LAWYERING PEACE

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CHAPTER 5: GOVERNANCE

CHAPTER FIVE: GOVERNANCE

INTRODUCTION

During a peace negotiation, the negotiating parties must reach agreement on a multitude of issues. As explored in previous chapters, the parties need to establish security arrangements and a monopoly of force, create power-sharing arrangements, determine natural resource ownership and management, and sort out questions of external self-determination. In addition to addressing these core issues, many other issues arise throughout the process of negotiating peace that parties may not have the time or capacity to fully resolve during the formal negotiations.

Establishing a comprehensive legal framework for post-conflict governance is one of those tasks where there is seldom the time or capacity for the parties to reach a full and complete agreement during a negotiation.

Though decisions relating to post-conflict governance are critical issues for discussion within peace negotiations, the parties often are not able to determine each detail of the system for post-conflict governance. Instead, the parties often agree to a preliminary set of principles coupled with a general governing framework. They then set forth an agreed upon process for negotiating, designing and implementing a national dialogue, the drafting or amending of a constitution, and elections.

The parties to peace negotiations are increasingly agreeing to hold national dialogues as a prelude to the preparation of a new or amended constitution. The national dialogue is intended to assess the will of the people as it relates to the structure and substance of the constitution. A national dialogue, also known as a popular consultation or national conference, is a process in which representatives from multiple parties discuss the issues and challenges related to a political transition.[1] A post-peace agreement national dialogue can provide the negotiating parties with the time and opportunity to build confidence and increase participation, as well as a platform to develop the political, economic, and social principles that will guide a state's transition.[2]

The parties to a peace negotiation generally also either directly address constitutional modification during the negotiations, via an articulation of principles, agreed upon amendments, or in rare cases, a new constitution imbedded in the agreement. The parties may also create a process for the post-agreement development of a new or amended constitution. Since 1991, provisions for a constitution-drafting process or components of a new constitution have been included in over 30 peace agreements.

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[1] *See* Peter Harris and Ben Reilly, 'Democracy and Deep-Rooted Conflict: Options for Negotiators' (International IDEA, 1998) 253; *See also* Katia Papagianni, 'Civil Society Dialogue Network Discussion Paper No. 3: National Dialogue Processes in Political Transitions' (Centre for Humanitarian Dialogue, 23 Jan. 2014) 1

[2] *See* 'United Nations Peacebuilding Commission Working Group on Lessons Learned, Chair's Summary: Lessons Learned from National Dialogue in Post-Conflict Situations' (United Nations Peacebuilding Support Office, Nov. 2009)

Negotiating a constitution-drafting process during the peace process allows the parties to lock in the objective, timeframe, scope, and structure of the process. As a state's constitution is its founding legal document and is often the supreme law of the land,[3] developing a post-conflict constitution-drafting process is one of the most important steps in the formation of a new or reformed structure for governance.[4] Notably, a recent study indicates that when parties draft a post-conflict constitution, which occurs in about a quarter of conflicts, the peace is more durable.[5]

In many instances, the parties will also decide during the negotiations to set parameters around how the system of post-conflict governance will operate, such as by affirming specific human rights protections. In some post-conflict contexts, there are principles that are so important to the resolution of the conflict that the parties articulate them specifically in the peace agreement. The parties may also create supremacy clauses in the peace agreement that provide the peace agreement with priority legal status in relation to the new or amended constitution.

Generally, once a constitution is agreed upon, but occasionally prior to a new or amended constitution, there will be elections. During the peace negotiations, the parties usually agree upon the process for holding these elections. The parties also generally cover such issues as the selection and mandate of an election commission, the type of electoral system to be implemented, the nature of voting rights for domestic and displaced citizens, timetables for the administration of the electoral process, dispute resolution mechanisms to resolve potential electoral disagreements, and regulations for political financing.

In keeping with the overall approach of the book, this chapter undertakes a detailed exploration of one dimension of the process for creating and implementing a system for post-conflict governance.[6] In this case, the chapter will address how the parties approach achieving changes to the constitutional structure of a state during the negotiations. As in the other chapters, this chapter notes along the way how the parties to the peace negotiation harmonized their approach to constitutional modification with other components of post-conflict governance. The chapter undertakes an analysis of approaches to constitutional modification from an array of peace negotiations, providing useful insights into the broader topic of establishing a comprehensive legal framework for post-conflict governance.

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[3] *See e.g.* Ecuador Constitution (2008) art. 424; Ethiopia Constitution (1994) art. 9.1; Swaziland Constitution (2005) Preamble; *see also* 'What is a Constitution?' (University College London: Constitution Unit)

[4] Jamal Benomar, 'Constitution-Making After Conflict: Lessons for Iraq' (2004) 15 Journal of Democracy 81, 82

[5] *See* Charlotte Fielder, 'Why Writing a New Constitution After Conflict can Contribute to Peace' (German Development Institute Briefing Paper, Nov. 2019)

[6] For a broader examination of topics related to post-conflict governance, *see generally* Louis Anten, 'Strengthening Governance in Post-Conflict Fragile States' (Netherlands Institute of International Relations Conflict Research Unit, Jun. 2009); Garth Glentworth, 'Post-Conflict Reconstruction: Key Issues in Governance' (DFID – Governance Department, 2002); Daniel G. Ogbaharaya, '(Re-)building Governance in Post-Conflict Africa: The Role of the State and Informal Institutions' (2008) 18(3) Development in Practice 395-402; Jonathan P. Worboys, 'Electoral laws and electoral reform' in Paul R. Williams and Milena Sterio (eds), *Research Handbook on Post-Conflict State Building* (Edward Elgar, 2020); Betsy Popken, 'Vetting the public sector' in Paul R. Williams and Milena Sterio (eds), *Research Handbook on Post-Conflict State Building* (Edward Elgar, 2020); Jennifer Trahan, 'Judicial reform and rebuilding' in Paul R. Williams and Milena Sterio (eds), *Research Handbook on Post-Conflict State Building* (Edward Elgar, 2020)

This chapter addresses a number of conundrums related to constitutional modification that parties face during peace negotiations and the broader peace process. First, the chapter discusses the puzzle of whether and how to address constitutional modification during peace negotiations in a manner that promotes a durable peace. Next, the chapter provides a conceptual and legal primer for understanding how the negotiating parties design post-conflict constitution-drafting processes. Then, the chapter explores a number of instances of key state practice to analyze and highlight how the parties involved in peace negotiations have sought to manage the conundrums they faced when seeking to solve the puzzle constitutional modification.

The Puzzle: Whether and how to address constitutional modification during peace negotiations in a manner that promotes a durable peace.

Parties to peace negotiations naturally primarily act out of their self-interest, including when determining a process for creating and implementing a system for post-conflict governance. When negotiating a modification of the constitution, or a process for post-agreement modification of the constitution, it can be exceedingly difficult for the negotiating parties to foresee which options will best suit their self-interest or the interests of their constituency. With other topics in a peace negotiation, such as external self-determination or a monopoly of force, the consequences of particular choices are more apparent to most of the parties to the negotiation.

Unlike other cornerstone issues for durable peace discussed elsewhere in this book, the decisions parties to a peace negotiation make regarding post-conflict governance and constitutional modification are less clear-cut as detrimental or beneficial to both their own interests, and to the prospects for a durable peace. The parties oftentimes find it exceptionally difficult to address constitutional modification and agree to the ultimate substance of a post-conflict constitution without fully knowing whether these decisions suit their interests or ameliorate the drivers of conflict. The long-term consequences of constitutional modification and the process by which it is brought about may be unclear to the parties even as they are negotiating these issues at the rapid speed often required by a peace process, contributing to a potentially flawed arrangement that the state may then be forced to contend with for years to come.

Despite the risks of not knowing long-term consequences of constitutional modification, and the process by which it is brought about, addressing governance-related conflict drivers remains essential for the successful implementation of any peace agreement.

The parties to a peace negotiation face the challenge of determining how much substance related to post-conflict governance will be determined by the peace agreement and how much will be left for a later point in time. Issues related to governance, deep structural flaws within a state's nature such as disenfranchisement or the failure to protect certain groups or classes of individuals, are often conflict drivers and therefore priorities to resolve during negotiations.[7] Peace negotiations themselves, though, are inherently time-limited and may not include all possible governance experts at the table to support the parties in attendance. Despite these

[7] Hallie Ludsin, 'Peacemaking and Constitution-Drafting a Dysfunctional Marriage' (2011) 33(1) University of Pennsylvania Journal of International Law 239, 242

limitations, the parties face immense pressure in peace negotiations to include specific principles for post-conflict governance, such as the text of a constitution, in their agreement. If the parties decide to draft a constitution during the peace negotiation, they will likely face an overwhelming number of challenging decisions, including vertical power-sharing, horizontal power-sharing, oversight mechanisms, human rights protections, fundamental freedoms, military structures, and electoral reform.

Precisely because of the constraints inherent to peace negotiations, the parties may instead opt to design a post-conflict constitution-drafting process. This process can serve as the conduit for key structural reforms that may have been impossible to resolve within the confines of a peace negotiation. The parties to a peace negotiation must also determine the relationship between the peace agreement and any future constitution, whether the text of what is agreed to in the peace agreement will be binding on the constitution-drafting process. Though deciding on a later constitution-drafting process may permit the parties to sign an agreement, designing the constitution-drafting process itself requires expertise and deft negotiation.

This overarching decision, choosing whether to draft or amend a constitution during the peace negotiations, or agree on fundamental principles and a select number of key mechanisms related to governance, and/or agree upon a process for subsequent constitution-drafting, can either lead to a durable peace or contribute to a relapse of conflict depending on the circumstances.

Additionally, peace processes do not always include all of the primary decision-makers or influencers in a particular state whose buy-in is needed to ensure that any constitution ultimately produced in fact is implemented. Peace processes tend to include certain powerful stakeholders but not others, excluding key groups from the table. If the constitution-drafting process is relegated to a later forum, the same parties engaged in the peace process may or may not have a seat at that table, or they may find themselves sharing it with a much wider group of stakeholders. This may dilute their influence over the outcomes of any such process and either promote or threaten a durable peace.

Often the parties to a peace negotiation are not entirely inclusive or representative of the wide range of constituent interests in a state, and disproportionately represent security actors. Whenever constitutional issues arise, these security actors will have an outsize influence on the constitution that is drafted or the process by which it will be drafted. As such, these stakeholders may seek to cement authoritarian power, establish a primary role for the military in post-conflict governance, or forge institutions and structures that perpetuate the marginalization of less powerful stakeholders. On the other hand, it is not necessarily a given that the security environment will allow for widespread public engagement and deliberative negotiation in constitution-drafting and approval processes immediately after the signing of a peace agreement.[8] A substantial delay to wait for the security environment to improve may undermine what limited stability is created by the agreement.

[8] *See* Darin Johnson, 'Post-Conflict Constitution-Making' in Paul R. Williams and Milena Sterio (eds), *The Research Handbook on Post-Conflict State Building* (Edward Elgar, 2020)

The intensity of negotiation over constitutional principles and the cooptation of ongoing constitution-drafting processes by belligerents to achieve political objectives under the threat of force has led some authors to refer to such negotiations as "conflict constitution-making."[9] A conflict constitution-making process transforms constitution-drafting into a so-called battlefield, deepening divisions among drafters, preventing consensus, and leading to boycotts or rejections by stakeholders.[10] Though the parties to a peace negotiation may outwardly strive for a participatory constitution-drafting process, if the conditions within the state remain highly contentious, constitution-drafting embeds the conflict in the new legal framework of a state, rather than alleviating the conflict drivers.[11]

Conceptual and Legal Primer

With respect to the issue of constitutional modification, there are a variety of legal norms that are relevant and important. Constitutions are a foundation for the domestic rule of law within a state, specifying "the rules by which law is made, interpreted, applied, enforced, and changed."[12] Creating these legal structures is at the core of a state's legitimacy, asserting a commitment to rule of law and a larger legal framework of norms, principles, and customary practice.[13]

An essential element of this legal framework of norms, principles, and customary practice is the notion of "participatory" constitution-drafting. The International Covenant on Civil and Political Rights, Article 25(a) codified this norm of participation.[14] The Covenant provided that every citizen shall have the right and opportunity "to take part in the conduct of public affairs, directly or through freely chosen representatives."[15] A formal interpretation of this article, from the UN Office of the High Commissioner for Human Rights, more concretely ties its contents to constitution-drafting. The High Commissioner formally noted "citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum…"[16]

Moreover, the UN Human Rights Committee has formally concluded that constitutional conferences and participatory constitutional reform processes align with Article 25(a) of the Covenant.[17] In *Marshall v. Canada*, a case brought before the UN Human Rights Committee, representatives from the Mikmaq tribal society argued that their exclusion from the Canadian

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Vicki C. Jackson, 'What's in a Name? Reflections on Timing, Naming, and Constitution-making' (2008) 49(4) William and Mary Law Review 1249, 1250
[13] Louise Olivier, *Constitutional Review and Reform* (Open Society Initiative for Southern Africa, 2007) 6
[14] International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, *entered into force* 23 Mar. 1976 (The provisions of article 41 (Human Rights Committee) entered into force 28 Mar. 1979.)
[15] *Id.*
[16] Office of the High Commissioner for Human Rights, General Comment 25, art. 6 (Fifty-seventh session, 1996), U.N. Doc CCPR/C/21/Rev.1/Add.7 (1996)
[17] Noha Ibrahim Abdelgabar, 'International Law and Constitution Making Process: The Right to Public Participation in the Constitution Making Process in Post Referendum Sudan' (2013) 46(2) Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America 131, 135

constitutional conferences was in violation of the International Covenant on Civil and Political Rights' Article 25(a).[18] These particular constitutional conferences had the objective of identifying and clarifying the rights of indigenous peoples in Canada.[19] The committee found that the constitutional conferences constituted the conduct of public affairs and required the representation of those interests, albeit approving indirect representation through elected representatives, and denying an absolute right to direct representation.[20]

The Human Rights Committee's 2006 state report on Bosnia similarly reinforced Article 25(a). The report indicated concern that the Bosnian Constitution, and its election law, excludes "Others", persons who do not belong to the Bosniak, Croat, or Serb "constituent peoples" groups, from being elected to the House of Peoples and to the presidency.[21] The Human Rights Committee formally recommended that Bosnia "reopen talks on constitutional reform in a transparent process and on a wide participatory basis, including all stakeholders" under Article 25 of the International Covenant on Civil and Political Rights.[22]

In post-conflict contexts since the late 20th century, participatory constitution-making has increased.[23] This method rooted in international human rights norms can forge societal acceptance of a post-conflict regime or constitutional order, allowing for more successful transitions out of civil conflict. Broad participation within decision-making processes, as endorsed by the Covenant and the High Commissioner, may assist with forging consensus and create a broadly accepted post-conflict legal order following violent conflict.[24]

A number of parties have sought to act consistently with the International Covenant on Civil and Political Rights, and with Article 25(a)'s interpretation by the High Commissioner in more recent constitution-drafting processes,[25] as in Kenya, the stalled Syrian Constitution Drafting Committee process, and in the case of South Africa. A number of global agreements[26] and every regional human rights charter also include language pertaining to the right to participation in state decision-making.[27]

Because of the nature of the puzzle and the focus specifically on constitutional modification, this chapter will not be engaging in a review of comparative state practice drawing

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[18] *Mi'kmaq Tribal Society v.* Canada, U.N. Doc. CCPR/C/43/D/205/1986 (1990) 3.1
[19] *Id.* at 2.2
[20] *Id.* at 5.3
[21] U.N. Doc. CCPR/C/BiH/CO/1 (2006) ¶ 8
[22] *Id.*
[23] *See* Jason Gluck & Michele Brandt, 'Participatory and Inclusive Constitution Making: Giving Voice to the Demands of Citizens in the Wake of the Arab Spring' (United States Institute for Peace, 2015) 105 PEACEWORKS 5, 5-6
[24] *See* Johnson, *supra* note 8; *See also* Vivian Hart, 'Constitution-Making and the Transformation of Conflict' (2001) 26 Peace and Change 153, 154
[25] Abdelgabar, *supra* note 17 at 134-135
[26] These include: The UN Declaration of Human Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination on All Forms of Discrimination Against Women*; See* Abdelgabar, *supra* note 17, at 133-134
[27] These include: The African Charter on Human and Peoples' Rights, the Asian Charter of Rights, the European Convention on Human Rights, the American Convention on Human Rights, and the Inter-American Democratic Charter; *See* Abdelgabar, *supra* note 17, at 133-134

from more established states that have created legal processes and procedures for constitutional modification.

This state practice, from which this book has drawn in previous chapters' sections on Conceptual and Legal Primers, did not address processes for creating and implementing a system for post-conflict governance in the same way, as we will see in our key state practice and conundrums sections below. Any type of historical analysis assuming what processes states like the Canada, Germany, Switzerland, or the United States devised to craft their constitutions will make sweeping assumptions about what those processes entailed and project lessons learned that are unlikely to apply to the key state practice we will examine in this chapter. Oftentimes, lawyers will project too great of an importance onto historical case studies while neglecting to acknowledge the important differences between historical cases and contemporary realities, as well as the lack of definite information available about those historical processes.

As will be apparent with the following instances of key state practice and the conundrums, post-conflict states are actively creating legal processes and procedures that govern how post-conflict governance reforms are created and implemented. For practitioners and scholars, it is this comparative analysis that will prove most useful.

Key State Practice

This chapter draws on the following key state practice cases for a discussion of the various conundrums that the parties to a peace negotiation face when confronting the puzzle of whether and how to undertake constitutional modification in a way that contributes to a durable peace. The paragraphs that follow highlight the relationship between each peace process and constitutional modification. For more on these conflicts, negotiations, and agreements, consult the Appendix.

The mediators to the **Bosnian** Dayton Accords, a negotiation made possible by NATO airstrikes, a military stalemate, and successful shuttle negotiation, designed a dramatic, all-or-nothing negotiation strategy to put an end to the violent dissolution of the former Yugoslavia.[28] After being forced into isolation in Dayton, Ohio for three weeks in November 1995, the parties agreed to a sweeping set of Accords. These Accords included a complete constitution in Annex 4, containing twelve multi-part articles and two sub-annexes.[29] The constitution negotiated at Dayton provided for new power-sharing arrangements, decentralization, citizenship rules, the rights of refugees, and human rights protections. The constitution and the peace agreement were accomplished through the drafting of one comprehensive set of Accords, capitalizing off the momentum established by isolating the parties from the ongoing conflict.

In 1991, **Colombia** sought to end the conflict with the Revolutionary Armed Forces of Colombia (FARC) and other non-state armed actors by modifying its constitution to provide for extensive devolution of power to the local level. These efforts failed, and the conflict continued

[28] James O'Brien, 'The Dayton Constitution of Bosnia and Herzegovina,' in Laurel E. Miller and Louis Aucoin (eds), *Framing the State in Times of Transition,* (United States Institute of Peace, 2010) 333-335
[29] The General Framework for Peace in Bosnia and Herzegovina (Dayton, 1995) Annex 4

until 2016 when the parties reached an agreement on a wide package of constitutional modifications. The agreement stipulated constitutional and legal reforms to ensure the political representation of the new political movement or party constituted by former FARC members.[30] Notably, the agreement mandated that the provisions within the agreement that created the Special Jurisdiction for Peace, the cornerstone of the peace and reconciliation process, be incorporated into the Colombian Constitution as a "transitional article."[31] The Agreement was put to a referendum and was rejected by the Colombian people. The Colombian parliament then amended the agreement, which was approved by the Colombian Constitutional Court, and then implemented it without putting the agreement to a second referendum.

Following a civil war and a public referendum on the question of self-determination in **East Timor**, the United Nations Security Council established the United Nations Transitional Administration in East Timor to oversee East Timor's transition to independence in 1999. The Transitional Administration was granted a significant number of administrative authorities, including judicial, legislative, and executive powers.[32] In exercising these authorities, the Transitional Administration created a rapid, six-month long constitution-drafting process, which included elections in 2001. While the process produced a constitution that entered into force a year later in 2002, a number of commentators noted that since the process moved so quickly the outcome suffered from a lack of full public participation.[33]

In December 1996, the parties to the conflict in **Guatemala** signed a comprehensive peace agreement that provided for the implementation of ten accords previously signed during the peace process from 1994-1996.[34] The Agreement included a series of constitutional amendments, which intended to give marginalized and indigenous communities greater rights, representation, and recognition, as well as accomplish key democratic reforms.[35] After the peace agreement was signed, voters participated in a subsequent constitutional amendment referendum process. Voters faced an overwhelming number of amendments, misrepresentation, and oversimplification of particular amendments in the campaigning process, and the referendum failed.[36]

The Transitional Administrative Law for **Iraq**, decreed in 2004 by the Coalition Provisional Authority, served as an interim constitution for Iraq. This interim constitution set the process for creating a permanent constitution. The law set a period of six and a half months, with the possibility of an extension. A constitutional assembly was formed, made up of 55 members drawn from the 275 members of the Transitional National Assembly.[37] After the constitution was drafted, it was presented to the National Assembly and submitted to a public

[30] Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (Bogota, 2016) 3.2.1.2
[31] *Id.* at Other Agreements and the Draft Law on Amnesty, Pardon and Special Criminal Treatment: Agreement of 7 November 2016, I
[32] S.C. Res 1272, U.N. SCOR., U.N. Doc. S/RES/1272 (1999)
[33] Markus Benzing, 'Midwifing a New State: The United Nations in East Timor' (2005) 9 Max Planck Yearbook of United Nations Law 295, 304
S.C. Res 1272, U.N. SCOR., U.N. Doc. S/RES/1272 (1999)
[34] U.N. Doc. S/1997/114 (1997) Annex II: Agreement on a Firm and Lasting Peace (1996)
[35] Agreement on the Identity and Rights of Indigenous People (1995)
[36] Lauren Marie Balasco and Julio F. Carrión, 'Required Consultation or Provoking Confrontation? The Use of the Referendum in Peace Agreements' (2019) 55 (2) Representation 141, 146
[37] 'Q&A: Drafting Iraq's Constitution' (The New York Times, 17 Aug. 2005)

referendum. In October of 2005, the constitution was approved by a majority vote. To ensure participation by the Sunnis in the referendum, who had threatened a boycott, the constitution-drafting committee agreed to add an amendment that created a constitutional review body after the referendum process had finished.[38] In 2007, the constitutional review body made further amendments to the constitution. The referendum process was designed to ensure a minimum level of support among the three main constituent populations of Iraq.

In an effort to end the conflict between the ethnic Albanians of **Kosovo** and Serbian forces in the territory of Kosovo, the international community convened mediation efforts in 1999. The mediators proposed a peace agreement, the Rambouillet Agreement, which contained a detailed interim constitution for Kosovo that established new democratic institutions to be overseen by an international administration. The Rambouillet process failed, and the war was only ended after a NATO humanitarian intervention. The United Nations Security Council adopted a resolution later that year that placed Kosovo under the administration of the United Nations Interim Mission in Kosovo. The UN gradually transferred its administrative responsibilities to interim authorities, and later, a permanent Kosovo government. In 2001, the United Nations created a Constitutional Framework for Provisional Self-Government in Kosovo to facilitate this transition. After violent demonstrations in 2004, and UN-mediated negotiations between Kosovar and Serbian officials, Kosovo's authorities declared independence in 2008.[39] A constitution was formally adopted later that year, after a drafting process one year prior.[40]

Following ethnic conflict between Slavic Macedonians and ethnic Albanians a decade after **Macedonia** achieved its independence from Yugoslavia, representatives from four Macedonian political parties negotiated the Ohrid Framework Agreement in 2001. The Ohrid Agreement ended the conflict and set forth specific modifications to Macedonia's constitution to address the root drivers of the conflict between the Slavic and ethnic Albanian Macedonian populations. The amendments focused on recognizing languages spoken by at least 20 percent of the population as additional state languages, mandating minority representation in government, goals for decentralizing the national government, and enhancing local governing bodies.[41]

In 2006, **Nepal's** Comprehensive Peace Agreement ended a 20-year long armed conflict between the Nepalese government and the Communist Party of Nepal.[42] The agreement provided the parties would draft an interim constitution based on an earlier 12-point understanding.[43] In 2007, the reinstated Parliament created the Interim Constitution. The Interim Constitution outlined the procedure for the negotiation and adoption of the future Constitution.[44] After several failed attempts to establish the Constituent Assembly designated by the Interim Constitution to draft the permanent constitution, a permanent constitution was

[38] 'Constitutional History of Iraq' (ConstitutionNet, International IDEA, 2016)
[39] 'Constitutional History of Kosovo' (ConstitutionNet, International IDEA, 2016)
[40] Kosovo Constitution (2008)
[41] The Ohrid Framework Agreement (Ohrid, 2001) Annex A
[42] Nanako Tamaru and Marie O'Reilly, 'A Women's Guide to Constitution Making' (Inclusive Security, Mar. 2018) 8
[43] 'Nepal's Constitutional Process' (International Crisis Group, 2007)
[44] Interim Constitution of Nepal (2007) 70(1)

eventually completed in June 2015.[45] The Constitution was approved by two-thirds of the second Constitutional Assembly, absent the Madhesh party representing much of southern Nepal.[46]

For three decades, **Northern Ireland** faced ethno-nationalist conflict between Catholic Republicans and Protestant Unionists. After a series of deliberate steps to allow for an environment conducive to a successful peace agreement, the parties to the decades-long conflict engaged in multi-year talks to establish a political agreement tied to constitutional reform. The parties decided that the agreement, dubbed the 1998 Good Friday Agreement, would be put to a referendum in both Northern Ireland and Ireland. After a one-month campaign period, this agreement was approved in successful referendums in both Northern Ireland and Ireland.[47] The Agreement created new power-sharing mechanisms and political reforms for the governance of Northern Ireland, which ended the seemingly intractable conflict.

Marking the end of the era of apartheid in **South Africa**, the parties to the peace process signed the 1993 Interim Constitution, which guided South Africa's transition to an inclusive, democratic state. As part of the peace negotiations, the parties agreed upon an interim constitution, which served as the peace agreement, and set forth a process for negotiating a permanent constitution. Elected Constitutional Assembly members and the Constitutional Court held hearings and consulted civil society and political representatives to gather input on the draft constitution.[48] After extensive public submissions from and consultation with individuals and public bodies, the Constitutional Court ratified the draft in 1996.[49] The constitution-drafting process was highly inclusive and deliberately planned. The process resulted in a constitution that provided for significant human rights protections and a quasi-federal system of decentralization.

The 2005 Comprehensive Peace Agreement between **Sudan** and **South Sudan** set forth an Interim Constitution for Sudan. The interim constitution provided for rather elaborate modifications to the governing structure of Sudan to allow for substantial power-sharing. The agreement also established separate institutions and governing arrangements for South Sudan.[50] The Interim Constitution served as the governing framework for South Sudan until it formalized its independence in 2011 through a referendum, a process also stipulated in the agreement.[51] At that point, South Sudan negotiated yet another interim constitution, which was perpetually extended through 2020.

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[45] 'Constitution-Making Process in Nepal: A Look Back at the Achievements in 2014-2015' (UNICEF: Children's Fund, 2014) 1

[46] 'Nepal's Constitution Building Process: 2006-2015: Progress, Challenges, and Contributions of International Community' (International IDEA, 2015) 10

[47] Joana Amaral, *Making Peace with Referendums: Cyprus and Northern Ireland* (Syracuse University Press, 2019) 90-94

[48] Catherine Barnes and Eldred De Klerk, 'South Africa's Multi-Party Constitutional Negotiation Process' (2002) 13 Accord 26, 31

[49] Albie Sachs, 'Constitutional Developments in South Africa' (1996) 24 New York University Journal of International Law & Policy 695, 698

[50] *See* Sudan Interim Constitution (2005)

[51] The Comprehensive Peace Agreement Between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army (2005)

Yemen's most recent constitution-drafting process began with the transition brokered by the Gulf Cooperation Council in 2011, aimed at resolving the Arab Spring-related uprising. The agreement called for a National Dialogue Conference to discuss key issues related constitutional modification. The National Dialogue Conference then authorized the creation of a 30-member Constitution Drafting Committee to draft the Constitution according to the outcomes produced by the Conference. The drafting committee was tasked with completing the constitution in six months. Amidst a Houthi insurgency, President Hadi announced the formation of the Constitution Drafting Committee. The Committee was comprised of 17 members who would deliberate over the course of a year,[52] a decision that was criticized for both expanding the timeframe and reducing the number of representatives from the National Dialogue's plan. Though the Committee completed a draft constitution in 2015, due to the persistent lack of consensus, the constitution was never signed by all the parties and Yemen tipped back into a multi-party civil war.

CONUNDRUMS

When attempting to address the question of constitutional modification during the peace negotiations, the parties to the conflict regularly grapple with a thorny set of key conundrums, including: whether and how to address constitutional modification during the peace process; the timing of determining and executing a post-conflict constitution-drafting process; whether to draft an interim constitution; whether to accomplish constitutional reform through amendments or drafting a full constitution; how to approve and finalize constitutional modifications; and whether and how to incorporate issues of human rights.

Addressing Constitutional Modification During the Peace Process

The first conundrum the parties face is whether and how to address constitutional modification during the peace process. Constitutional modifications that are focused on resolving the immediate conflict may cripple the long-term legitimacy and efficacy of the constitution. A peace process that spends too much time on difficult and contentious constitutional issues may also prolong the conflict or lead an otherwise stable peace process to relapse into conflict.

The contradictory needs of these two approaches require the parties to strike a difficult balance. The parties to peace negotiations have attempted to resolve the conundrum in various ways, including drafting a constitution as the peace agreement, attaching a constitution to the agreement, creating an interim constitution, or agreeing upon a future process (and timeline) for drafting a new or amended constitution.

In cases where the parties seek to amend the constitution, the existing constitution and corresponding legal framework often plays a significant and complex role in the peace negotiations, its relationship to constitutional reform, and its implementation. The parties are then faced with the conundrum of how to balance the legitimacy of the existing constitutional system with the need for swift changes to accommodate the peace process.

[52] Darin Johnson, 'Conflict Constitution-Making in Libya and Yemen' (2017) 39 University of Pennsylvania Journal of International Law 293, 321

Approaches to resolving the constitution/peace process conundrum

During the Dayton Peace Negotiations for Bosnia, the mediators and the parties chose to address this conundrum by agreeing to negotiate a full constitution during the negotiations. The aim of so doing was to facilitate a swift end to a particularly violent war. After years of failed talks, and with a high likelihood that the parties would return to fighting in the spring, the mediators designed a dramatic, all-or-nothing negotiation strategy at Dayton. During the talks, the parties initially discussed the possibility of drafting a constitution after the peace agreement. The parties to the peace negotiation, however, perceived a final constitution-drafting process as a way to cement the gains they had made through fighting and chose to draft the constitution during the negotiations.[53] Through shuttle negotiation at Dayton, the parties approved a draft constitution that was attached to the Agreement as Annex 4.

By attaching the Bosnian Constitution to the Accords, the mediators avoided having to reconvene the parties for contentious negotiations over the future constitution, which may have undermined the tentative peace agreed to at Dayton. This choice also averted the potential for one of the parties to withdraw from future negotiations.

The Dayton Accords as a whole achieved an almost impossible feat, ending a war and authorizing the deployment of 50,000 NATO troops to guarantee the peace. Drafting a permanent constitution during these negotiations, however, also ensured that the tensions that existed in the conflict were entrenched in the future governing structure. The short drafting period meant that the parties did not have the time necessary to build trust, move closer together, or envision a common future.[54] Rather than building a cohesive future state, each party focused on ensuring that the other two ethnic groups could not gain what they perceived to be disproportionate much power. As a result, the parties failed to design a functional national government.

The strong influence of the parties is reflected throughout the constitution, which effectively served to perpetuate the ethnic tensions present during the negotiations.[55] The power-sharing mechanisms created in the constitution reflect the tense environment and deep ethnic divides present in the drafting process. By creating ethnic proportionality requirements in the new government, the constitution ultimately incentivized the parties to continue to campaign and govern with only the interests of their own ethnic group in mind.[56] This structure ensured that for years to come there was significant support in Bosnia for extreme political parties and little incentive to pursue political reconciliation or moderation.[57]

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[53] O'Brien, *supra* note 28, at 335

[54] Fionnuala Ni Aolain, 'The Fractured Soul of the Dayton Agreement: A Legal Analysis' (1998) 19(4) Michigan Journal of International Law 957, 970-973

[55] Robert M Hayden and R. Bruce Hitchner, 'Constitution Drafting in Bosnia and Herzegovina' (The Wilson Center Jul. 2011)

[56] Nikolaos Tzifakis, 'The Bosnian Peace Process: The Power-Sharing Approach Revisited' (2007) 28 Perspectives 85, 88

[57] Kirsti Samuels, 'Post-Conflict Peace-building and Constitution-Making' (2006) 6(2) Chicago Journal of International Law 663, 675

In South Africa's peace negotiations, which took place after two decades of conflict between state security forces and armed opposition groups, the issue of constitutional reform was a central tenant of discussions. Drafting a new constitution, through a representative process, was a key demand of the African National Congress.[58] In 1993, after two years of multi-party peace talks, the parties produced a peace agreement that also served as an interim constitution until the final constitution was adopted roughly three years later.[59] The Interim Constitution outlined the timeline and process for drafting a new constitution.[60] The Interim Constitution also created a Constitutional Court, and empowered the Court to review the final draft.[61]

In the Interim Constitution, the parties agreed on 34 Constitutional Principles that would guide the future constitution, representing an elite consensus on key constitutional issues. These Principles were designed to be binding on the future constitution, and covered such issues as anti-discrimination, separation of powers, protecting language diversity, and power-sharing.[62] As part of this peace agreement/interim constitution, the newly-formed Constitutional Court was given the power to strike down a draft constitution that did not comply with these principles.[63] This multi-step process ensured that the consensus gained in the initial peace negotiations would be retained in the permanent constitution, while also allowing for flexibility and a process that would grow more inclusive over time.[64]

In Colombia, the 2016 peace agreement between the Colombian government and the FARC aimed to achieve constitutional modification and the creation of new institutions geared towards transitional justice. Accomplishing such reforms could not be accomplished through the drafting of a peace agreement alone; unlike many other post-conflict states, Colombia has a long history of constitutionalism and judicial review.[65] As such, Colombia's Constitutional Court played a large role in the implementation of the 2016 peace agreement, producing a "highly judicialized peace process."[66]

During the negotiations, the FARC initially argued for a Constituent Assembly to draft a new constitution, hoping to create deep reforms and to cement the terms of the Agreement throughout the constitution. Fearing that reopening the entire constitution could derail the peace process, the Colombian government rejected this proposal. The parties settled on a path through which key provisions of the agreement would be enshrined in the constitution through the traditional amendment process. More specifically, the parties agreed to put the 2016 peace agreement to a popular referendum and then submit it for approval to the Congress and the Constitutional Court.

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[58] 'A History of South Africa: 1910-1996' (South African History Online, 21 Mar. 2011)
[59] Christine Bell and Klmana Zulueta-Fülscher, 'Sequencing Peace Agreements and Constitutions in the Political Settlement Process' (International IDEA Policy Papers No. 13, Nov. 2016) 14
[60] South Africa Interim Constitution (1993) arts. 40(1), 48(1), 73(1)
[61] Bell and Zulueta-Fülscher, *supra* note 59, at 25
[62] South Africa Interim Constitution (1993) Schedule 4
[63] Barnes and De Klerk, *supra* note 48, at 31
[64] Bell and Zulueta-Fülscher, *supra* note 59, at 26
[65] Manuel José Cepeda Espinosa, 'The Peace Process and the Constitution: Constitution Making as Peace Making?' (IACL-AIDC Blog, 5 Jul. 2016)
[66] David Landau, 'Constitutional implications of Colombia's judicialized peace process' (ConstitutionNet, 29 Jul. 2016)

After failing to win the referendum in October 2016 by less than one percent, the parties renegotiated parts of the agreement and signed a new agreement on November 24, 2016. The revised agreement included provisions that required the FARC to declare their assets and hand them over to the government for use in reparation payments and an adjustment of language that religious groups perceived to undermine family values. The revised Agreement also imposed a limit of 10 years for the transitional justice system, and required the FARC rebels to provide information about drug trafficking.[67] The parties to the peace negotiations chose to avoid the referendum the second time and instead went through the Congress and Constitutional Court, both of which approved the Agreement.

By enacting laws associated with the peace agreement as part of the Constitution, this process ensured that a high, two-thirds majority in Congress would be needed to undo the Agreement. Colombian President Ivan Duque attempted in 2019 to modify the terms of the Special Jurisdiction for Peace included in the peace agreement, in response to public outcry that the mechanism was too lenient on former rebels in the agreement. This two-thirds majority threshold, however, prevented him from gaining Congressional approval, and the Constitutional Court rejected the changes as unconstitutional.[68] By integrating provisions of the peace agreement into the existing constitution through both Congressional and Constitutional Court approval, this process also sought to uphold the existing constitution and the legitimacy of the existing rule of law.

When the negotiating parties are unable to agree upon a final constitution during a peace negotiation, an international administration may decide how the state will be governed immediately after the peace agreement is signed and design a process for how the future constitution drafting will take place, as in Kosovo.

In the Kosovo peace process, following months of negotiations to end the armed conflict, the Rambouillet Agreement set forth an interim constitution. The Interim Constitution established new democratic institutions for Kosovo.[69] The Agreement, however, was not signed by the Serbian representatives and this interim constitution did not come into effect. Following a NATO intervention in Kosovo, the UN Security Council adopted Resolution 1244, which set out a path for a transitional international administration of Kosovo.[70]

The international administration governed Kosovo while gradually transitioning responsibility to the interim government. The international administration was also tasked with overseeing the resolution of Kosovo's final status and Kosovo's transition to a permanent, independent government.

In 2005, UN Special Envoy Martti Ahtisaari was assigned to oversee the negotiations for Kosovo's final status. After 17 rounds of negotiations between Kosovar and Serbian officials, a final report was produced. The report recommended a structure for governance and called for a

[67] 'Colombia signs new peace deal with Farc' (BBC News, 24 Nov. 2016)
[68] Helen Murphy and Julia Symmes Cobb, 'Colombian high court rules FARC peace law must be sanctioned' (Reuters, 29 May 2019)
[69] *See* Rambouillet Accords, Ch. 1
[70] UNSC Res. 1244, U.N. SCOR, U.N. Doc. S/RES/1244 (10 Jun. 1999)

Constitutional Commission, to be appointed by the interim legislature.[71] The Constitutional Commission began drafting shortly thereafter, producing a final draft by the end of 2007. In February of 2008, Kosovo declared independence, announcing that it would approve a constitution within 120 days. After a period of public consultation, the Kosovo Assembly ratified a permanent constitution.

But for the initial stewardship of the international community, it is unlikely that the minority populations in Kosovo would have constructively engaged in the constitution-drafting process. While many, quite reasonably, argue that the delay was unnecessarily long, in the end Kosovo was set on a path of durable peace, and the Constitution is well crafted and operates as a framework for an effective and inclusive democracy.

In the case of the Sudanese peace talks, the parties agreed that the constitutional negotiations would begin after the multi-track negotiations were concluded. The constitutional negotiations were naturally designed to include a broader representation of Sudanese society, given that the Juba negotiations were focused on reaching agreement between the state and marginalized regions such as Darfur, Southern Kordofan, the Blue Nile, the North, and the East.

To ensure that the constitutional negotiations did not undo or substantially modify what was agreed upon in the Juba Agreement, the parties specified that the peace agreed should hold supremacy over the subsequent Constitutional Decree. The parties agreed that the Juba Agreement would be included or annexed to the Constitutional Decree, and that in the event of a conflict between the peace agreement and the constitutional Decree, the Decree would be amended to remedy such conflict.[72]

Each method by which parties choose to incorporate constitutional modification into the peace process poses its own challenges. To mitigate the potential risks, the parties face strategic decisions related to the timing of the constitutional process, the kinds of constitutional revisions undertaken, and how the constitutional process is ultimately approved.

Timing

Another early conundrum that parties face during a peace process is the question of how long the constitutional modification process should take, be it a part of the peace negotiation, or a separate process commencing after the signing of a peace agreement. Moreover, if the process for constitutional modification occurs after the signing of the agreement, when should that process begin?

If the constitutional negotiations take place too soon, the legacy of the conflict may overshadow the discussion and the parties may entrench aspects of the conflict in the constitution. Short drafting processes tend to be exclusive or favor former armed groups. One recent empirical study found that a longer period for the constitutional drafting process leads to a

[71] Kimana Zulueta-Fülscher and Sumit Bisarya, '(S)electing Constitution-Making Bodies in Fragile and Conflict-Affected Settings (International IDEA Policy Paper No. 16, 2018) 24

[72] Darfur Agreement Between the Transitional Government of Sudan and Darfur Parties to Peace (Juba, 2020) § B, art. 24.1

more durable peace as the parties have the time to develop trust and to structure functional compromises.[73]

If the parties wait too long to draft a constitution, however, the momentum for key changes may be lost and the conflict may resume. A longer period does not necessarily produce greater inclusion. In some cases, where the conflict features a popular uprising against an exclusive state government, inclusion may be greatest shortly after the conflict ends. In these cases, elite actors may strategically extend the timeframe to make the process more exclusive over time and to reduce momentum for serious forms.

Within the timeline as a whole, the parties must also decide when to negotiate particularly contentious issues. By negotiating divisive issues too soon, intense debate can derail the process or prevent progress on other issues. To avoid these outcomes, the parties frequently defer contentious issues to the future by drafting abstract principles, designing easy amendment processes, or delegating decisions to the future legislature.[74] These approaches can help the parties overcome sticking points to reach an agreement. By deferring issues to a later part of the process, this approach can also create future challenges in interpreting or implementing the constitution.

To balance these competing concerns, the parties and mediators make complex choices and predictions regarding the initiation, length, and sequence of constitutional modification. Often, issues related to timing can be defined by the role of mediators and the legacy of the conflict. In turn, decisions about timing define the extent and nature of reform, as well as the long-term legitimacy of the constitution.

Approaches to resolving the timing conundrum

The Northern Ireland peace negotiations, which included substantial constitutional modification, lasted for 22 months. This extended timeline was designed to allow for gradual rolling agreements, and for the inclusion into the process of key non-state actors. The negotiations initially began with small, inter-party talks. Following these talks, elections were held for the public to select negotiators, in a voting system that ensured the inclusion of smaller parties.[75] The gradual inclusion of potential spoilers, smaller parties, and civil society groups also moderated the parties' positions and helped the parties to overcome previous gridlock.[76]

The negotiations also benefitted from an incremental, several-year series of efforts to address drivers of conflict and produce an environment conducive to peace.[77] In the years preceding the negotiations, non-state armed actors were encouraged to transition to political

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[73] *See* Fielder, *supra* note 5

[74] Rosalind Dixon and Tom Ginsburg, 'Deciding Not to Decide: Deferral in Constitutional Design' (2011) 9 International Journal of Constitutional Law 636, 652-654

[75] *Accord: Striking a Balance, Northern Ireland Peace Process* (Conciliation Resources, 1999) 33

[76] Amaral, *supra* note 47, at 90-94

[77] *Accord: Striking a Balance, Northern Ireland Peace Process (*Conciliation Resources, 1999) 36; Jennifer Todd, 'Northern Ireland: Timing and Sequencing of Post-Conflict Reconstruction and Peacebuilding' in Arnim Langer and Graham K. Brown (eds) *Building Sustainable Peace: Timing and Sequencing of Post-Conflict Reconstruction and Peacebuilding* (OUP, 2016) 1

parties and work within a political process, and the parties made efforts to address root causes of the conflict, including employment discrimination. The process also benefitted from changes in British policy, greater coordination between the British and Irish governments, and increased American involvement.[78] The negotiations ended in April 1998, with the announcement of the Good Friday Agreement. After a one-month campaign period, the agreement was approved in successful referendums in both Northern Ireland and Ireland.[79]

Frequently, however, the parties and mediators may only have a brief window of time to address constitutional issues before the conflict resumes. Following a popular uprising and the outbreak of civil war in Yemen, the Gulf Cooperation Council negotiated an agreement for Yemen's future that outlined a process for a transitional government and a path toward a new constitution.

The timeline for the constitutional process included five months for an inclusive national dialogue and four months for a constitution-drafting process, to be followed by a constitutional referendum and elections.[80] The process was designed to allow a brief window of time for public participation in order to build some sense of national cohesion necessary to create a durable constitution.

Although the National Dialogue extended its mandate to 10 months, the large body of 565 participants made it difficult to achieve full agreement on key issues. While the participants agreed on a federal structure, they were unable to agree on the number of sub-state entities or on the boundaries.[81] Two months after the end of the National Dialogue, President Hadi, the interim president, appointed a 17-member Constitution Drafting Committee to draft the new constitution based on the outcomes of the National Dialogue and authorized it to spend a year preparing the new constitution.

In contrast to the positive role that gradual economic improvement played in Northern Ireland, Yemen's economic deterioration gradually eroded trust as the process continued.[82] Shortly after the creation of the Constitution Drafting Committee, the transitional government ended fuel subsidies, leading to mass protests that precipitated a crisis as the Houthis capitalized on unrest to move into Sana'a.[83] Notably, the parties saw the new constitution as essential to restoring peace, and continued the negotiations throughout the renewed conflict, even moving the constitution drafting committee "off-site" to Abu Dhabi in the United Arab Emirates so that the committee could operate in a secure environment. As the Constitution Drafting Committee continued to work on the constitution, Yemen's economy, as well as its security situation, rapidly

[78] Jennifer Todd, 'Northern Ireland: Timing and Sequencing of Post-Conflict Reconstruction and Peacebuilding' in Arnim Langer and Graham K. Brown (eds) in *Building Sustainable Peace: Timing and Sequencing of Post-Conflict Reconstruction and Peacebuilding* (OUP, 2016) 3
[79] Amaral, *supra* note 47, at 90-94
[80] George Anderson, 'Yemen's Failed Constitutional Transition: 2011-2015' (Forum of Federations Occasional Paper Series 41, 2019) 5-6
[81] Jason Gluck, 'Constitution-building in a political vacuum: Libya and Yemen' (2014) Annual Review of Constitution-Building Processes 43, 50; Anderson, *supra* note 80, at 3
[82] Anderson, *supra* note 80, at 18
[83] *Id.* at 3

deteriorated.[84] Two days after the draft constitution was published, the Houthis rejected the proposed federalist structure. Shortly thereafter, armed conflict in Yemen reignited.[85]

Yemen's constitution drafting timeline offered ample time for public participation and expert deliberation. Unfortunately, the parties failed to take advantage of the timeline and were delayed in securing consensus on key governance issues. Moreover, failing to prioritize economic reform in parallel to the reform of the state structure also proved detrimental, as the struggling economy and loss of fuel subsidies undermined the political process.

In East Timor, the Transitional Administration attempted to resolve this conundrum by deciding on a short, three-month timeline to quickly transition to a new government. In March 2001, the Transitional Administration issued Regulation 2001/2, which outlined a constitution-drafting process in which the Transitional Administration would oversee elections for a Constituent Assembly. The Constituent Assembly would then have three months to draft the new constitution.[86] Although the deadline was ultimately extended to six months, East Timor's six-month process represents one of the shortest constitution-drafting processes to take place outside of a peace agreement.[87]

With international forces taking over security and administrative responsibilities during the transition, domestic transitional leadership was able to focus on drafting the new constitution.[88] This provided for a relatively fast drafting process that was able to capitalize on momentum for a peaceful transition and quickly establish the rule of law.

This short time frame also created several challenges for achieving a durable peace, and disaffected groups criticized the timeline as being designed to fit the international administration's interests in a quick and low-cost win, rather than the long-term interests of East Timor.[89] Civil society groups who criticized the process as rushed also questioned whether the decision to enforce a short timeline was motivated by a genuine threat of violence or whether the threat of violence was exaggerated in order to justify a shorter timeline.[90]

The short period allocated for elections for the Constituent Assembly meant that the former opposition group, Fretilin, won the majority of the seats, while smaller and newer groups struggled for representation. As a result, the Constituent Assembly was dominated by one

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[84] *Id.* at 18
[85] Mareike Transfeld, 'The Failure of the Transitional Process in Yemen' (German Institute for International and Security Affairs, 2015) 1
[86] United Nations Transitional Authority for East Timor, Directive No. 2001/3, On the Establishment of Constitutional Commissions for East Timor, U.N. Doc UNTAET/DIR/2001/3 (31 Mar. 2001)
[87] Jennifer Widner, 'Constitution Writing & Conflict Resolution: East Timor' (Princeton University and United States Institute of Peace, 2004)
[88] Benzing, *supra* note 33 at 365; Jim Della-Giacoma, *Self-Determination and Peace Operations in Timor-Leste* (Crisis Group, 28 May 2012)
[89] Michele Brandt, 'Constitutional Assistance in Post-Conflict Countries: The UN Experience: Cambodia, East Timor & Afghanistan' (United Nations Development Programme, Jun. 2005) 9, 16
[90] Louis Aucoin and Michele Brandt, 'East Timor's Constitutional Passage to Independence' in Laurel Miller & Louis Aucoin (eds), *Framing the State in Times of Transition: Case Studies in Constitution-Making* (USIP, 2010) 245, 256-257

party.[91] With a majority of seats, Fretilin had little incentive to compromise with other groups or to design constitutional limits on executive powers.

Additionally, due to East Timor's lack of prior political representation, few members of the Constituent Assembly had political experience or knowledge of the key issues to be addressed in the constitution-drafting process. The short timeframe established by the Transitional Administration gave members little time to develop these skills and knowledge, leaving some members and their constituencies disenchanted and marginalized.[92]

In Nepal, the negotiating parties sought to provide sufficient time to enable a diverse and inclusive constituent assembly to craft a durable constitution. Despite this, the process was intentionally hindered in order to extend the time even further as a means to enable elite re-capture of the process. The constitution drafting process in Nepal began after a 10-year civil war between the monarchy and Maoists rebels over political and economic exclusion. In 2006, a massive people's movement tipped the scales of a military stalemate as millions of people participated in protests and civil disobedience.[93] The momentum achieved through this movement ensured that the process began with a high degree of inclusivity.

To meet the demands of the Maoists and minority groups, the political parties agreed to elect a Constituent Assembly to draft the new constitution. The Interim Constitution provided for elections for a 601-member body that would have two years to discuss, debate, and draft the new constitution.[94] The first elected Assembly was remarkably inclusive in terms of regional, ethnic, and gender representation.[95] Civil society groups also advocated for even greater representation by establishing the Women's Commission and five commissions for historically marginalized minority groups.[96]

Political elites unwilling to accept the plans proposed by the majority strategically reduced and momentum over time. Outside of the confines of the peace negotiations, parties such as these elites who did not have much initial leverage, manipulated the agreed-upon process for peace. For instance, by postponing votes in the first Constituent Assembly, elites avoided a vote on the proposed reforms and ran out the clock in the first Constituent Assembly.[97] After waiting for the election of a second Constituent Assembly, whose participants were less representative of the country than the first Assembly, elites worked with a body whose participants were more amenable to elite interests.[98]

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[91] *Id.*
[92] *Id.* at 255-258
[93] Kanak Mani Dixit, 'The Spring of Dissent: People's Movement in Nepal' (2006) 33(1) India International Centre Quarterly 113, 114
[94] 'Nepal's Constitution Building Process: 2006-2015: Progress, Challenges, and Contributions of International Community' (International IDEA, 1 Nov. 2015) 8, 16
[95] Tamaru and O'Reilly, *supra* note 42, at 8; *Id.* at 10
[96] Hari Phuyal, 'Nepal's Constitution: 65 Years in the Making,' (The Diplomat, 18 Sept. 2015)
[97] Mahendra Lawoti, 'Prolonged Transition and Setback in Reforms: Timing, Sequencing, and Contestations over Reforms in Post-Conflict Nepal' (Centre for Research on Peace and Development Working Paper No. 43, 2015) 19-20
[98] 'Nepal's Constitution Building Process: 2006-2015: Progress, Challenges, and Contributions of International Community' (International IDEA, 1 Nov. 2015) 19

When stalling proved to be an effective tactic for avoiding significant reforms, the process, originally intended to last two years, prolonged into four years. Not until an earthquake literally shook the country and the political establishment did the Constituent Assembly move forward with agreeing to a new constitution.[99]

In South Africa, strategically stalling on a contentious issue proved to be beneficial to moving the constitutional process ahead. The parties to the peace negotiation struggled to reach agreement on issues related to land use and distribution. The African National Congress, representing the majority of black South Africans, believed that land reform was necessary to achieve economic equality. Groups within the African National Congress sought to weaken constitutional protections for existing property and to guarantee future land reform. The National Party, representing white South Africans, remained committed to protecting existing property rights, and they sought international support by predicting that land redistribution would lead to food insecurity.[100]

To resolve this issue, the drafters agreed upon language that highlighted key principles such as "equitable access to land." The drafters gave the future government the ability to take measures to redress historical discrimination in land tenure but did not specify exact programs. This allowed for a system that was amenable to change, defined by the National Assembly, and able to incorporate to new information, such as new evidence showing that the National Party's fears of food insecurity had been over-stated.[101] By deferring this issue to the future legislature, parties were able to reach an agreement that created a functioning and equitable democracy, while granting the future government the flexibility necessary to meet future challenges.

Another conundrum faced by the parties to a peace negotiation is the question of selecting an interim or permanent constitution as part of post-conflict governance reform, a choice closely tied to the many tradeoffs examined in this section on timing.

Permanent vs. Interim Constitution

As the parties to a conflict look to design a new constitution to structure their state, they face the conundrum of whether to immediately establish a permanent constitution or design interim structures for the transition period. Either approach can be implemented as part of the peace agreement, or come about as the result of a post-agreement process established by the peace agreement.

The parties to a peace negotiation that are set on using a constitutional process to bring about changes to state structure, inclusiveness, and legal reform are often inclined to see a permanent constitution come into being as part of the negotiated agreement, or in the alternative as soon as possible after the conclusion of the negotiations. Yet, as the parties increasingly settle conflicts through negotiated agreements rather than outright military victories, it is unlikely that

[99] 'Constitution-Making Process in Nepal: A Look Back at the Achievements in 2014-2015,' (UNICEF: Children's Fund, 2014) 1
[100] Rosalind Dixon and Tom Ginsburg, 'Deciding Not to Decide: Deferral in Constitutional Design,' (2011) 9 International Journal of Constitutional Law 636, 647
[101] *Id.* at 657-648

state and non-state armed actors engaged in armed conflict will readily reach consensus around the core pillars of a new permanent state structure.

Political theorists often conceive of the creation of a constitution as a defining moment in which a populace forms a social contract out of a unified understanding of its "demos, polis and territory." In reality, most states in the immediate aftermath of conflict lack such a unified understanding. Many are still experiencing bouts of violence and are struggling to build sufficient consensus between competing factions to ensure the cessation of hostilities.[102] Trying to establish deep, permanent, structural changes in such a contentious period can be challenging. It may feel "premature" to begin codifying a new constitutional order when many of the immediate security and humanitarian processes set forth in the peace agreement have yet to conclude, or perhaps have not even begun.[103]

One way that the parties to peace negotiations have sought to overcome this dilemma is through the adoption of an interim constitution prior to the drafting of a permanent constitution. Interim constitutions are defined as "a constituent instrument that asserts its legal supremacy for a certain period of time pending the enactment of a contemplated final constitution."[104] They can be functionally understood as "temporary political frameworks that allow competing elites to continue negotiating fundamental disagreements in the near future."[105]

According to data from the Uppsala Conflict Data Program, interim constitutions have become significantly more prevalent in the last three decades, especially in states emerging from conflict. Since 1990, two-thirds of all states adopting interim constitutions were states emerging from conflict.[106] Interim constitutions can be particularly appealing to states emerging from conflict as they provide an avenue for agreeing upon initial compromises relating to the political framework of a state, while preserving the possibility for re-negotiation and allowing the parties time to build trust and consensus.[107]

This is particularly true in situations in which the parties continue to engage in sporadic or low-level violence. The adoption of an interim constitution may create the stability necessary for the parties to buy into the initial structural reforms and participate in a more comprehensive process for long term reform embedded in a permanent constitution. According to a recent study, the interim period can "give parties a critical window of time during which to rebuild trust; facilitate an iterative process through which consensus can be built around complex or controversial issues; enable constitution-makers to test out new political and institutional arrangements; and allow for more meaningful public participation."[108]

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[102] Charmaine Rodrigues, 'Letting Off Steam: Interim Constitutions as a Safety value to the Pressure-Cooker of Transitions in Conflict-Affected States' (2017) 6(1) Global Constitutionalism 33, 61-62
[103] Michele Brandt, Jill Cottrell, Yash Ghai, and Anthony Regan, 'Constitution-making and Reform: Options for the Process' (Interpeace, 2011) 67
[104] Kimana Zulueta-Fülscher, 'Interim Constitutions: Peacekeeping and Democracy-Building Tools' (International Institute for Democracy and Electoral Assistance, Policy Paper, Oct. 2015) 9
[105] *Id.* at 6
[106] *Id.* at 3
[107] Rodrigues, *supra* note 102, at 41, 61
[108] Rodrigues, *supra* note 102, at 40-41, 43

An interim constitution, however, cannot simply serve as a way to pass the time while hoping for peace. In post-conflict states, the conflict may have decimated many of the state's institutions. An interim constitution, even if temporary, is still the state's constitution for the transition period. In this way, the interim constitution "may serve the critical purpose of setting out an administrative roadmap to help quickly establish the basic infrastructure of a new governance regime, while still allowing flexibility to test out what works and what does not, before settling on a final form set of institutional arrangements."[109]

The parties to peace negotiations can establish "thick" interim constitutions that provide great detail for how the state should be governed or "thin" interim constitutions that are more limited in the amount of detail and specification they provide.

The parties are likely to arrive at a consensus on a thinner constitution faster than they would on a more extensive document. Depending on the military and political conditions, the parties may consider a thin constitution the only viable option at the time, committing to return to heftier questions when they draft a permanent constitution at a later stage.[110] Even so, relegating the tougher questions to the permanent drafting process can stall the creation of the permanent constitution. The parties may seek to extend the interim period to severely delay or even prevent the passage of key structural reforms.

One benefit that the parties identify in having this period in between the signing of a peace agreement and the drafting of a final constitution facilitated by an interim constitution is the ability to make the process of drafting and ratifying the permanent constitution more inclusive. Historically, constitutions that are quickly drafted immediately following a conflict have been primarily drafted by a "small coterie of elites," who are often male, former combatants or unelected technical experts, and not representative of the public writ large.[111] A more participatory process typically requires more time because it necessitates a period of public engagement, education, and/or consultation.[112]

Approaches to resolving the permanent vs. interim constitution conundrum

In 2004, Somalia adopted the Transitional Federal Charter of the Somali Republic, which provided a thin interim constitution that guided the transition period.[113] Thorny issues, such as the wealth sharing, were set aside to be determined later via legislation adopted by the Transitional Federal Government.[114] Somalia then continued negotiating the more challenging issues until it adopted its 2012 Constitution, which was substantially more detailed. The permanent constitution, for instance, had an entire chapter devoted to land, property, and environmental principles that guided the allocation of these resources between the national government and its constituent member states. The Constitution also contained significantly

[109] Rodrigues, *supra* note 102, at 46
[110] Zulueta-Fülscher, *supra* note 104, at 4
[111] Rodrigues, *supra* note 102, at 50
[112] *Id.*
[113] Though Somalia is a failed state, its peace process contains important approaches to resolving the conundrums related to post-conflict governance and constitution-making.
[114] The Transitional Federal Charter of the Somali Republic (Feb. 2004, Nairobi) Art 13 (1)

greater detail and specificity on topics such as devolution of power, state structure, and parliamentary duties.[115]

In on other cases, the parties prefer to negotiate a detailed "thick" interim constitution as part of the peace agreement. For instance, Chapter 1 of the Rambouillet Accords provides a detailed interim constitution for Kosovo. The Constitution was robustly designed with enough detail to establish new democratic institutions of self-governance for Kosovo.[116] Such detail was necessitated by the fact that Kosovo had been denied its right of internal self-determination by the Republic of Serbia and did not possess existing democratic institutions, or a functioning impartial and fair judiciary bound by the rule of law at the time of the Rambouillet negotiations.

Opting for a "thin" interim constitution, though often more expedient, can stall more permanent post-conflict governance reform, as in Nepal. Nepal's 2007 interim constitution ushered in a new representative governing structure to replace the monarchy, but it did not include agreements on how key governance features of the state would operate. The parties lacked agreement on the federal state structure, electoral system, or judicial entities, amongst other aspects, and the parties negotiated and re-negotiated these issues for years without significant progress.[117]

As previously mentioned in the timing conundrum, political elites in Nepal empowered by the interim constitution took the opportunity to stall the process of passing a permanent constitution to retain power as long as possible.[118] Stalling the process of implementing a permanent constitution be particularly problematic when thin interim agreements do not contain sufficient checks, balances, and civil protections.[119]

For instance, the 2011 Transitional Constitution of the Republic of South Sudan allocated a disproportionate share of power to the executive branch to compensate for the low governance capacity of institutions in the newly independent state. This interim Transitional Constitution had limited checks on presidential power. The Constitution, for instance, specified a four-year term for the President, but set no limit on how many terms the President could serve.[120] Moreover, the Constitution only minimally developed more inclusive or participatory bodies that could have potentially offset the executive branch. Combined with imprecision in the process by which a permanent constitution was to be drafted, the weak interim constitution allowed for South Sudanese politicians easily to manipulate it to their advantage.[121]

Many parties try to regulate the time interval between the interim and permanent constitutions by adding provisions to the interim constitution relating to the process by which a final constitution will be produced. The Interim Constitution for Kosovo included in the Rambouillet Accords, for instance, was written to govern Kosovo for three years, at which point

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[115] The Federal Republic of Somalia Provisional Constitution (1 Aug. 2012, Mogadishu) Ch. 3, Arts. 43-45; Chs. 5-10
[116] Rambouillet Accords, Ch. 1, Perambulatory Cl. 4
[117] Rodrigues, *supra* note 102, at 53
[118] Rodrigues, *supra* note 102, at 52
[119] Zulueta-Fülscher, *supra* note 104, at 4
[120] The Transitional Constitution of the Republic of South Sudan (2011) Part Six, Ch. II, art. 100
[121] Rodrigues, *supra* note 102, at 57

"an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures."[122]

The period between the passage of an interim constitution and that of the permanent constitution varies significantly. Some states, such as Iraq, proceed from interim to final over a one or two-year period, while others, such as Kosovo and Nepal, take closer to a decade, and in certain cases, such as the Democratic Republic of the Congo and Rwanda, the process may exceed 10 years.[123] Whether the length of the gap in time between interim and permanent constitutions supports or hinders the establishment of a durable peace depends on the context of the conflict and the conflict drivers the parties seek to confront with post-conflict governance reforms.

When considering the adoption of an interim constitution, it is helpful for the parties to bear in mind that the conflict-alleviating potential of an interim constitution cannot be mistaken as a panacea for constitution making in post-conflict states.[124] In fact, between 1990 and 2015, "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."[125] Any state emerging from conflict that seeks new constitutional arrangements will face obstacles. Post-conflict constitution modification is an arduous challenge, one in which interim constitutions may be helpful, even while they bring their own difficulties.

Amendments vs. Full Constitution

Another major conundrum that parties face when negotiating peace is whether to amend the existing constitution or craft an entirely new constitution. This debate frequently represents deeper disagreements about the nature of post-conflict governance reforms. The symbolic importance of an amendment process or new drafting process can also be misused to mislead the parties about the nature of the reforms.

By amending an existing constitution, the drafters begin with the structure established in a previous constitution. This can allow the drafters to focus more narrowly on an amendment tailored to the drivers of conflict. In other cases, grafting an amendment onto the framework of an older constitution can constrain the transformative potential of the process. Constitutional amendment may be particularly palatable if there are only a few constitutional provisions with which one or more of the parties disagree.

A new constitution drafting process promises a fresh start through which the parties can begin to envision a new future for the country. This more elaborate process also entails significant time, debate, and opportunities for disagreement.

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[122] Rambouillet Accords, Ch. 8, art. I(3)
[123] Zulueta-Fülscher, *supra* note 104, at 14
[124] Rodrigues, *supra* note 102, at 62
[125] Zulueta-Fülscher, *supra* note 104, at 15

Debating whether to amend the constitution or draft a new constitution may seem at first glance like a technical exercise. This debate frequently reveals deeper conflicts over the nature and scope of the reform necessary to resolve the conflict. The parties with greater power or structural advantages may argue for an amendment processes to restrain reform and limit input, while non-state actors often call for drafting a new constitution through processes that reflect a more inclusive vision of the future state.

Approaches to resolving the amendment vs. full constitution conundrum

Macedonia's Ohrid Framework Agreement stipulated the modification of Macedonia's existing constitution.[126] In the text of the Agreement, the parties agreed on a suite of constitutional amendments that addressed the key drivers of conflict without redrafting the entire constitution.

The Agreement modified several articles in the Macedonian Constitution to emphasize and codify the "equitable representation of persons belonging to all communities in public bodies at all levels and in other areas of public life."[127] The amendments included formal recognition, protections, and services for speakers of minority languages; an extension of the freedom of religious expression, and clarification of the separation of religion and the state; and the creation of a Committee for Inter-Community Relations.[128]

Rather than redraft the whole constitution, the Macedonian amendments were designed directly to confront the exclusions and omissions of the past constitution, a driver of societal unrest and fragmentation leading to the outbreak of conflict. By focusing just on the provisions tied to conflict, the amendment process allowed the parties quickly to negotiate the peace and to embed the amendments within the peace agreement.[129]

While constitutional amendments present the potential for a more tailored and efficient process of post-conflict governance reform, this is not always the case. In Guatemala's peace process, elites used an amendment process to introduce an overwhelming number of future reforms, confusing voters and obfuscating key reforms.

In Guatemala's 1996 peace agreement, the parties to the peace negotiation drafted 15 constitutional amendments.[130] These wide-ranging amendments included formally recognizing Guatemala's indigenous peoples, creating reforms related to the role of police and armed forces, fixing the number of deputies in Congress, strengthening the judiciary, creating a career judicial service, specifying the duties of the President over armed forces, and delineating the jurisdiction of military courts.[131]

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[126] Ohrid Agreement (Ohrid, 2001) Annex A
[127] Ohrid Agreement (Ohrid, 2001) Annex A, art. 8
[128] Ohrid Agreement (Ohrid, 2001) Annex A, arts. 7, 19, 78
[129] Stefan Andonovski, 'The Effects of Post-conflict Constitutional Designs: "The Ohrid Framework Agreement" and the Macedonian Constitution' (2018) 81 Croatian International Relations Review 23, 25.
[130] G.A. Res. 526, U.N. GAOR, U.N. Doc. A/54/526 (11 Nov. 1999)
[131] G.A. Res. 776, U.N. GAOR, U.N. Doc. A/51/776 (20 Jan. 1997)

During congressional deliberations, however, lawmakers added 45 additional amendments, bringing the total to 50 shortly before the public referendum.[132] By creating dozens of amendments on unrelated issues, the agreement's critics turned the amendments into an overwhelming amount of information that primed voters for the misrepresentation and oversimplification of the amendments in the referendum campaigns.[133] In the referendum, Guatemalans voted on four questions that represented the content of the 50 amendments, as well as the 297-page long agreement. Voters ultimately rejected all the proposed amendments.[134]

In other cases, a government may strategically frame constitutional reform as an amendment process to downplay the scope of the reforms to the public as in the case of South Sudan.

The 2005 Comprehensive Peace Agreement between Sudan and southern Sudan included an interim constitution for South Sudan.[135] When South Sudan gained its independence, the new government undertook a process to transform the Interim Constitution into the Transitional Constitution.[136] Drafted during the peace negotiations, the Interim Constitution was drafted primarily by members of one party, the Sudan People's Liberation Movement, along with the Government of Sudan. Given the exclusive nature of this process, civil society groups in South Sudan hoped that the transformation of the Interim Constitution into the Transitional Constitution would be a more inclusive process.

To avoid opening this process to the public, the new government of South Sudan claimed that the process was not a drafting process for a new constitution, but rather a narrow amendment process. By claiming that the process was only providing a "technical review" to amend the constitution, the government attempted to avoid calls for greater inclusion in the drafting process.[137] Rather than engaging in a more inclusive drafting process, the government instead convened a small Technical Review Committee and appointed members from the Sudan People's Liberation Movement.[138]

In response to pressure, the government allowed several members into the Technical Review Committee from outside of the Sudan People's Liberation Movement, although they remained a minority.[139] The government's claim provided a loose justification for an exclusive process, as the Interim Constitution had outlined a specific process for amendments that the Government was not following.

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[132] Lauren Marie Balasco and Julio F. Carrión, 'Required Consultation or Provoking Confrontation? The Use of the Referendum in Peace Agreements' (2019) 55 (2) Representation 141, 146
[133] *Id.*
[134] G.A. Res. 526, U.N. GAOR, U.N. Doc. A/54/526 (11 Nov. 1999); Balasco and Carrión, *supra* note 132, at 142
[135] The Comprehensive Peace Agreement Between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army (2005)
[136] 'South Sudan: Constitutional Structure' (International Commission of Jurists, 16 Jun. 2014)
[137] Remember Miamingi, 'South Sudan's endless transition: The illusive search for a "Permanent" Constitution' (International IDEA ConstitutionNet, 2015)
[138] 'South Sudan: Constitutional Structure' (International Commission of Jurists, 2014)
[139] Miamingi, *supra* note 137

Frequently, the debate over whether to amend the constitution or draft a new constitution aligns with larger conflicts over the extent of reforms that the parties want to see in the post-conflict constitution. This issue became a major dynamic of the Syrian peace process that eventually centered on negotiations over constitutional reform.

In 2012, to appease Arab Spring protestors, the Syrian government appointed a small committee to amend the state's 1973 Constitution. The revised 2012 Constitution allowed for multiple parties and introduced competitive presidential elections. These reforms were considered insufficient by many of the opposition, who also questioned the adoption process. Despite opposition to the amendment process, the government continued to avoid the deeper reforms that would likely come with drafting a new document through a more democratic process.[140]

The question of whether to continue amending the constitution or draft a new constitution remained a major point of contention. In the Intra-Syrian Peace Process in 2019, after five years of peace negotiations, the Syrian regime continued to emphasize that it would only entertain amendments to the pre-existing 2012 Constitution. The moderate Syrian Opposition, on the other hand, remained adamant that an entirely new document was essential to ensure effective and vital reform to the Syrian state.

When the parties engage in a drafting process for a new constitution in a genuine way, with ample time for debate and discussion, however, a new constitution can provide the necessary foundation for a new social bargain. In South Africa, debates over the nature of constitutional reform played a central role in the peace process. From as early as South Africa's independence from Britain, black South Africans resisted racially exclusive constitution drafting processes. Likewise, opposition groups also resisted government attempts to mollify the opposition by amending some aspects of the constitution while retaining its overall structure. Organizations like the African National Congress insisted that only a new constitution, drafted in an inclusive process where black South Africans were directly represented, would be sufficient.[141]

After two decades of conflict between state security forces and armed opposition groups, as well as growing external pressure to change, the white South African government relented to secret negotiations with the African National Congress that led to the signing of the National Peace Accord in 1991. To select the members of the new Constituent Assembly, which would also form the constitution-drafting body, the first nonracial elections were held in 1994.[142]

Two years later, the Constituent Assembly produced a new constitution and ratified it on May 1996. The new constitution was hailed as a landmark achievement and a model constitution. The Constitution succeeded in transitioning the country into a post-apartheid democracy and it

[140] Nicholas Norberg, 'A Primer on Syria's Constitutional Committee' (Lawfare, 22 Dec. 2018)
[141] 'A History of South Africa: 1910-1996' (South African History Online, 21 Mar. 2011)
[142] Kroc Institute for International Peace Studies, University of Notre Dame, 'South Africa Interim Constitution Accord' (Peace Accords Matrix)

introduced an extensive Bill of Rights that featured both political and comprehensive socio-economic rights.[143]

While the new constitution could not fully remedy the legacies of colonialism that persisted through the unequal distribution of land and wealth, it succeeded in producing a political process through which continued reforms could be peacefully negotiated. The legitimacy of the new constitution and, in particular, the process through which it was drafted, encouraged the continued negotiation of grievances through further amendment processes, providing a new foundation and process for ongoing peaceful reforms.[144]

Structure does not necessarily guarantee a particular outcome or resolve these deeper conflicts. In both amendment and redrafting processes, the legacies of conflict can subvert the expectations and intended goals of the process, limiting or expanding post-conflict governance reform in unexpected ways.

Referendums

The parties to peace negotiations that address constitutional issues have increasingly chosen to finalize either the peace agreement, or the constitution resulting from a process determined by the agreement, through a public referendum.[145] A public referendum can be a tempting choice, particularly in cases where the public has been excluded from the drafting process. When referendums are successful, they can solidify public agreement at a key moment, providing essential legitimacy that can translate the new constitution into the foundation for the rule of law.

While an attractive option, a public referendum is also a risky choice. Public opinion is ephemeral; in a tense post-conflict environment, it can be both difficult to measure and difficult to retain. Notably, it can be difficult to determine the public will, and, in some cases, the parties gravely misinterpret it. When subject to intense "no" campaigns in preparation for a referendum, otherwise solid public approval can slip through the parties' and mediator's grasp. Additionally, in many post-conflict societies, there is also no singular "public," but rather multiple distinct identity groups. In these cases, the zero-sum nature of the voting process can reintroduce or reinforce ethnic and political tensions that drove the conflict.

Approaches to resolving the referendums conundrum

Shortly after the signing of the Good Friday Agreement, Northern Ireland held a referendum to vote on the agreement.[146] As the majority of the negotiations had been conducted

[143] 'Constitutional History of South Africa' (International IDEA ConstitutionNet)
[144] *See* Marianne Merten, 'Land Expropriation Amendment Moves Forward in South Africa, Will Likely Pass' (ConstitutionNet, 15 Nov. 2018)
[145] Michel Stephan, 'Majority Rules in Constitutional Referendums' (2017) 70(3) International Review for Social Sciences 402, 403
[146] Amaral, *supra* note 47, at 84

through secret back-channel negotiations, a public referendum was viewed as an important step for gaining public approval and legitimacy.[147]

For the agreement to take effect, a simple majority of the voters had to vote "yes." Given the stark division between Nationalist and Unionist communities, a vote that achieved a majority but revealed a stark divide between the two sides may have deepened divisions. Ultimately, however, the referendum achieved a majority approval overall of 71.1 percent. The Agreement also received a majority approval within each community. Additionally, the referendum had a high voter turnout of 81.1 percent, lending legitimacy to the results as a means of translating public will.[148]

The short time frame between the signing of the Agreement and the referendum may have contributed to its success, as the popularity of the Agreement peaked immediately after it was signed.[149] The robust presence of a civil society-based "yes campaign," which operated independently from the political parties, may also have helped the referendum avoid a politically divisive environment and result.[150] With majority approval from both communities shortly after the signing of the agreement, the referendum secured legitimacy at a key moment for the constitutional reform negotiated in the Good Friday Agreement.[151]

In divided post-conflict societies, however, it can be difficult to determine how best to assess the will of the people in a manner that does not perpetuate divisiveness or disenfranchisement of the minority. Following the US intervention in 2003, Iraq drafted a permanent constitution and put it to a public referendum on October 15, 2005.[152] While the referendum was intended to provide a voice to "the public," Iraq's public remained deeply divided along ethnic lines, and these lines shaped both the referendum's structure and its outcomes.[153]

As the parties debated the referendum's structure during the drafting of the Transitional Administrative Law, Shia Arabs, representing a majority of the population, proposed requiring a simple majority for approval. The Kurdistan National Assembly instead proposed a referendum that would require a majority approval in the region of Kurdistan. As a compromise, the two groups agreed on a "*de facto*" veto, in which three provinces, such as the three Kurdish provinces of Dohuk, Erbil, and Sulaimania, could reject the constitution if two-thirds of participants in those provinces voted "no." While intended to leverage Kurdish power in the negotiations, this structure also presented the opportunity for a Sunni veto. In response to such a threat, mediators

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[147] Ian Somerville and Shane Kirby, 'Public Relations and the Northern Ireland Peace Process: Dissemination, Reconciliation and the 'Good Friday Agreement' Referendum Campaign' (2012) 1(3) Public Relations Inquiry 231, 233

[148] Amaral, *supra* note 47, at 85

[149] Amaral, *supra* note 47, at 87

[150] Somerville and Kirby, *supra* note 147; Amaral, *supra* note 47, at 97

[151] Stephen Tierney, 'Reflections on Referendums' (International IDEA Discussion Paper, 2018) 13

[152] Makau Mutua, 'The Iraq Paradox: Minority and Group Rights in a Viable Constitution' (2006) 54 Buffalo Law Review, 927

[153] Joost R. Hiltermann, 'Elections and Constitution Writing in Iraq, 2005' (International Crisis Group, Middle East at a Crossroads, 2006) 39-40

worked feverishly in the days before the referendum to secure enough Sunni votes to pass the referendum.[154]

The referendum was approved with a wide margin in predominately Shia and Kurdish provinces. In the three Sunni-majority provinces, it was voted down.[155] Crucially, the "no" votes exceeded two-thirds in only two of those provinces, one province short of a rejection of the draft.[156] While this outcome allowed the constitutional process to move forward, the divide in the votes also highlighted the continuing ethnic divides just as the permanent constitution was adopted.[157]

The amendments drafted in Guatemala's peace negotiations were also subject to a national referendum, which took place in May 1999. As noted above, the referendum featured a series of four questions in which voters were able to approve or reject 50 constitutional amendments.[158] The amendments would have given greater rights, representation, and recognition to the marginalized, indigenous communities through the Agreement on the Identity and Rights of the Indigenous People. The Agreement also declared Guatemala to be a "multi-ethnic, multi-cultural, and multi-lingual" state, a significant shift from the country's previous structure, which had marginalized its indigenous majority.[159]

While the referendum was created as a method for achieving public approval of the final agreements, the binary nature of the referendum and the tense political environment surrounding it ultimately subverted this goal. By reducing 50 detailed compromises into zero-sum binaries, the referendum provided critics with the opportunity easily to oversimplify the amendments and what they represented. The "*No* campaign" capitalized on broad confusion by reducing the content of the accords to familiar ethnic and religious divides and encouraged elites to vote no based on racist fears of the indigenous majority.[160]

Additionally, while the referendum was technically open to all registered voters, this access was limited in practice for the indigenous majority, many of whom were located in rural areas. The lack of voter education and outreach, combined with the rapid addition of last-minute amendments, meant that many indigenous Mayans did not understand the referendum or its potential impacts. Of those who did, many could not afford the trips to the municipal centers where the referendum votes were held. Still others stayed home out of legitimate fears of violent reprisals for voting "yes."[161]

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[154] *Id.*
[155] Edward Wong, 'Iraqi Constitution Vote Split on Ethnic and Sect Lines; Election Panel Reports No Major Fraud' (The New York Times, 23 Oct. 2005)
[156] Mutua, *supra* note 152
[157] Hiltermann, *supra* note 153, at 39-40
[158] Balasco and Carrión, *supra* note 132, at 147
[159] Agreement on the Identity and Rights of Indigenous People (1995) IV(A)
[160] Sung Yong Lee and Roger Mac Ginty, 'Context and Postconflict Referendums,' 18(1) Nationalism and Ethnic Politics 43, 54-55; Balasco and Carrión, *supra* note 132, at 147
[161] *Id.*

As a result, only 18.5 percent of registered voters participated in the referendum, and two thirds voted no.[162] Rather than creating greater inclusivity, the referendum process allowed elites effectively to backtrack on prior compromises under the guise of "public opinion" while using the final nature of the referendum effectively to close off future discussion.[163]

In Colombia, the parties chose to hold a referendum on the 2016 peace agreement. Both the FARC and the Colombian government agreed that a form of public approval was necessary to legitimize the Agreement and the constitutional reform within it, which had been primarily negotiated behind closed doors. While the FARC preferred a constituent assembly to debate and approve the draft, the Colombian government feared that this might open the door to a redrafting of the whole constitution. The parties agreed instead on a popular referendum.[164] Early polls provided support for this decision, as they predicted a strong "yes" vote based on the public's support for the majority of the Agreement's content.[165]

In the months leading up to the referendum, media campaigns from detractors narrowed in on the Agreement's most controversial provision, *de facto* amnesties for former FARC rebels. This emphasis on just the most contentious provision effectively reduced the referendum in voters' minds from a vote on a number of broad issues to a vote on that provision alone, shifting more voters against the Agreement. Combined with low voter turnout, this shift helped ensure a narrow rejection of an otherwise popular agreement, significantly reducing the agreement's overall legitimacy at a crucial moment.[166] Ultimately, this high-stakes gamble meant "what was gained in peacebuilding was lost in representation."[167] Not every provision was equal in the eyes of the voter. Voting on a number of provisions accomplishing significant constitutional reforms can be exceedingly difficult for this reason.

To solidify public opinion and legitimacy for a new constitution, the parties may be tempted to view referendums as an easy answer. Indeed, the parties have chosen to finalize constitutions through referendums with increasing frequency and are likely to continue to rely on referendums as a tool for public input.[168] Nonetheless, referendums can be risky gambles, in which parties must decide whether they are willing to risk losing the gains that they have won in the drafting process.

Human Rights

This chapter has, until this point, focused on the processes the parties to a peace negotiation agree to for post-conflict governance reform, including whether and how to incorporate constitutional reform into a peace process, timing, constitution-drafting, amendment-drafting, and referendums. Sometimes, however, the parties consider certain substantive topics within constitutions to be so important, such as human rights, that they are

[162] Balasco and Carrión, *supra* note 132, at 147
[163] Lee and Mac Ginty, *supra* note 160, at 58
[164] Balasco and Carrión, *supra* note 132, at 148
[165] Susanne Jonas, *Of Centaurs and Doves: Guatemala's Peace Process* (Westview Press, 2000) 198
[166] Balasco and Carrión, *supra* note 132, at 147-8
[167] *Id.* at 152
[168] Stephan, *supra* note 145, at 403

deliberately included in the peace agreement so as to ensure they are embedded in the new post-conflict governance structure.

During peace negotiations, the parties are faced with whether and how to incorporate human rights into the agreement. Relatedly, the parties must determine the types of human rights to incorporate into a post-conflict constitution, whether solely fundamental human rights or a more expansive view of human rights that also includes socioeconomic rights. In so doing, the parties often seek to balance the relationship between human rights enumerated within international treaties and potential conflicts with existing cultural or religious norms within that state.

Broadly defined, human rights are "the equal protection (within the rule of law) of individuals or groups inside a nation-state by the government, NGOs and private individuals."[169] The violation of human rights, whether political, social, or economic, is often a conflict driver. When discrimination by one group or a government transforms existing societal inequalities or privileges into antagonistic group identities, the potential for collective action and internal conflict within a state emerges.[170] Since the 1990s, as part of attempts to remedy conflict, human rights have become an increasingly integral part of conflict prevention and peacemaking.[171]

The pressures on the peace negotiation itself related to timing, inclusivity of stakeholders, and the context of the conflict itself, impact the nature of human rights provisions detailed in the peace agreement. In seeking to resolve the series of conundrums related to incorporating human rights into post-conflict constitutions, the parties must contend with a series of tradeoffs. While drafting a peace agreement and post-conflict constitution, the parties often face pressure to reach an agreement quickly in order to resolve the conflict, which may inform whether and how human rights are incorporated in the final text. At the same time, the parties drafting a post-conflict constitution often aim to create a document that will govern, if not fundamentally transform, the state for years to come.

The ways in which the negotiating parties decide to balance these sometimes-clashing interests can inform whether human rights are specifically enumerated within the constitution or included through references to existing human rights agreements; whether human rights are included through a fundamental or more expansive lens; and whether a domestic cultural context is incorporated.

Drafting Rights or Affirming Existing International Human Rights Law?

Human rights can be can be individually enumerated within the language of a post-conflict constitution or peace agreement to avoid ambiguity and include particular rights specific to the context of the state. This approach enables the parties to the agreement to set their

[169] E. Ike Ugodu, *Human Rights, the Rule of Law, and Development in Africa* (University of Pennsylvania Press, 2004) 83
[170] Oskar N.T. Thoms and James Ron, 'Do Human Rights Violations Cause Internal Conflict?' (2007) 29(3) Human Rights Quarterly 674, 692
[171] 'Human Rights in Peace Negotiations' (1996) 18(2) Human Rights Quarterly 249

own specific terms with regard to the protection and insurance of human rights and fundamental freedoms.

South Africa's 1993 Interim Constitution, which marked the end of apartheid and a transition to a democratic South Africa, included a chapter on Fundamental Rights. This chapter enshrined principles of equality within its 29 sections, detailing such rights and freedoms as to life, dignity, assembly, association, movement, political participation, justice, economic activity, property, and language.[172] This extensive section in the Interim Constitution sought fundamentally to distinguish the future of South Africa from its apartheid past, which institutionalized racial discrimination and denied the majority of its population human rights. South Africa's 1996 Constitution further formalized these human rights in a bill of rights, described in the text of the Constitution as "a cornerstone of democracy in South Africa."[173]

Alternatively, some parties choose to cement to human rights and minority protections in post-conflict constitutions by drawing from international treaties and covenants.

During the condensed, urgent drafting timeline of the Dayton Accords, human rights took center stage. The Dayton Accords contained annexes on several human rights issues, including the rights of refugees and the displaced.[174] Annex 6 of the Dayton Accords stipulated that the parties would ensure the internationally recognized human rights and fundamental freedoms of all within their jurisdiction, listing 16 international human rights charters and conventions in an appendix to the annex.[175]

The new Constitution for Bosnia laid out in the Dayton Accords asserted that European human rights law "shall apply directly" and "have priority over all other law."[176] The inclusion of this language directly referencing the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols in the new Constitution indicated Bosnia's desire fully to integrate into Bosnia law the highest level of human rights protections. By affirming international human rights agreements in their constitution and peace agreement, the parties at Dayton sought to embed their vision of a post-conflict Bosnia within international consensus on the topic of specific human rights, including language on the definition, provision, and protection of those rights.

The issue with implementing this sweeping vision of human rights in Bosnia is the degree to which Bosnian citizens were and are aware of their actual rights. For Bosnia to affirm a suite of treaties in its governing document demonstrates a commitment to human rights, but without enumerating those rights, the populace was less familiar with the precise content of those rights.

Somalia's 2004 thin interim constitution, the Transitional Federal Charter of the Somali Republic, combined these two approaches to incorporating human rights into a post-conflict constitution. The Charter included a provision that Somalia would recognize and enforce

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[172] South Africa Constitution (1993) Ch. 3
[173] *Id.* at Ch. 2, § 7(1)
[174] O'Brien, *supra* note 28, at 338
[175] The General Framework for Peace in Bosnia and Herzegovina (Dayton, 1995) Annex 6, Appendix
[176] *Id.* at Annex 4, art. II

international human rights treaties to which it is a party, and then detailed out an extensive list of specific fundamental and socioeconomic human rights.[177] Though this thin constitution did not address all issues motivating the conflict, as noted previously in this chapter, the parties chose to include a detailed enumeration of human rights.

Fundamental or Expansive Rights?

Once negotiating parties decide to include human rights in a post-conflict constitution, they must determine the types of human rights that are enumerated: fundamental human rights or more expansive human rights, including socioeconomic rights.

Some parties to peace negotiations decide only to include fundamental rights in their post-conflict constitutions. These fundamental rights include such rights as those included in the 1948 Universal Declaration of Human Rights, or political rights, such as those set forth in the International Covenant on Civil and Political Rights.[178]

During the Kosovo peace process in the midst of a devastating ethnic conflict, drafters of the Rambouillet Accords Constitution chose to prioritize fundamental human rights in the Accords. The Accords broadly stipulated that all authorities and institutions in Kosovo would ensure and conform to internationally recognized human rights. Notably, the Accords directly provided that the rights and freedoms included in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, rights which pertain to civil and political rights, would directly apply in Kosovo. In greater specificity, the Constitution provided for expanded and concretized political and identity-based rights for Kosovo's national communities, a primary conflict driver. The Constitution did not specify economic-based rights, though it provided the opportunity for the Kosovo Assembly to approve internationally recognized human rights agreements.[179]

Other parties to a peace negotiation may choose to incorporate a more expansive view of human rights, including rights to work or to property, in post-conflict constitutions. Importantly, should the parties take a more maximalist approach to human rights in a post-conflict constitution, but not follow through on implementing all aspects of those rights, the legitimacy of the fundamental rights upon which the expanded rights are based is minimized.

South Africa's 1996 post-conflict Constitution, cementing the transition away from apartheid, required the inclusion of both fundamental and socioeconomic human rights. The 1996 Constitution arose from deliberate, detailed negotiations among the parties committed to creating a solid foundation for a new and democratic South Africa based on principles of equality. The Constitution included a bill of rights that ensured fundamental human and political rights, such as equality before the law; freedom of religion, belief and opinion; freedom of assembly; right to political participation; and access to the justice system.[180] From an economic

[177] The Transitional Federal Charter of the Somali Republic (Nairobi, 2004) Ch. 5
[178] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
[179] Rambouillet Accords, Ch. 1, arts. VI (1-3), art. VII
[180] South Africa Constitution (1996) Ch. 2

standpoint, the bill of rights included in the 1996 Constitution also included freedom of trade, occupation and profession; rights to fair labor practices; rights to organize in unions; and rights to collective bargaining.[181]

Incorporating Cultural or Religious Context

Throughout the post-conflict constitution drafting process, the parties may also need to account for specific cultural or religious contexts when determining which rights to enumerate or reference. This may create tensions as domestic or religious legal frameworks come into conflict with international human rights frameworks.

Yemen's 2015 draft constitution, written as part of the larger peace process, included an expansive view of human rights. The draft constitution included fundamental rights such as equality before and the law, as well as a series of detailed socioeconomic rights.[182] This chapter of the draft constitution also included an article that guaranteed all these rights and freedoms as long as they do not conflict with Sharia.[183]

Beyond the relevance of Islamic Sharia to considerations of human rights, Sharia is mentioned several additional times in Yemen's 2015 draft constitution. The draft constitution sought to develop a common understanding of Islamic Sharia, which it defined as the source of legislation. The draft constitution ensured that inheritance, and the defining of Zakat authority, an independent regional institution that collects Zakat (alms) from citizens, were established in accordance with provisions of Sharia. The draft constitution also created the Ifta Council, an institution through which Sharia was to be deliberated.[184]

The establishment of the Ifta Council represented a Yemeni effort within the state's constitution to establish a common understanding regarding the legal relevance of Islamic Sharia. The creation of the Ifta Council addressed disagreement surrounding intent, understanding, and application of Sharia. The Council was established to operate as an independent national institution comprised of Sharia scholars from varied jurisprudence doctrines. The aim of the Council was to interpret and support the understanding of Islam and Islamic studies, while promoting values of tolerance and moderation.

The two articles of Yemen's 2015 draft constitution that followed the article stipulating that human rights and freedoms were guaranteed (lest they come into conflict with Sharia) provided that assault against these rights would be punished, and all state authorities would enforce and apply the rights and freedoms stated in the constitution.[185] In this case, the parties managed to include both extensive protections of human rights while acknowledging the importance of the domestic cultural and religious context. Because the 2015 Yemeni draft constitution was never implemented and conflict resumed, it has yet to be seen whether a

[181] *Id.* at Ch. 2(23)
[182] Yemen Constitution (2015) Ch. II
[183] *Id.* at Ch. II, art. 135
[184] Yemen Constitution (2015) Ch. I, arts. 4, 25; Ch. III, arts. 295-297, 306-307
[185] *Id.* at Ch. II, arts. 136-137

provision like this, when implemented, can allow for both Sharia law and an expansive view of human rights to coexist, or if it would limit the reach of those human rights.

Somalia, likewise, attempted to incorporate both the cultural and religious context of the state and a desire to include greater human rights in its constitution. Somalia's 2004 Interim Constitution included a chapter entitled "Protection of Fundamental Rights and Freedoms of the People," which detailed equality of citizens before the law regardless of race, birth, language, religion, sex, or political affiliation.[186] Coexisting with these provisions of human rights, Article 8 of the Interim Constitution marked Islam as the official religion of the state and Sharia as the base source for all national legislation.[187] After the Transitional Federal Charter was adopted, however, violence carried out by insurgents demanding a greater presence of Islam in the government of Somalia continued.

The government formally adopted Sharia as the law governing Somalia in 2009 in an effort to unify the state and quell violence by insurgents using Islam as a justification for anti-government violence.[188] Attempting to merge a constitutional framework with specific cultural and religious contexts can pose a distinct challenge for states, as codifying this context in law sometimes comes into conflict with a number of provisions of international human rights frameworks.[189] This tension is heightened when there are multiple interpretations of that cultural and religious context, or where a state has a number of primary cultural and religious identities. This challenge is heightened in a state with only a transitional governing authority and ongoing civil unrest, as in Somalia.

Successfully navigating the difficult choices of determining whether to incorporate principles of international human rights law, minimalist or maximalist definitions of human rights, and particular domestic cultural and religious practices into a post-conflict constitution can address conflict drivers and pave the path to a durable peace.

CONCLUSION

Addressing constitutional modification, or establishing a process to so after the coming into force of the peace agreement can be an effective way of mitigating conflict drivers. Constitutional modification can remedy imbalances in representation, create more inclusive political institutions, enhance the protection of political and socio-economic rights, and provide for more genuine democratic representation. A post-conflict constitution may lay the foundation for a durable peace and equitable governance, but for it to do so, the parties to a peace negotiation must weigh approaches to several distinct conundrums. Despite the risks of committing a misstep while determining the processes for post-conflict governance reform, the

[186] The Transitional Federal Charter of the Somali Republic (Nairobi, 2004) Ch. 5
[187] *Id.* at Ch. 1, art. 8
[188] Mohamed Ibrahim, 'Somalia Adopts Islamic Law to Deter Insurgency' (The New York Times, 18 Apr. 2009)
[189] Ran Hischl, 'The Theocratic Challenge to Constitution Drafting in Post-Conflict States' (2008) 49(4) William & Mary Law Review 1179, 1185

parties see including constitutional reform as an increasingly important component of peace negotiations.

The parties in post-conflict peace negotiations have the opportunity to undertake constitutional modification in a number of ways, depending on the needs and context of the conflict at hand. The parties may agree to strategic amendments, as in the case of Macedonia, which modified the existing legal framework. The parties may also choose to make the peace negotiations and the constitutional negotiations one and the same while momentum exists between the parties to the conflict, as in the case of Bosnia and the Dayton Accords, which resulted in a new constitution for the state attached as an annex to the Agreement. Elsewhere, as in Nepal and South Africa, the parties may agree to the creation of an interim constitution to end the violence and put off the negotiation of a permanent constitution to a later, specified or unspecified, date. Notably, though the parties in these contexts selected forms of constitution-making that reflected the political will of their specific situations, each faced its own challenges following peace negotiations, and its own degrees of governmental dysfunction.

Riskier, the parties may take on post-conflict constitution-making processes that are highly ambitious, or that may be easily manipulated to cement the conflict within a state's legal structure. As noted with the case of East Timor, a plan for a six-month constitution-making process set out by the international administration did not leave time for the parties to the constitutional negotiations to develop sufficient expertise. According to some commentators, this resulted in a document that fit the international administration's interests rather than the long-term interests of East Timor. In Guatemala, the parties used peace negotiations as a window of opportunity to catalyze sweeping governance reforms through constitutional amendments, only to have the process co-opted and corrupted by the political elite during the amendment referendum process.

The numerous key state practice cases highlighted in this chapter—Bosnia, Colombia, East Timor, Guatemala, Iraq, Kosovo, Macedonia, Nepal, Northern Ireland, Somalia, South Africa, Syria, and Yemen—underscore the mixed outcomes that similar processes for post-conflict governance reform can have depending on the particular post-conflict setting. As with the cornerstone issues discussed in previous chapters, successfully ensuring that post-conflict governance reforms within the larger conversation of a peace negotiation lead to a durable peace and not a return of conflict requires the parties to carefully consider every conundrum they will likely face in the drafting process.