key sociopolitical actors into account. A more limited text might ensure a speedier process, but could fall short of sufficiently constraining governing structures and protecting fundamental rights, while giving too much voice to international norms and actors, and therefore leading to weak national ownership. However, thinner interim constitutions might be the only option if a conflict is ongoing and the public cannot be duly engaged.

Second, the breadth of issues covered needs to be assessed when designing an interim constitution. While peace agreements usually include issues related to the immediate aftermath of the conflict, interim constitutions focus instead on principles and values, institutions and processes. Furthermore, interim constitutions—in contrast to peace agreements—often include amendment procedures, issues related to the constitution-making process, as well as clauses that outline the transitional institutional framework. Most interim constitutions might include timeframes and deadlines concerning the drafting of the final constitution, alternative ways to deal with an unwillingness to compromise and intractable disagreements between negotiating parties, and the sequencing of elections throughout the constitution-building process. Finally, constitutional arrangements made on an 'interim' basis are more likely than not to survive into a more permanent framework, showing the 'stickiness' of their provisions.

The process of drafting an interim constitution should institutionalize the arrangements for the transition, setting the stage to move beyond current narrow political bargains and create a final constitution that responds to the public's hopes and fears. In this sense, there are at least three key issues to consider during this process:

1. *The levels of participation, representation and/or inclusion*. In other words, who decides on the process and who drafts the document? Ideally, interim constitutions are negotiated and agreed separately from the peace agreement, and include a broader spectrum of participants in negotiations; otherwise, the process will struggle to gain traction and will risk turning excluded groups into spoilers.

2. *The approval mechanisms*. Generally, the same body drafts and approves the interim constitution. Therefore, it is important to make sure it is as representative as possible.

3. *The role of international actors*. International actors play an increasing role in constitution-building in conflict-affected settings, advising on content and participating—more or less directly—in the constitutional process. Interim constitutions offer the international community both the possibility of an exit strategy and the opportunity to remain in place as a guarantor, depending on the willingness to invest resources.

In brief, the relationship between the country context and the choice of procedure and design also affects the likelihood that an interim constitution (and indeed the entire constitutional process) will be successful. Furthermore, while success is a slippery concept, there are clear benefits of using interim constitutions, given their potential to facilitate consensus over time on issues that, either directly or indirectly, may have caused the conflict to erupt in the first place. Interim constitutions can also contribute to a culture of (participatory) constitutionalism and address sequencing issues, especially regarding elections and the need to start building or strengthening key institutions that will help implement any constitutional framework.

1. Introduction

Constitution-building processes are increasingly seen as both key conflict-management tools and essential elements of the state-building agenda. Initiating such a process in a conflict-affected state, however, is exceedingly difficult.[1] Actors who have been engaged in violent confrontation are now responsible for negotiating the (re)framing and (re)building of the state mechanisms (e.g. institutions and processes) needed to achieve sustainable peace (Ludsin 2011: 254). However, working in the shadow of conflict, low levels of trust, and fundamental disagreements regarding both the constitutional process and design, are not conducive to the cooperation and compromise required for successful constitution-building, and peacebuilding processes in general (Elster 1995).

Since the end of the Cold War, interim constitutions or arrangements have been increasingly used in transitions from war to peace, and from authoritarianism to democracy. This was a change from the post-World War Two period, in which interim constitutions were mostly used in post-coup scenarios (Grover forthcoming). One of the key reasons for this increase is the radical change in the nature of conflict since the 1990s. Interstate wars have given way to intrastate wars, and national agreements—both peace agreements and interim constitutions—have mostly replaced international peace treaties.

Furthermore, interim constitutions are temporary political frameworks that allow competing elites to continue negotiating fundamental disagreements in the near future (Ludsin 2011). These political frameworks seek to disincentivize armed conflict as a means of pursuing political goals, mainly by offering more time to negotiate.

This Policy Paper aims to fill a significant gap in the policy and academic literatures about the process and design of interim constitutions in conflict-affected settings by contributing to an incipient literature on transitional arrangements in constitution-building processes. It addresses a number of specific questions. How should interim constitutions be defined, and how can they be differentiated from peace agreements and other interim arrangements? What is the main goal of interim constitutions? What can be said about the success rate of interim constitutions? What criteria should be used to appraise their specific characteristics? What characteristics do interim constitutions in post-conflict settings share?

This Policy Paper has been developed as a result of a December 2014 workshop at Edinburgh University on interim constitutions in post-conflict settings (International IDEA 2015). The workshop was co-organized by International IDEA, the Edinburgh Centre for Constitutional Law and the Global Justice Academy.

The data used in this analysis have been derived from a number of databases, including the Constitution Writing Conflict Resolution database at Princeton University and the University of Chicago's Constitute Project database. Specific documents, including

1 This Policy Paper uses 'conflict-affected' and 'post-conflict' states interchangeably, following the understanding that it is not entirely clear what 'post-conflict' means, as in most cases no clear division is possible between the phases of active conflict and post-conflict. Furthermore, the conclusion of active hostilities might well mean the settlement of the conflict at hand, with no acknowledgement of the root causes that must be addressed through constitutional means.

the texts of interim constitutions, have been sourced from the relevant government and United Nations agency websites. Sources for peace agreements and other interim arrangements include the UN Peacemaker Database and the Peace Accords Matrix of the University of Notre Dame.

The structure of the paper is as follows. Section 2 outlines a conceptual framework that defines interim constitutions and differentiates them from peace agreements and other interim arrangements: the key distinguishing factor is that only interim constitutions are legally enforceable. Section 3 examines the diversity of post-1990 interim constitutions in terms of their structure and their role in broader peacebuilding processes. In Section 4, the design of interim constitutions is defined in terms of detail and scope, looking at specific examples and comparative experiences. Section 5 defines the process of drafting interim constitutions. Section 6 presents conclusions.

2. Interim constitutions: a conceptual framework

Constitution-building in conflict-affected settings is a key element of the peace- and state-building agenda. Ideally, it introduces mechanisms that will allow opposing groups to settle differences using non-violent means, therefore contributing to peacebuilding and conflict prevention in the long term. It also seeks to consolidate peace in the short term and prevent future violent outbreaks in a sustainable manner (Cousens, Kumar and Wermester 2001; Malone and Wermester 2000: 46; Ludsin 2011: 242).

Democratic constitution-building ideally establishes an inclusive institutional framework for the implementation of new constitutional provisions, while incentivizing political elites to lead the country to sustainable peace (Paris and Sisk 2009; Call 2012). Constitution-building processes in conflict-affected settings may take a variety of different forms, depending on the broader political context and the nature of the conflict. For example, it is possible to distinguish between:

- peace agreements that include final constitutions, such as in Bosnia and Herzegovina (1995);
- peace agreements that include interim constitutions as part of a broader constitution-building process, such as in Rwanda (1993) and the Democratic Republic of the Congo (DRC) in 2003;
- amendments of existing constitutions, whether preceded or not by peace agreements, such as in Liberia (2011) and Sierra Leone (forthcoming);
- peace agreements that include or represent interim arrangements, such as in Cambodia (1991), Afghanistan (1993) or Liberia (2003);
- interim arrangements (separate from peace agreements), such as in Angola (1992), East Timor (2002) or Yemen (2011); and
- interim constitutions (separate from peace agreements), such as in Somalia (2004), Sudan (2005), Nepal (2007) and South Sudan (2011), among others.

Often, policymakers do not consciously choose the type of constitutional process. Specifically, they do not deliberately decide to draft an interim constitution (or any other form of interim constitutional arrangement). Rather, the political circumstances—that is, the historical context and more immediate constraints, such as intractable differences that take time to settle—dictate the form of the process.

A working definition

The primary goal of interim constitutions is to serve as a bridge during a transition from one constitutional order to another. They provide both a temporary institutional structure for government and a framework for negotiating the final constitution, and are legally enforceable (in contrast to most peace agreements).[2] In this Policy Paper,

2 Of course, no constitution is ever 'final', but the term is used in this paper to signify a constitutional settlement intended to endure indefinitely without an expected successor document.

an interim constitution is defined as a constituent instrument that asserts its legal supremacy for a certain period of time pending the enactment of a contemplated final constitution.[3] An interim constitution can, therefore, be understood as a 'constituent instrument' in terms of constituting (transitional) government structures. Furthermore, it (a) asserts legal supremacy, formally established in the document; (b) is limited temporally; and (c) provides for a future constitutional process.

Using this definition, Table 2.1 lists 30 post-Cold War interim constitutions, which include a myriad of documents, such as transitional charters, provisional constitutions, constitutional agreements and interim declarations.[4]

Peace agreements and interim constitutions

Peace agreements are usually understood as contracts between contending parties that are intended to end a violent conflict through a ceasefire, and/or to significantly transform a conflict by designing new political and legal structures, setting the stage for a constitution-building process (Bell 2006: 374; Bell 2008: 200; Easterday 2014: 379; Samuels 2009: 175). They sometimes adopt the role of interim constitutions, and thus are not always clearly discernible from each other. Rwanda in 1993 and Sudan in 2005 are examples of peace agreements that eventually became interim constitutions.

In general terms, the nature of peace agreements is more exclusionary than that of interim constitutions, both in terms of process (i.e. who is at the table) and substance (i.e. the interests that are incorporated). Furthermore, peace agreements often have narrower timelines for setting up the transitional process than interim constitutions. Finally, where peace agreements can be strictly differentiated from interim constitutions or other constitutional arrangements, peace agreements might focus on narrower interests in efforts to placate violent actors, either by buying them off or offering attractive deals in kind.

3 The original version of this definition posits that 'An interim constitution is a constituent instrument that marks a major legal rupture from the existing constitutional order and asserts its legal supremacy for a fixed period of time pending the enactment of a final constitution or settlement of an entity's legal status' (Grover forthcoming). The definition used in this Policy Paper is the result of email exchanges between Christine Bell, Sumit Bisarya, Tom Ginsburg, Cheryl Saunders, Christie Warren, Asanga Welikala and the author of this paper, which took place between 31 March and 1 April 2015. By discounting the last phrase of the definition ('settlement of an entity's legal status'), this analysis explicitly excludes cases of subnational constitution-building, such as Bougainville (1994), Somaliland (1997), South Sudan (2005) and the Bangsamoro (2012), and leaves this category of interim constitutions/arrangements for a future publication.

4 The interim constitutions of Armenia, Croatia, the Former Yugoslav Republic of Macedonia, Georgia and Slovenia have not been included. In the post-Yugoslav countries, interim constitutions constituted amendments to the Yugoslav Constitution. In Armenia, according to the Princeton Database on Constitution Writing and Conflict Resolution, a series of documents adopted in 1991—including the Declaration of Independence, supplemented by laws on the presidency, the Supreme Soviet and the structure of government—functioned as an interim constitution, but there was no single, formal document. For Georgia, the original document was unavailable. Hungary is another interesting case that was not included, as its 1989 interim constitution became permanent after a failed attempt at 'second-stage' drafting (Arato and Miklósi 2010: 351).

Table 2.1. Interim constitutions, 1990–present

Country	Name of document	Period of validity
Lithuania	Provisional Basic Law	1990–1992
Ethiopia	Transitional Period Charter of Ethiopia	1991–1995
Chad	Transitional National Charter	1991–1996
Albania	Law on Major Constitutional Provisions	1991–1998
Togo	Interim Constitution	1992
Poland	Small Constitution	1992–1997
Eritrea	Proclamations 22/1992 and 23/1992	1992–present
Rwanda*	Arusha Accords	1993–2003
South Africa	Interim Constitution of the Republic of South Africa	1994–1997
Democratic Republic of the Congo (DRC)	Transitional Constitution of the Democratic Republic of the Congo–Acte Constitutionnel de la Transition du 09 Avril 1994	1994–1997
Ukraine	Constitutional Agreement	1995–1996
Burundi	Transitional National Constitution and Transitional Constitution Act	1998–2001
Burundi	Constitution of transition of the Republic of Burundi (According to Protocol I, Chapter II (Constitutional Reform) and Protocol II, Chapter II, Art.15 (Transitional Institutions) of the Arusha Peace and Reconciliation Agreement for Burundi)	2001–2004
Afghanistan	Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (Bonn Agreement)	2001
Kosovo	Constitutional Framework for Provisional Self-Government	2001–2008
DRC*	Transition Constitution of the Democratic Republic of the Congo	2003–2006
Iraq	Law of Administration for the State of Iraq for the Transitional Period or Transitional Administrative Law	2004–2005
Somalia	Transitional Federal Charter of the Somali Republic	2004–12
Sudan	Interim National Constitution of the Republic of Sudan	2005–present
Thailand	Constitution of the Kingdom of Thailand	2006–2007
Nepal	Interim Constitution of Nepal	2007–15
Madagascar	Charte de la transition	2009–10
Egypt	Provisional Constitution of the Arab Republic of Egypt or Constitutional Declaration of 2011	2011–12
Libya	Libyan interim Constitutional Declaration	2011–present
South Sudan	Transitional Constitution of the Republic of South Sudan	2011–present
Yemen	Agreement on the implementation mechanism for the transition process in Yemen in accordance with the initiative of the Gulf Cooperation Council	2011–present
Somalia	Provisional Constitution of the Federal Republic of Somalia	2012–present
Central African Republic	Constitution of the Central African Republic	2013–present
Burkina Faso	Transitional Charter of Burkina Faso	2014
Thailand	Constitution of the Kingdom of Thailand	2014–present

* Denotes interim constitutions that were either peace agreements that included interim constitutions, or 'constitutional peace agreements'.

Note: a list of links to the texts of interim constitutions is available on the ConstitutionNet website, <http://www.constitutionnet.org/event/workshop-role-interim-constitutions-post-conflict-settings-4-5-december-2014-edinburgh>.

At the same time, peace agreements have a contested, or at least an uncertain, legal nature. The successful implementation of peace agreements primarily depends on the voluntary and ongoing consent of the parties, incentivized perhaps by third-party guarantors (Bell 2006: 384, 400; Abbot et al. 2000). Additionally, if the site of a conflict is a single state, the peace agreement would be enforceable only if (a) all parties accept the legitimacy of the domestic courts; (b) the armed forces are capable of enforcing the agreement, an unlikely premise in most conflict-affected settings; and/or (c) the peace agreement is given legal supremacy, and therefore becomes a constitutional arrangement.

The legality of a peace agreement is an important element of compliance. While, on the one hand, the legal form of such an agreement might raise the reputational costs of non-compliance, on the other hand, the ambiguity over its binding status might discourage the parties from engaging (Bell 2006: 386). Since 1990, some states have circumvented issues related to the legality of peace agreements, and their implementability, by immediately negotiating or drafting interim constitutions (e.g. Ethiopia in 1991, Togo in 1992, DRC in 1994 and 1997, Burundi in 1996 and 1998, Iraq in 2004 and Libya in 2011).

Others have made interim arrangements that function under an existing constitution. Since the end of the Cold War, at least four countries—Algeria (1994–1997), Mauritania (2009), Madagascar (2011–14) and Mali (2012–13)—have drafted interim arrangements prior to (and separately from) peace agreements, in which the interim arrangements, while lacking legal supremacy, were enforceable for a limited period via an existing constitution. Without a peace agreement, Egypt's 2013 Constitutional Declaration also states the legal supremacy of previously issued 'laws and regulations' (art. 32), although it allows for amendments or abrogation in accordance with the declaration.

In brief, the two clearest differentiating factors between interim constitutions and peace agreements are that interim constitutions have a higher degree of inclusion in both process and substance, and have a legal basis and legal enforceability. Peace agreements—if they are independent of the existing constitutional framework—might have a legal form at most, but their enforcement will mostly depend on third-party support. Both documents are transitional in nature, and share the goal of ending the conflict and serving as emerging social contracts between the state and society.

These differences and similarities explain why Nepal included parts of its peace agreement as an annex to the interim constitution (so that the peace agreement would continue to be enforced during the initial transitioning phase), and why other state parties avoid peace agreement negotiations entirely by proceeding directly to the constitution-drafting process.

Interim arrangements and interim constitutions

Interim arrangements are the (temporary) result of political negotiations aimed at helping a country bridge a given transition. Following the definition of interim constitutions above, interim arrangements might constitute government structures, but they lack (formal) legal supremacy, and do not necessarily set the stage for a constitution-building process.

Notably, peace agreements are increasingly likely to include interim arrangements as part of their function to create a framework for new political and legal structures. Furthermore, in transitions from war to peace, interim arrangements are likely to be part of (or equivalent to) peace agreements.

Since peace agreements lack formal legal supremacy, compliance depends on the voluntary consent of the parties to a much greater extent than interim constitutions. Yet the enforceability of peace agreements and provisional/interim arrangements relies first and foremost on the compliance of the parties, which in turn depends on a number of external factors, including their commitment to abide by the agreement, and the capacity and legitimacy of the judicial system and the armed forces to drive compliance.[5] The same can, however, be said of interim constitutions.

Therefore, there might be good reasons why peacebuilding scholars have avoided clearly distinguishing peace agreements (and interim arrangements) from interim constitutions. Their substance clearly depends on the specific context and might go beyond established categories. Sometimes peace agreements might conflict with constitutional methods of reconciliation, as they are the result of political peace negotiations (Easterday 2014: 392). At other times, they might set the stage for (further) transitional justice and reconciliation mechanisms, which lead to the final constitution (Teitel 2000: 191). The same logic is also true for interim constitutions.

In this Policy Paper, however, we distinguish between interim constitutions, and both peace agreements and interim arrangements. Unlike peace agreements and interim arrangements, the strength of interim constitutions lies in their legal enforceability. This distinction is made for two reasons: (a) to maintain conceptual clarity and (b) to describe the design and process, goals and factors for the success of interim constitutions.

5 Bell (2006, 2008) defines 'peace agreement constitutions'—or 'constitutional peace agreements' (Easterday 2014: 379)—as processes that might include a ceasefire agreement, a comprehensive peace agreement (which likely includes interim arrangements), an interim constitution, the final constitution or all of the above.

3. Interim constitutions in conflict-affected settings

This section uses quantitative data to demonstrate both the diversity of post-1990 interim constitutions, and the fact that their success depends on a number of historical and structural factors specific to the transitioning country (Miller 2010: 601). The following subsections address the design and process choices of interim constitutions.

Analysing the data

Since 1990, a total of 30 interim constitutions have been adopted worldwide—19 in Africa, 6 in Asia and 5 in Europe (see Table 3.1). Of these interim constitutions, 20 emerged from what the Uppsala Conflict Data Program (UCDP) defines as 'conflict-affected settings' (or 18 if Ethiopia and Eritrea are excluded, as they were engaged in interstate as opposed to intrastate war). The UCDP defines an active conflict as one in which there have been 25 or more battle-related deaths per calendar year in one of the conflict's dyads, considering both state-based and non-state conflict parties.

The remaining ten interim constitutions emerged from generally peaceful (although sometimes turbulent) transitions, including post-Soviet regime changes (e.g. Lithuania in 1990, Albania in 1991, Poland in 1992 and Ukraine in 1995); democratic transitions (such as in South Africa in 1991); coups (in Madagascar in 2009, Burkina Faso in 2014, and Thailand in 2006 and 2014); and other transitions (such as in the DRC in 1994 and in Egypt in 2011).

Table 3.1 Four categories of interim constitutions in conflict-affected settings

Interim constitutions not preceded by peace agreements	Afghanistan 2001[a] Iraq 2004 Libya 2011
Peace agreements constituting de facto interim constitutions	Rwanda 1993 DRC 2003 Yemen 2011
Peace agreements following interim constitutions	Chad 1991 Togo 1992 DRC 1997
Interim constitutions following peace agreements	Burundi 1996 and 2001 Kosovo 1999 Somalia 2004 and 2012 Sudan 2005 Nepal 2007 South Sudan 2011 Central African Republic 2013[b] (South Africa 1991)[c]

Notes:

a. The 2001 Bonn Agreement for Afghanistan constituted an agreement 'on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions', which functioned as an interim constitution and presumed the defeat of the Taliban rather than ending the conflict (Ludsin 2011: 304).

b. In the case of the Central African Republic, a ceasefire agreement also followed the interim constitution.

c. South Africa, while not necessarily a conflict-affected setting, would be an additional case in this category as the parties agreed to a National Peace Accord in 1991 in order to prevent further violence and enable a successful transition.

A list of links to the texts of interim constitutions is available on the ConstitutionNet website, <http://www.constitutionnet.org/event/workshop-role-interim-constitutions-post-conflict-settings-4-5-december-2014-edinburgh>.

Table 3.1 groups interim constitutions in conflict-affected settings according to four distinct categories. In brief, half of these interim constitutions were preceded by a peace agreement; in three cases peace agreements constituted de facto interim constitutions; and in six cases interim constitutions were not preceded by peace agreements (three of which were prompted to sign a post-interim-constitution peace agreement). In Iraq and Afghanistan, the foreign occupation force might explain the lack of a peace agreement, while Libya's transition was already underway before the parties decided to negotiate a peace agreement.

Over half (18) of the 30 interim constitutions contributed to constitution-building processes that eventually produced a final constitution.[6] In a few cases, two interim constitutions were necessary before setting the stage for a final constitution. In Burundi, parties agreed to the 1998 Transitional National Constitution and Transitional Constitutional Act, and then to the 2001 Constitution of the Transition. The DRC decided on a Transitional Constitution in 1994, which was superseded in 1997 by decree law until 2003, and again in 2003 by the 'final' interim constitution. Also, Somalia had two consecutive interim constitutions—the 2004 Transitional Federal Charter, followed by the 2012 Provisional Constitution; the latter is still in force.

A majority of interim constitutions ensured a swift, if not immediate, process toward a final constitution, within one or two years, as in Egypt, Iraq, Lithuania, Madagascar, Thailand, Togo and Ukraine. Some took moderately more time—up to 5 years—as in Afghanistan, Chad, Ethiopia, Poland and South Africa. The processes in Albania, Burundi, Kosovo and Nepal took up to 8 years, and only the DRC and Rwanda took more than 10 years. However, nine interim constitutions adopted since 1990 (one-third of the total) are still in force.[7] Except for Eritrea (1992) and Thailand (2014), all interim constitutions currently in force were developed in conflict-affected settings, and represent about half of all the interim constitutions drafted in conflict-affected settings since 1990.

Ludsin (2011: 303–04) mentions three challenges that explain why a number of interim constitutions delay the constitutional process and/or endure longer than expected: (a) a rushed process that does not give the parties time to cool passions and negotiate; (b) the unwillingness of one or more parties to compromise, perhaps because stalling the process may be perceived as more beneficial; and (c) a refusal to cede drafting power to the broader population (see also Samuels 2006). One could add a fourth challenge: the weakness of existing institutions to enforce agreements and contribute to the legitimacy of the constitutional process and the state.

> Whether a conflict-filled country will benefit from the multi-stage process depends heavily on the will of the warring parties to compromise and their ability to design a final process that avoids these tensions. The more fragile the cease-fire and the more uneven the balance of power between conflicting parties, the easier it is for negotiators or drafters to design a process that undercuts the benefits of a multi-stage constitution-drafting or peacemaking process. For example, where the potential for renewed violence is great, peace-makers are more likely to push for a quick final drafting process.
>
> (Ludsin 2011: 299)

These challenges are reflected in the fact that 14 out of the 18–20 countries in which interim constitutions were created in conflict-affected settings either relapsed into conflict or never experienced a lull in conflict. In addition, 7 out of 9 interim constitutions currently in force—in Burkina Faso, the Central African Republic (CAR), Libya, Somalia, South Sudan, Sudan and Yemen—were drafted in conflict-affected settings. In 5 of these countries (CAR, Libya, Somalia, South Sudan and Yemen) the conflict either relapsed or never ceased.

Other countries that managed to approve a final constitution after an interim period either relapsed or never stopped being in conflict, including Afghanistan, Chad, the DRC and Iraq. While Afghanistan has been at war since 1946 (UCDP n.d.), after the Taliban were ousted from power in 2001—and although Afghanistan had an interim constitution (2001–2004) and a final constitution since that time—the conflict never stopped. Iraq has also been marred by conflict ever since the occupation of its territory by the United States and its allies, despite also having a short-lived interim constitution (2004–2005) and a final constitution since 2005.

In Chad, the latest phase of the civil war started in 2005 and ended in 2010. The civil war in the DRC lasted from 1997 to 2003—the year the last interim constitution was approved—but conflict persisted in the eastern part of the country until 2012. In Rwanda, the genocide started shortly after the Arusha Accords were signed in 1993, while in Burundi the 12-year civil war stopped shortly before the approval of the permanent constitution in a referendum.

Managing expectations

One possible conclusion might be that interim constitutions are no panacea, as most conflict-affected countries that witnessed what Ludsin (2011) calls a 'multi-stage process'—which includes an interim constitution as part of a broader constitution-

6 As of September 2015, these were Lithuania (1990–1992), Ethiopia (1991–1995), Chad (1991–1996), Albania (1991–1998), Poland (1992–1997), Togo (1992), South Africa (1994–1997), Rwanda (1994–2004), Ukraine (1995–1996), Kosovo (2001–2008), Burundi (2001–2005), Afghanistan (2001–2004), DRC (2003–2006), Iraq (2004–2005), Thailand (2006–2007), Madagascar (2009–10), Egypt (2011–12) and Nepal (2007–15).

7 These are Eritrea (since 1992), Sudan (2005), Libya (2011), Yemen (2011), South Sudan (2011), Somalia (2012), Central African Republic (2013), Burkina Faso (2014) and Thailand (2014).

building process—were not able to manage conflict. This, however, only offers a one-dimensional metric of success for interim constitutions: ending the violence.

An alternative conclusion is that ending large-scale violence is a difficult task that requires not only a well-planned, inclusive and thorough constitutional process, but also the willingness of all parties to engage in the broader peace process. Without a willingness to compromise, a constitutional process that includes an interim constitution might, in the short and medium term, 'only' aspire to (a) scale down the conflict—already quite an achievement—while providing space for continued negotiations; (b) incentivize some political actors to follow the rules, thereby increasing the legitimacy of the process and the state; and (c) give the parties enough time to resolve their differences in an increasingly inclusive manner (see Hirschl 2009; Ludsin 2011: 252).

At the same time, the success of any interim constitution will also have to be measured against the original context in the country in question (Samuels and Wyeth 2006). To put it bluntly, South Africa is not Somalia, and Yemen is not Nepal. Expectations of success should remain linked to realities on the ground.

The interim constitutions in Nepal and Somalia

Nepal managed to negotiate and implement a Comprehensive Ceasefire Agreement that ended a decade-long civil war (1996–2006) and initiated a constitution-building process. This constitutional process started with the approval of a negotiated interim constitution and the scheduling of elections for a 601-member Constituent Assembly (CA) in June 2007.

The CA was tasked with drafting the permanent constitution within two years. While the two-year deadline was extended four times before the first CA was dissolved in May 2012, and even the second CA was unable to produce a draft by its February 2015 deadline, the process has been able to prevent political dialogue—or infighting—from sparking violent outbreaks (Suhrke 2014; International Crisis Group 2012; Jaiswal 2015: 5). In September 2015 the permanent Constitution was finally approved.

Meanwhile, in Somalia—the paradigm of a fragile state—two consecutive interim constitutions (in 2004 and 2012) have managed to repeatedly bring some of the parties back to the negotiating table, and have allowed them to partially engage emerging government structures in efforts to find solutions to the problems at hand (Bradbury and Healy 2010; Ainte 2014).

Somalia was able to reduce battle-related deaths shortly before or shortly after approving an interim constitution. The total number of such deaths fell from 8,009 in 1991 to 0 in 2004, and from 1,587 in 2007 and 2,006 in 2012 (after the rise of the Islamic Courts Union and later al-Shabab) to 896 in 2013 (World Bank n.d.).

Without assuming any correlation, it is possible that the negotiation and endorsement of both interim constitutions in Somalia contributed to the ongoing peacebuilding process—in the absence of a more thorough and final constitution-building process.

Yet one can also see that failures in the constitution-building process clearly contributed to its lack of legitimacy, and therefore its failure (thus far) to achieve sustainable peace. These failures include international support that is sometimes overwhelming to local actors, the exclusion of political parties and civil society groups, delays in the establishment of independent commissions to deal with specific issues such as human rights or federalism, and the lack of transparency and haste in the selection process for the National Constituent Assembly.

4. The design of interim constitutions

When designing interim constitutions, two large areas need to be taken into account: the level of detail and the scope of issues covered.

Level of detail

If the interim constitution attempts to deal with too many issues—and in too much detail—it may hamper advancement toward a final constitution. A highly detailed interim constitution risks establishing a complete system of government without including all (or even most) key sociopolitical actors (Ludsin 2011). A shorter, more limited text lowers the transaction costs of making and changing the interim constitution and potentially ensures a speedier peace process. However, this option also has its risks. If a text is too thin, and perhaps too heavily reliant on a set of international norms, it may not include all relevant stakeholders in the constitutional project, which might lead to weak national ownership and a lack of traction. Furthermore, depending on the general capacity of existing institutions, it may not sufficiently constrain transitional governing structures and protect fundamental rights.

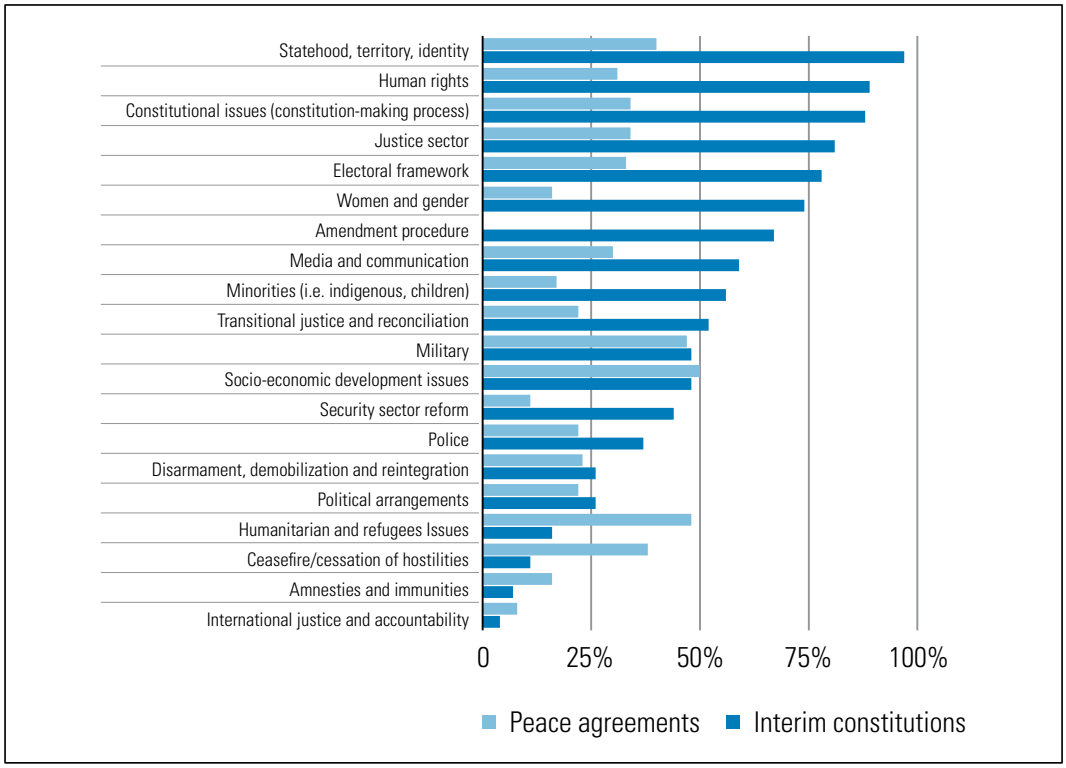
The 'thickness' of an interim constitution does not necessarily depend on the substantive issues it addresses, but rather on the level of detail contained in its provisions. Of the 30 interim constitutions analysed in this survey, those erring on the 'thin' side are either unilateral presidential/military decrees (e.g. Egypt and Thailand) or documents drafted during active conflicts (e.g. Afghanistan and Libya).

Generally, the ideal is to have a peace agreement with a ceasefire in place before initiating constitutional negotiations, but where conflict is raging and the public cannot be duly engaged (regardless of whether there is a previous peace agreement), the interim constitution should be thin. It should offer the space to end the conflict, settle passions and slowly draw the public into the constitutional debate, without deciding on any more issues than necessary. It should also build both a national sense of belonging and an understanding of the importance of reaching a more inclusive and sustainable agreement on a final constitution.

Scope of issues covered

Beyond thickness, the range of topics covered is also important to consider in the design of interim constitutions. Using the categories developed by the UN Peacemaker Database (UN n.d.), and in parallel to Easterday (2014: 388–90), this paper compares and analyses the content and themes of the 30-case universe of interim constitutions with those of peace agreements. The results are presented in Figure 4.1.

Figure 4.1. The substantive focus of peace agreements and interim constitutions



Source: Easterday (2014) and author's own data. All figures expressed in percentages.

Note: Some words of caution are necessary regarding this figure. First, the absolute number of documents examined varies quite substantially (e.g. note the disparity between 750 peace agreement-related documents and 30 interim constitutions). Second, the author of this paper coded the 30 interim constitutions, and the criteria used might vary from those of the UN Peacemaker Database. Third, the percentages are only indicative, but the relative weight should be evidence of the most common substantive issues addressed in the specific type of document. Fourth, 'constitutional issues' within interim constitutions refer to issues related to the constitution-making process, while peace agreements refer to constitutional issues in general. Fifth, the 'amendment' category was not present in Easterday's categorization, nor in any of the post-1990 peace agreements reviewed for this study; however, it seemed to be an important element of some interim constitutions. Sixth, while Easterday only considered 'power-sharing', the present study broadened the scope of this category to 'political arrangements', which also include direct designations of parties or people to adopt specific government functions.

The data presented in Figure 4.1 demonstrate that, in relative terms, peace agreements—unsurprisingly, perhaps—focus mostly on issues related to the immediate aftermath of conflict, such as ceasefires and the cessation of hostilities, humanitarian issues and refugees, and amnesties and immunities. In contrast, interim constitutions tend to include issues related to the initial state-building process (e.g. principles and values such as statehood, territory and identity, and human rights) or institutions and processes (i.e. the justice sector or the electoral framework).

Furthermore, two-thirds of interim constitutions include amendment procedures, while virtually no peace agreements include such provisions. In addition, all interim constitutions include clauses outlining the institutional framework that will govern the

transitional period in general, while only 1 in 7 peace agreements also includes such 'transitional political arrangements', defined as including provisions about the interim government, transitional government, governments of national unity, interim measures, and transitional institutions and mechanisms. Finally, all interim constitutions include issues related to the constitution-making process that will follow, compared to only one-third of peace agreements.

The following subsections discuss the amendability of interim constitutions, the institutional framework for the transition, and the outline of the broader constitution-building process, which includes issues related to timeframes, deadlines and sequencing of elections.

The amendability of interim constitutions

Two-thirds of the 30-case universe of interim constitutions include clauses on amendment procedures, which seem to be intended to make interim constitutions easier to change than final constitutions (Varol 2014: 11). This might be expected, due to their explicit temporary nature, the lower level of political investment and the fluidity of the situation. Indeed, where interim periods ended with the ratification of a final constitution, amending the constitution generally became more difficult.

Setting the institutional framework for the transition

Despite their amendability, the more detailed and specific the provisions, and the longer the duration, the more likely interim constitutions are to fall prey to 'constitutional stickiness', which is the fact that 'each stage of historical development constrains the next stage in the temporal sequence and stimulates movement in the same direction' (Varol 2015: 10).

According to this line of reasoning, the higher the costs of constitutional change, the higher the likelihood that the status quo will stick. Yet sometimes it will do so even where the benefits outweigh the costs, as 'human judgment is not perfect' and suffers from systematic biases and cognitive limitations (Varol 2015: 36).[8] According to Elkins et al. (2009: 56–7), there is an 81 per cent match between constitutions before and after replacement or amendment.

One might argue that, the thinner the interim constitution, the less likely it is that provisions will stick in the final constitution. At the same time, change will progressively become more unlikely the longer the provisions are in place, or the longer the debates about them continue.

An examination of the 21 post-Cold War interim constitutions that yielded either a final constitution (18) or another interim constitution (3) reveals that two specific changes are highly unlikely during the process of finalizing a constitution. First,

8 Varol (2015) uses behavioural law and economic methodologies to hypothesize five different biases that may affect or produce constitutional stickiness: status quo bias, anchoring bias, availability bias, hedonic adaption and excessive veneration of the constitution.

alterations in the form of the state—that is, its designation as a republic or monarchy, and as unitary or federal—are rare. Second, the system of government—for instance, whether it is structured as a parliamentary, presidential or semi-presidential system—is also highly unlikely to change.

However, regarding the choice between a unicameral or bicameral system, seven interim constitutions—in Afghanistan, Burundi, DRC, Ethiopia, Iraq, Rwanda and Somalia—first instituted a unicameral system and later evolved into a bicameral system. Chad shifted from no parliament to a unicameral system of government.

This analysis also examined whether each interim constitution established a constitutional or supreme court, or any other high court dealing with constitutional matters, and compared each of these provisions with regard to developments in later documents (either final constitutions or follow-up interim constitutions). A total of 9 out of 21 interim constitutions included the establishment of a constitutional court or similar—in Kosovo there was a Special Chamber on Constitutional Matters that later became a Constitutional Court, and in Thailand the Constitutional Tribunal gave way to a Constitutional Court in the final constitution. Six countries created constitutional courts, or similar, in their final constitution—Chad, DRC, Ethiopia, Lithuania and Madagascar—or in the follow-up interim constitution, as in Somalia. In Rwanda, the Arusha Accords established a Constitutional Court that was abrogated by the final constitution.[9]

It is important to recognize that constitutional arrangements made on an interim basis are more likely than not to survive—and become more complex—when transitioning to a more permanent framework.

Outlining the constitution-making process

Interim constitutions include, almost by definition, a roadmap or timeframe 'setting out the sequence of and deadline for the activities and decisions leading to the adoption of the [final] constitution' (Brandt et al. 2011: 19). The longer this timeframe, the more useful interim constitutions are considered to be as mechanisms for deferring important decisions. Conflict parties can therefore benefit from additional time not only to negotiate, but also to allow the immediate conflict dynamics and enmities to subside somewhat (Ludsin 2011: 242, 269, 288; Jackson 2008: 1288; Miller 2010: 624; Varol 2014: 26–32), and slowly build a national identity (Ludsin 2011: 264). Otherwise, as Ludsin (2011: 255) warns:

> Insecurity and continued conflict could polarize the warring groups and harden uncompromising positions, all of which will only inflame the conflict and undermine both constitution-drafting and peacemaking goals.

9 It is rare for a specific electoral system to be established in either an interim or a final constitution. There are probably only two exceptions to this rule: South Africa (proportional representation) and Burundi (blocked lists with proportional representation). In both cases, the electoral system is stated in both the interim and final constitutions.

This creates tension between short- and long-term goals in constitution-building after conflict. According to Easterday (2014: 403), 'longer time-frames between the peace agreement negotiation and constitution drafting can allow for more deliberation and inclusion and can increase the likelihood that the constitution will succeed'. The duration of the interim period, however, should be directly related to the time needed to decide on key procedural and substantive issues that will lead to, and be included in, the final constitution.[10]

Timeframes should respond to specific contextual issues such as (a) the number and relative proportion of negotiating parties and spoilers; (b) the level of agreement among negotiating parties; (c) the scale of state restructuring/rebuilding needed to implement the interim constitution; and (d) the potential consequences of not meeting deadlines (e.g. dissolving the constitution-making body and holding new elections) regarding the continuous relevance and legitimacy of the interim constitution.

In the present universe of 30 cases, excluding those that are still in force at the time of writing, interim constitutions last an average of 3.5 years. The range spans from a maximum of 10 years—as in Rwanda's Arusha Accords—to a minimum of approximately 1 year, as in Lithuania in 1990, Togo in 1991, Ukraine in 1995, Iraq in 2004, Thailand in 2006, Madagascar in 2009 and Egypt in 2011.[11]

Deadlines

About one-third of the interim constitutions in this sample—mostly in African countries and former Soviet republics—did not establish a deadline for the interim period or for drafting a final constitution. The deadlines set in the remaining interim constitutions ranged from a few months (e.g. Thailand) to six years (e.g. Sudan). One-fifth of the deadlines in post-Cold War interim constitutions expired, for example in Chad, the DRC, Libya, Nepal and Yemen. All of these countries, with the exception of Nepal, either never emerged from conflict or swiftly relapsed into conflict after the creation of the interim constitution.

In Chad, serious deficiencies in the process—including the lack of legal training of the committee members in charge of drafting the constitution, and the lack of public participation in the process—allegedly caused the country to miss its deadline. These deficiencies were compounded by problems in the design of the final constitution, including strong presidential powers and insufficient judicial independence. Together, these factors gravely undermined the legitimacy of the document, and arguably contributed to the 2005 civil war (Widner n.d.).

In the DRC, after the Congolese Government enacted the 1994 interim constitution, the National Conference drafted a final constitution. However, due to increasing

10 Widner (2008: 1534) calls for occasional sunset clauses as helpful (though ambiguous) tools to help diminish passions in negotiations.

11 This average prevails even if post-Soviet republics such as Albania, Lithuania, Poland and Ukraine are excluded, and when post-Soviet republics are excluded and interim constitutions that are still in force (Libya 2011, Yemen 2011, South Sudan 2011, Somalia 2012, Central African Republic 2013, Burkina Faso 2014 and Thailand 2014) are included (for further detail on this issue see Ginsburg, Elkins and Blount 2009: 209).

instability the constitution was never implemented. The transitional period—with a 15-month deadline (art. 117)—lasted until 1997, when the interim constitution was superseded by decree law after General Joseph Kabila seized power in a coup.

Transitional periods remain ongoing in Libya and Yemen. In both countries, the security situation declined into chaos, and key stakeholders are now focusing on negotiating a peace process rather than resuming the failed constitutional process (Gluck 2015). In Libya, a number of factors arguably contributed to both the failure of the constitutional process and the country's further decline into chaos, although the key factor may have been the poor sequencing of elections for the House of Representatives. The opposition's victory in the elections, and the Supreme Court's declaration that these elections were unconstitutional, damaged the entire constitutional process and triggered a new phase of the civil conflict. In Yemen, the inability of the National Dialogue Conference to agree in a timely manner on a number of issues of vital importance to key stakeholders meant that decisions were made in a fast-paced and non-participatory manner (Gaston 2014; Gluck 2015; Transfeld 2015). Several groups, including the Houthi rebels, did not accept some of those decisions—specifically the federal division of the country into six provinces—and responded by escalating the civil conflict (Abi-Habib 2015).

Nepal is a special case in the sense that the civil conflict stopped before the interim constitution came into force. Although Nepali stakeholders were unable to agree on a number of important issues throughout the process, including the number of provinces and the type of federal government structure, the conflict did not relapse—at least before the approval of the final Constitution in September 2015.

Dealing with intractable disagreements

Deadlines to create a final constitution might be missed due to parties' unwillingness to compromise, intractable disagreements, or both. Disagreements might involve principles or values, or which procedures to follow (Brandt et al. 2011). While seeking a court ruling is one way to solve a procedural problem, this may not be possible, especially in conflict-affected settings with weak institutions. When substantive issues are at stake, legal involvement might aggravate the problem by ruling for one party when compromise is needed (Brandt et al. 2011: 27).

In such cases, it may be preferable to adopt informal political mechanisms to deal with intractable disagreements on both process and substance, such as (a) giving decision-making power to party leaders; (b) postponing or deferring contentious issues for future resolution by using constructive ambiguity or by-law clauses (Ludsin 2011: 278; Lerner 2010; Ginsburg and Dixon 2012); (c) easing the amendment procedures; (d) using review or sunset clauses on compromise solutions (Pildes 2008: 186); and (e) engaging in mediation or seeking external advice.

Sequencing of elections

Interim constitutions also help overcome the 'chicken-and-egg' problem in the sequencing of elections. There is a perennial debate about whether elections are necessary before drafting a legitimate constitution (under a democratically elected leadership),

or whether a constitution is necessary to create a legitimate basis for elections. An interim constitution might establish a transitional institutional framework that enables elections to the body in charge of drafting the final constitution. Therefore, a well-built interim constitution might be an opportunity to create a legitimate (yet transitional) framework for elections, while leaving the final constitutional arrangements to be drafted by an elected body.

The Iraq case illustrates how the poor sequencing of elections with regard to the constitutional process can jeopardize general peacebuilding. The Coalition Provisional Authority established by the USA and its allies created the Iraqi Governing Council—a small committee of ten men—to draft the Transitional Administrative Law (TAL) between January and March 2004 (Dann and Zaid 2006: 436). The TAL was signed on 8 March 2004 and came into force on 28 June 2004. It laid out a framework for drafting a permanent constitution during the next six months, and for elections to the National Assembly to be held no later than 31 January 2005.

The permanent constitution was ratified in a referendum held on 15 October 2005, after which general elections took place in December 2005. The TAL remained in force until the new Iraqi Government was formed in May 2006. These tight deadlines largely excluded the Sunni community from key phases in the constitution-building process, and impaired any hopes that negotiations could lead to consensus-building (or at least to an improvement in the power balance) between the three major ethnic groups in Iraq. Furthermore, they significantly contributed to the deteriorating security situation, as Sunnis—and other serious opponents of the US-led invasion—became, almost by default, spoilers of the constitution-building process.

5. The process of drafting interim constitutions

The three most important issues to consider when deciding on the process of drafting an interim constitution are (a) the levels of participation, representation and/or inclusion (i.e. who decides on the process and who drafts the document), (b) the approval mechanisms and (c) the role of international actors.

Levels of participation and representation

Ideally, interim constitutions follow on from (and are more inclusive than) peace agreements, and include a broader spectrum of participants in their negotiations (Benomar 2004: 82–83; Varol 2014: 6).

> Peace agreements are limited by who sits at the table and can result in counter-productive political arrangements. They can be difficult to implement and risk being undermined by spoilers. . . . With international involvement, they may reflect neo-colonialist tendencies or be further weakened by imposed timelines and competing priorities of international interveners.
>
> (Easterday 2014: 380)

Inclusion is further enabled by transitional arrangements that facilitate trust-building and allow for a more progressive constitutional arrangement. Additionally, the legitimacy of an interim constitution likely depends on a certain degree of inclusivity (Ludsin 2011: 276), even if it falls short of full public participation (Ghai 2004), which is becoming the norm for final constitution-building processes (Hart 2010).

Even if the conditions for broad participation are suboptimal, it is important that politically salient groups are represented at the constitutional negotiating table in some form, otherwise the process (and the resulting settlement) will struggle to gain traction and risk turning excluded groups into spoilers. The challenge of selecting the appropriate representative body is explained as follows:

> The drafting of a constitutional text is inevitably the task of some relatively small group. Full-scale direct democracy is never a practical proposition … The issues for participation through electoral means are not whether the process will involve representation, but the nature and function of the representative body, the kind and degree of representation, constraints placed upon representatives, and their accountability to the public, specifically for constitution-making decisions.
>
> (Hart 2010: 33)

In the 30-case universe studied here, specific national actors appointed the body in charge of drafting the constitution. These actors included either an alliance of political parties (as in Rwanda in 1993, DRC in 2003, Sudan in 2005 and Nepal in 2007) or an executive body (permanent or transitional), whether elected, self-appointed or appointed by a third party (e.g. Afghanistan in 2001, Kosovo in 2001, Iraq in 2004 and Yemen in 2011).

The case of Togo (1991) is unique in that the government and the opposition agreed to hold a 'national forum', later called the National Conference, which drafted the interim constitution and established a one-year transitional period.

Approval mechanisms

Especially in conflict-affected settings, the same body that drafts the interim constitution also generally approves it. There are a few exceptions, for example when the latest parliament approves the draft interim constitution, such as South Africa 1993 and South Sudan 2011; and cases such as Thailand 2006 and 2014, in which the king approved the draft. In Egypt, the 2011 Constitutional Declaration of 30 March included a number of amendments to the former constitution, which were approved by referendum (BBC News 2011).

The role of international actors

International actors play an increasing role in constitution-building in conflict-affected settings, advising on both process and content (Dann and Zaid 2006). International actors can further support the drafting of an interim constitution by mediating or facilitating dialogues among different parties, supporting the development of local actors' capacities in their role as negotiators, and enabling governmental and non-governmental institutions to effectively implement the new constitutional (and other legal) provisions.

Two further issues are worthy of mention regarding the international community. First, interim constitutions can act as the beginning of an exit strategy for international actors that are heavily engaged in the broader peace process, as they provide a means of returning initial government control to national actors, while providing assurances to minorities of their political inclusion in the ultimate constitutional bargain. Second, the international community can often act as a guarantor for the interim process—allowing disempowered groups to commit to the political arrangements of the interim constitution with less fear that the power holders will renege on the deal. Even where international actors are unwilling to invest resources in enforcing the arrangement, they can help parties monitor compliance.

6. Conclusions

> Constitutions are not drafted by angels, and the constitutional design process is riddled with limitations that often make durable constitutional design difficult and error-prone.
>
> (Varol 2014: 59)

Interim constitutions are mediating tools that serve to bridge transitions from one constitutional order to another. While they are sometimes the result of failed (or unfinished) constitutional processes, interim constitutions can also be considered in their own right, as they attempt to create 'a more durable and more optimal constitution that incorporates the benefits generated from the use of a temporary constitution . . . for an interim period' (Varol 2014: 11; see also Widner 2008: 1533–34). Such benefits include more time and the possibility of greater inclusion throughout the process.

Interim constitutions can be defined as constituent instruments that assert their legal supremacy for a certain period, pending the enactment of a contemplated final constitution. This definition, however, encompasses a variety of legal documents that differ fundamentally in their design, process and rate of success, such as 'transitional charters', 'provisional constitutions', 'constitutional arrangements,' 'interim declarations' or even the 2011 Agreement on the Implementation mechanism for the transition process in Yemen.

This variation relates directly to substantial contextual differences among conflict-affected states—that is, the degree of institutional fragility, the nature of the conflict, the political and social landscape (including the existence of spoilers and different levels of public constitutional awareness), and the role of the international community in the unfolding constitution-building process.

These differences have a crucial impact on both the choice of procedure, including contemplated levels of participation, approval mechanisms and the role of international actors. They also affect the choice of the substantial issues to be addressed and their level of detail, including timeframes, deadlines and the sequencing of elections.

Furthermore, the relationship between the country context and the choice of procedure and design also affects the likelihood of success of interim constitutions (and the entire constitutional process). However, success is a slippery concept that might involve achieving improvements in certain areas rather than full accomplishments (Hirschl 2009: 1372; Widner 2008: 1536).

While interim constitutions 'cannot do all the work' (Haysom and Welikala n.d.), they have the potential to (a) facilitate consensus over time on issues that directly or indirectly caused the conflict to erupt in the first place; (b) contribute to a culture of participatory constitutionalism; and (c) address sequencing issues regarding elections, and the need to build or strengthen key institutions in order to implement the current and future constitutional framework (see also Ludsin 2011: 251).

Furthermore, there are four key questions that help assess not only the need for an interim constitution, but also the difficulty of pursuing this multi-stage constitutional process in the absence of better alternatives.

1. Is there buy-in from all major stakeholders to the broader peacebuilding process?
2. Do stakeholders to the conflict (and at the negotiating table) represent the majority of the population? If not, are there mechanisms to involve the broader population in the process?
3. How structural are the grievances that led to the conflict, and to what extent is there a willingness to conduct far-reaching reforms?
4. Does the institutional framework need to be recreated from scratch, or was the pre-war institutional framework strong enough to be (easily) rebuilt?

Time is an interim constitution's single most important contribution to a constitution-building process in a conflict-affected setting. Interim constitutions can offer time for major stakeholders to participate constructively in peace- and constitution-building processes, as well as for parties at the negotiating table to forge stronger ties with their constituencies and the population at large. Time is also key for discussing and agreeing on the kind of (structural) reforms needed to permanently end the conflict, and for the institutional framework to be capacitated enough to implement constitutional and other legal agreements.

Lastly, the international community often has a role to play in the development of interim constitutions. When international actors adopt a management position with regard to the peace process, interim constitutions may offer the opportunity to return governing control to national actors. The international community may also serve as a guarantor of the process, which might strengthen perceptions that the process will be respected, and further enable implementation of the new constitutional framework.

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