Constitution-making and Political Settlements in Times of Transition

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Abstract
This special section is an output of the Political Settlement Research Programme – PSRP (www.politicalsettlements.org). The PSRP examines how to use peace processes to create inclusive and open political settlements. This special issue addresses in particular constitution-making and political settlements in times of transition. We consider how constitutional design and adjudication must be understood to have a specific political role in constructing and enabling a political settlement, as in the shared understandings as to how power is to be held and exercised, that forms the political constitution which the constitution attempts to institutionalised. We collectively argue that traditional constitutional devices have to be understood as operating differently in times of transition where the constitution plays a very constructivist role with respect to the forming of agreement, rather than reflecting prior agreement.

Keywords
political settlement, constitution-making, post-conflict, democratisation, transition
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Bargaining on Constitutions: Political Settlements and Constitutional State-building

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Christine Bell is Assistant Principal (Global Justice) and Professor of Constitutional Law (University of Edinburgh), and Director of the Political Settlement Research Programme. This article and special section are an output of the Political Settlement Research Programme, supported by funding from the Department of International Development, United Kingdom, although nothing herein constitutes the views of the Department, or has been subject to input by the Department.

Abstract

This article considers the relationship between constitutions and political settlements and locates the special section articles within this wider discussion. The article points to the apparently paradoxical connection between disillusionment with internationalised statebuilding techniques on one hand, and increased international faith in constitution-making as a statebuilding tool on the other. Using understandings of the relationship of the constitution to political settlement from conventional constitutional theory, it argues that the current context of negotiated transitions requires constitution-making to be approached with an eye to the distinctive dilemmas of statecraft that pertain in contemporary transitions. The most central dilemma concerns how power-balances between political/military elites shape can be broadened to ensure the constitution’s capacity to fulfil its normative role in restraining power and delivering broader social inclusion. The article points to how the pieces which make up this special section draw together development and legal discourses to suggest how constitutional theory provides a resource for those seeking to promote constitutionalism as a tool for reaching political settlements capable of resolving conflict. It also argues that those who seek to rely on constitutions for conflict resolution, need to understand this enterprise as just a political and fraught as all other institution-building efforts.

Keywords

political settlement, constitution-making, post-conflict, democratisation, transition

I. Introduction

This special section addresses constitutional development in countries attempting transitions, drawing on peacebuilding, development and international legal discourses. Collectively we ask whether constitutions can bear the conflict resolution and democratisation burdens being ascribed to them in political transitions. At issue are two types of transition (often intertwined): the first from authoritarianism to democracy; and the second from violent conflict towards peaceful political settlement.
We attempt to respond to two apparently contradictory contemporary impulses with regard to international intervention in transitions. The first is that of profound international disillusionment with transitions across development, peacebuilding, and international legal statebuilding interventions. The second is the international turn to constitutions as a vehicle through which to promote and even enforce progressive democratic directions for the transition. From the first impulse international actors question the effectiveness of their development, peacebuilding and international legal interventions and increasingly turning to politics for explanations. From the second, they paradoxically appear to place renewed faith in constitutions as capable of remediying the deficits of past state-building approaches.

This introduction explores this apparent paradox, and seeks to locate the other articles in our special section with reference to it. Centrally I suggest that a common thread runs through the articles: that transitional constitution-making practices all need to be understood against the background politics of transitional struggles of competing groups to ‘own’ the state and a countervailing impulse towards a more open rule-based political order. Put another way, transitional constitutionalism is characterised by an attempt to navigate from a foundational elite pact, to a more normative constitutional order. This article shows how the pieces that follow trace how this struggle plays out in constitutional design processes. Each piece in this special collection exposes how a particular aspect of constitutional design is shaped by the political struggles in transitions over whose interests are placed at the centre of the state. We collectively suggest that more attention needs to be paid to the complex constructive relationship between constitutional text and political settlement in contemporary transition contexts. As a side point, we hope the collection demonstrates the need for further thinking on how development theory and constitutional legal theory can better speak to each other.

II. Politics or Law?: Coping with the ‘Failure’ of Transitions

The Era of Disillusionment

Where transitions were once understood as part of a ‘third wave’ of democratisation in what would be the ultimate global ‘wave’ democratisation and peace, this heady expectation has long been replaced with caution. More recently, caution has moved to outright disillusionment. A quarter of a century of investment in transitions has seen specific new international and regional architecture built to address transitions, new international norms promulgated, and expensive development and governance interventions embarked on. It is now apparent that these efforts have failed to lead to democracy and peace to taking hold worldwide, for globally differentiated reasons.

First inter-related problems of state fragility and conflict are even more difficult to transition from than interveners realised, peace processes appear to have limited success in breaking cycles of fragility, conflict, and poverty. An inordinate amount of attention, intervention

1 See generally, SP Huntington, The Third Wave: Democratization in the Late Twentieth Century (Oklahoma University Press, 1991) (whose original thesis was much more critical and anticipating of failure than is often given credit to); and more recently, T Carrothers, ‘End of Transition Paradigm’ (2005) 13(1) Journal of Democracy 5-21.
and money has failed to transform so-called ‘fragile and conflict affected states’ into functional democratic structures. Despite strongly internationally supported attempts to broker peace agreements and negotiate new constitutional orders states such as Somalia, Nepal, the Democratic Republic of Congo and South Sudan appear to defy all attempts to promote transition.² With ever present pressures to only fund ‘what works’, these contexts seem to say that ‘nothing works’ and that fragile states have mechanisms which render them curiously strong and resilient in their ‘fragility’: as de Waal writes facetiously of Sudanese politics ‘it changes from week to week but if you come back after ten years it is exactly the same’.³

Second, some past relative transitional ‘successes’ appear rather less successful than they once did. Across very different regional contexts, many transitional societies, now well down the line from their transitional moment, appear still ‘transitional’ and stuck in a ‘no war no peace’ liminal space. Transitions in Central America while formally replacing dictatorship with democracy appear characterised by enduring forms of ‘state ownership’ by political elites, high levels of inequality and exclusion, and high levels of corruption and violence – now in the form of organised crime.⁴ In Europe, transitions in divided societies such as Bosnia or Northern Ireland appear to be ‘stuck’: their apparently liberal democratic institutions in uneasy relationship to still tense power-sharing governments based on strong forms of group accommodation. In Africa in addition to the transitional ‘failures’ outlined above, some once-apparently-successful transitions, notably Burundi, appear susceptible to reversal almost overnight, and even the paradigmatic transitional state of South Africa appears to be on a less certain liberal democratic trajectory than was once assumed.

As a result, international intervenors are questioning their practices and attempting to understand and respond to these failures. The language varies across diverse international actors, but articulation of frustration with failure is similar. Development actors, ranging from UK and Australian government aid agencies to the World Bank and the OECD, are questioning their approaches to projects of state-building as development.⁵ Peacebuilders and peacebuilding analysis increasingly seek to understand why the liberal political orders supported by their interventions have failed to come about, resulting in ambiguous ‘hybrid’ political orders rather than liberal ones.⁶ Similarly, international legal norm-promoters who

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have over the decades promoted international standards relating to women, peace and security, or transitional justice, have also begun to question why legal norms have delivered so little change.

Not only is the sense of failure common to different international actors, but so too is the response. Rather than viewing failures as simple bad management, lack of political will, or lessons not learnt, international interveners understand a more profound failure to be at play: they have failed to understand the local political game in which they were immersed. Although they use slightly different language, development, peacebuilding and legal interveners appear to be coming to the same conclusion: that they have misunderstood the local political dynamics of the transitions that they have intervened in and now require more politically smart responses.

Development actors speak of the need to approach ‘development as politics’, and in particular to better understand and navigate ‘the political settlement’ through which elites hold and exercise power. The political settlement can be understood as ‘the forging of a common understanding, usually between political elites, that their best interests or beliefs are served through acquiescence to a framework for administering political power’. Peacebuilding intervenors, similarly increasingly acknowledge a profound failure to sufficiently understand and reckon with the power politics of the countries in which interventions take place. The recent reviews from the UN’s Group of Experts on the UN’s Peacebuilding Architecture, and its High Level Panel on UN Peace Operations Panel, and the Women, Peace and Security Global Study, for example, all point to a need to better engage with the power-politics of local political settlement processes and the need for mandates and modalities to be nimble enough to respond to changing local games if they are to be effective. International norm-promoters also demonstrate a turn to the local in a move towards understanding how distinct contexts affect the effectiveness of norms and how elite power politics affects the domestic institutions that seek to implement international norms. A recent report by ICTJ and the Kofi Annan Foundation, for example, examined truth commissions to confront the paradox that while truth commissions have expanded and shown a tendency towards uniformity based on their mandates, recent truth-making processes seemed to have gone through chronic crises. In place of any attempt to articulate new standards for truth commissions they called instead for ‘well-informed analysis of

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concrete situations’ and seek to understand the local conditions which influence whether truth commissions play a constructive or unconstructive role.¹⁰

Insofar as conflict resolution, development and international legal actors have formed analysis of why their interventions have failed, the most consistent suggestion has been that they have failed to sufficiently understand local political bargaining processes. Where they once believed peaceful liberal democracy was taking hold, they now see complex and contingent local bargains over access to power. These bargains often frustrate and even subvert the outworking of the political and legal institutions in which international actors placed their faith for transition.

*Internationalised Constitutionalism*

Curiously, however, just when faith in liberal institutional solutions has waned, there is evidence of an apparently countervailing rise in faith in constitutions and constitution-making as a liberal democratic transition-promoting device. A fast-developing internationalisation of constitution-making practices is taking hold. International law is increasingly moving to regulate the production of constitutions, through standards dealing with inclusion in constitution-making processes and standards providing for forms of group accommodation.¹¹ International legal standards are also increasingly moving towards requiring ‘constitutionalism’ as a ‘good’ *per se*, and international legal protection of constitutions as a tool in preventing ‘democratic regression’. Standards in Africa and the Americas have seen the African Union, and the Organisation of American States firmly commit to democratic government and both have treaties committing their member states to democracy. Both entities have recently developed these standards towards more specific prohibitions of ‘unconstitutional rupture’, or ‘unconstitutional change of government’, to be enforced through sanctions and ultimately expulsion from the relevant regional organization.¹² This move, ties international organisations to the domestic constitution, and to understanding it as having a central role in regulating moves towards and away from democratic and peaceful societies.

This new regulation requiring good constitution-making practice and good constitutional order, is accompanied by a new international technocracy of constitutional compliance. This technocracy includes forms of international adjudication on constitutional validity, for

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example as with the ‘sanctions’ jurisprudence of the AU with respect to its new constitution-promoting standards, or through new international machinery such as the Venice Commission of the Council of Europe which both advises on, and undertakes forms of adjudication of new constitutional arrangements.\(^{13}\)

It is perhaps not surprising that such faith is being placed in constitutions. Constitutionalism has an implicit theory of both democracy and conflict-resolution, articulated throughout the history of constitutional theory. Constitutions are understood to both capture and create the political settlement that grounds and stabilises the resultant political order enabling its orderly development. In so doing, they create both the vertical relationship of restraint between the individual and the state necessary to democratic practice, but also the potential for a wider horizontal relationship of civic trust necessary to minimising violent conflict, often theorised in concepts such as the ‘social contract’. This account of constitutionalism understands it as critical to statebuilding. It understands the concept of underlying political settlement or social contract as a heuristic way of talking about the political understandings which underpin the constitution as text. However, it also views the constitutional text as not just a once-off codification of those understandings, but also as a tool which enables their development and mutation over time. The constitution while capturing the elite pact of the moment, is a document whose endurance depends on its capacity to provide a justificatory narrative for the state as a whole. It must transform the elite pact of the moment into a more enduring set of social understandings.

The idea that constitutions are tools of navigation between political and legal conceptions of the political order is one that is as old as public law itself. The historical conceptual work of Martin Loughlin, provides a useful theoretical basis for understanding the relationship between political settlements and constitutional order in the contemporary context.\(^{14}\)

Martin Loughlin uses the term *droit politique* to capture the idea of the political pact (or even ‘political constitution’) which serves as a set of pre-constitutional understandings which shape and give rise to the constitutional text. The transitions of the post-cold war context, as a still slim literature demonstrates, have often placed constitutional development centre-stage in the attempt to broker a new political settlement and given a starring conflict-resolution role.\(^{15}\) However, the practical conditions of this new context are very different from those which generated the theoretical accounts which ground established constitutions. In this new context we know relatively little about how and when constitutional development achieves the necessary balance between elite pact and more inclusive social contract, and the

\(^{13}\) Ibid, see also Council of Europe, European Commission for Democracy Through Law (Venice Commission) (hereinafter – Venice Commission) <http://www.venice.coe.int/WebForms/pages/?p=01_Presentation>.


precise role that constitutional design and constitutional courts play in this process of ‘statecraft’.

Despite the differences, the theoretical account of the relationship between social contract and constitution has something to say to the context of contemporary transitions. Traditional constitutional theory provides a theoretical resource for bringing this very contemporary project into conversation with constitutional theory in more settled circumstances. There is a similarity between Loughlin’s concept of the *droit politique* and – to use the language of development organisations – that of political settlement as in the acknowledgement by elites that they should acquiesce to a common framework for holding power. Loughlin argues that constitutions are ‘an exercise in statecraft that functions according to the precepts of the *droit politique*’, by which he means that constitutions as legal documents reflect and respond to what might be understood as the fundamental understandings at the heart of the state that bind it ‘morally and politically, not legally’.

The concept of *droit politique* therefore bears similarities to the concept of political settlement, although for Loughlin the idea of the material, or underlying political constitution, is a fairly robust political concept of ‘the right’ – that is a concept of a power-brokerage that includes normative commitments to restraint of power. In fact, Loughlin’s sometimes strange use of the term *droit politique* captures the ways in which this underlying set of political agreements is related to restraint of power. Loughlin’s argument is based on his review of the historical development of public law and liberal democracy in Western societies where elite deals evolved towards normative commitments over long periods of time. Yet, the relationship he exposes between constitutional text and underlying political agreement is one that speaks to attempts to support contemporary constitutional development in deeply divided societies because it seeks to understand the relationship between political power and constitutionalism as a process of statecraft in which the nature of the state is itself under construction.

There are, however, key elements of the contemporary context which pose distinctive challenges for the project of constitutional development as statecraft. The first challenge is that of timescale. In contemporary transitions we attempt to develop constitutions almost overnight rather than over hundreds of years, and the elite commitment is often more of a dirty deal than a commitment to the political right (or *droit politique*). How then is a constitution built on contingent narrow elite bargains, to transform into a more robust social contract? The second challenge is how to understand and locate the significant internationalisation of contemporary domestic constitution-making processes. In addition to being propelled by the power dynamics and bargaining of political elites, contemporary post-conflict constitution-making often involves international actors and organisations in a critical role, posing challenges for articulating the constitution’s legitimacy in terms of its ‘we the people’ origins. International actors not only introduce technical assistance, but come with, particular biases that control the type of political settlement that can be achieved. These biases include the prohibition on changing the state’s boundaries, and an impetus towards

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16 Ibid at 288 and 310.
forms of participative constitution-making process.\textsuperscript{17} Finally, the contemporary context is also distinctive in terms of the sequencing of political settlement and constitution: the production of a constitutional text may arise as part of an attempt to document and stabilise a new political understanding, but the constitution-making process may precede or come adrift from the process of peace-making and political settlement, as in Yemen, Somalia or Libya, and be left with the burden of creating it in almost impossible circumstances of conflict.\textsuperscript{18}

III. Constitutional Development as Statecraft: Locating the Special Section

This special section attempts to address the relationship between political settlement and constitutional development and the state-craft of constitution-making, that takes the distinctive dimensions of contemporary constitutional transitions seriously. The special collection contributions operate as a form of ‘concept album’: discrete discussions over aspects of constitutional drafting and adjudication which seek to begin a larger conversation over the relationship of contemporary constitutions in conflicted states to political agreement. A central thesis runs through the collection, namely that both the practice of constitution-making and constitutional legal thought must better understand the relationship between constitutional text and the politics of elite bargaining that shape and constrain it. We suggest that the critical need in contemporary conflict contexts is to understand how to navigate the tension between the constitution as reflecting and elite ‘dirty deal’ and the constitution as reflecting the droit politique. This tension we suggest affects the design of the constitution-making processes; it recasts the operation of what look like ‘normal’ constitutional devices with a heightened and distinctive politicised role; and it calls for a new understanding of the role of courts and judicial review as part of a complex political tapestry of transition.

The first article, by Charmaine Rodrigues, (Letting off steam: Interim constitutions as a safety valve to the pressure-cooker of transitions in conflict-affected states?) picks up the question of the relationship of securing political agreement to any new legal and political order, to the design of constitution-making process. This article reflects a practitioner’s experience of the connection between development approaches to political settlement and constitution-making. Rodrigues sets out the international modus operandi of incremental constitution-making through a two phase constitution-making process of producing an interim constitution and then a final constitution. She shows how the interim constitution has been used in ‘fragile and conflict-affected states’, outlining its challenges, but also arguing for its benefits. The two-stage model sees an initial interim constitution locking-in an initial elite agreement as to the parameters of the polity and securing agreement to a joint constitution-making process to produce a ‘final’ constitution. This two-stage process aims to both produce a wider political settlement and embody it in a constitution, and is becoming a key international modus operandi, driven less ideologically than pragmatically as a logical way to do business. An initial agreement to stop fighting is often coupled with some sort of interim power-map as to how power will be held and exercised which


\textsuperscript{18} See further, C. Bell, and K. Zulueta-Fülscher, ‘Sequencing peace and constitutions in the political settlement process’, International IDEA Policy Paper November 2016.
simultaneously sets out the power-map for how the final constitution will be achieved. The coupling of ceasefires with constitutions has been criticised. However, undesirable as it may be, to link ceasefires to constitutional guarantees, they often cannot be decoupled as parties will not move from conflict until they get some guarantees as to the political settlement that will prevail. The initial interim constitutional documents vary from short constitutional ‘holding devices’, to full constitutions which merely have the label ‘interim’. The two-stage process has the benefits of enabling incremental approaches to constructing constitutional order, in contexts where legitimate legal frameworks are difficult to achieve. In addition to being politically plausible the two-stage process appears to have a normative dividend: the interim constitution limits the reach of the initial elite deal, by enabling the establishment of a second stage full constitution-making process capable of involving much the broader social or political participation that is understood as important to constitutional ownership. The interim constitution’s ‘unusual’ constitutional features speak to a familiar constitutional project – the need to forge political agreement to a common political community as an on-going political process, and to constitutionally institutionalise the restraint of power to enable it as public power.

Yet, for constitutional lawyers the very term interim constitution is paradoxical when viewed from a traditional constitutional stand-point. The interim constitution subverts the constitution’s normal positioning as a document which rests on prior political consent, and which serves to define and articulate the fundamental norms on which the polity is predicated. The constitution is recast from a foundational document which stands above and is more permanent than ordinary legislation, to a very temporary arrangement which anticipates its own replacement. However, as Rodrigues argues, in conflicted states constitutional reform is often understood as presenting singular, winner-takes-all opportunities. Against this backdrop, it can be useful to more systematically embrace interim constitutions as a useful ‘circuit-breaker’ in peace processes because they help broker political settlement, while enabling a platform for ongoing peacebuilding. Rodrigues suggests that interim constitutions can help build-in a more incremental approach to constitutional development which enables the constitution to function more explicitly as a tool of political settlement.

However, interim constitutions also carry risks as Rodrigues points out. The first risk relates to how interim constitutions in sketching the contours of the eventual political settlement also create pathway dependencies. The interim constitution may shape and constrain the capacity of the end constitution in ways that make it difficult to ensure that the elite deal opens up and develops into a more normative constitutionalism. Second, international actors tend to engage with the political settlement processes and constitution-making processes as distinct processes, despite constitutions operating as the legal manifestation of the brokered peace. Rodrigues suggests that better awareness of the complexity of the relationship between political bargaining and constitutional development and the risks of the two-stage process, might assist in smarter design of such processes in the future.

19 Kaldor M., ‘How Peace Agreements Undermine the Rule of Law in New War Settings’ 2016 Global Policy 7 (2), 146-155.
The second article, by Silvia Suteu (Eternity Clauses in Post-conflict and Post-Authoritarian Constitution-making), addresses the ways in which traditional design elements of constitutions play a distinctive role in transitional societies with respect to deep political division, using ‘eternity clauses’ as her case study. As Suteu points out, literature on entrenchment as a means to achieve constitutional endurance has grown in recent years, as has the scholarship on unamendable provisions as a mechanism intended to safeguard the constitutional project. Less attention, however, has been paid to the promise and limits of unamendable ‘eternity clauses’ in contemporary transitional post-conflict settings. Yet, they have appeal in the transitional context because they provide a mechanism through which to ‘hard wire’ core or ‘unnegotiable’ elements of the political settlement into the constitutional text, as the eternity clause protecting federalism in the German Constitution illustrates. The attraction of eternity clauses from a conflict-resolution point of view, is that they provide security for elites that the most critical understandings agreed between opposing elite actors will be protected against unilateral change by ‘the other side’, or indeed by the pressure of the wider participative processes or demands of international actors. Groups whose place in the political order rests on their use of armed force, take a risk to their power in moving from violence into transitions, exacerbated by the unpredictability that committing to elections brings. In such contexts, constitutional guarantees can play a role in reassuring political actors that the deal they are agreeing to, will stick. The relationship of eternity clause to a newly inclusive political settlement is often not immediately visible from the wording of the clause itself. While eternity clauses always hard write core elements of political settlement, as Suteu traces through her example of Tunisia, choices as to what to place beyond constitutional amendment often reflect and entrench an inter-group balance of power. The political choices over what to include in eternity clauses reveal a sub-text as to critical trade-offs between elites as to the core requirements of any political settlement, such as compromises between secularist and islamist visions of the state, or particular territorial balances of power.

As with Rodrigues’ discussion of interim constitutions, Suteu questions the extent to which constitutional design can carry the burden of forging political agreement. She examines through her wider comparative positioning of the Tunisian example, how eternity clauses, rather than ensuring that the political settlement is stabilised, often merely provide new battlefields for the constitution’s destabilisation when elite consent to the settlement is withdrawn. She uses the example of Honduras as illustrative. There an eternity clause was used by the Supreme Court to remove a President who sought to hold a referendum to extend constitutional Presidential limits in what was an attempt to tilt the balance of power. However, the international community found the court to be complicit in an (unconstitutional) coup which saw the President returned to power. Suteu demonstrates how the eternity clause itself became a mechanism for destabilising the constitutional order because it could be used to undo the political settlement (by deposing the President), albeit in the face of an alternative challenge to undo the settlement (by the President’s extension of terms limits and proposed amendment of the eternity clause). In a sense what Suteu’s Honduran example illustrates is the form of constitutional crises that prevails when local elites are smart as to how to work within the letter of the constitution when seeking to subvert the foundational inter-group deals at its core by attempting to take-back unilateral ownership of the state in ways that the constitution was understood to prevent. Often these efforts involve
elite moves and counter-moves which take place within the frame of the constitution rather than outside it. The example poses a challenge for those who understand the turn to domestic constitutionalism as somehow de-politicising judgements over who is behaving as a ‘good democrat’ and who is not. Suteu’s examples show that it is difficult for international interveners doing ‘normal constitutional law’ to articulate the constitutional rights and wrongs of each move in terms of the constitution’s text. It is difficult to articulate why such moves are ‘unconstitutional’ in terms of the constitution’s text without a political assessment of the type of group accommodation the constitution was designed to achieve and the impact on democratic prospects of any move from this inter-group ‘deal’. Suteu’s article therefore ultimately illustrates both the potential but also the limits of eternity clauses to legalise mechanisms of group accommodation and reassurance.

The second two articles continue the theme that there is a need to understand the political bargaining process, but with reference to constitutional adjudication. Both examine the distinctiveness of post-conflict or post-democratisation judicial review by apex courts. Tom Daly (The Alchemists: Courts as democracy-builders in contemporary thought), explores the democratisation setting and questions the increasingly onerous role given to courts by constitution-makers – a role of maintaining a functioning political settlement and to act as engines of transition by ensuring successful democratisation. Constitutional courts, as Daly argues are expected to breathe life into the paper promises of the new democracy’s constitutional text; to mediate the text’s shifting relationship with the underlying political settlement process; and also to guard and build democracy itself by policing political adherence to emerging transnational norms of democratic governance. These combined roles are acutely difficult and push courts beyond the realm of legal adjudication in the strict sense towards a more heightened political role involving political judgement as to what furthering democratic transition demands.

Daly questions whether international support for independent courts and unthinking preferences for such courts to be given strong forms of judicial review, pays sufficient attention to the heightened political context in which they will operate. He examines the ways in which traditional debates between political and legal constitutionalists around the legitimacy of strong forms of judicial review, fail to capture the dilemmas for transitional courts in brokering process between a former elite-captured political order, and a new more inclusive and democratic political order. He also notes the lack of attention paid to the democratisation role of regional human rights courts, and the complex ways these interact with domestic judgements. In line with Rodrigues, Daly notes the complexity of the temporal relationship between political settlement and constitution-making – for Daly it plays out even in the academic contestation over what comprises the distinctive phase of democracy consolidation in which a distinctive role for courts should be understood to be at play. In line with the other contributions to the collection, Daly’s contribution on judicial review suggests that our traditional debates – in this case over the democratic or counter-democratic imperatives of judicial review - need to be re-thought to take account of the constructivist relationship of the constitution to the democratic political order.

The fourth article, by Jenna Sapiano also takes transitional constitutional judicial review as its focus, but this time focusing on transitions from conflict to peace, rather than on those from
authoritarianism to democracy per se. As with Daly she notes that even though the scholarship on the legitimacy of judicial review is unsettled, a strong constitutional court with authority over constitutional interpretation is commonplace in new constitutions – this time post-conflict constitutions. Like Rodrigues and Suteu she notes that the parties to a peace process are required to make numerous compromises in the interest of reaching a constitutional text and that this context means that tensions that present in any constitutional system become more acute and heightened in the post-conflict context. Under a constitution with strong-form judicial review, the on-going resolution of those tensions can be left to the courts to deal with. Using Bosnia-Herzegovina, Colombia and Northern Ireland as case studies, Sapiano suggests that debates between political and legal constitutionalism need to be reconfigured to understand the constructivist relationship that judicial review plays with relation to political settlement. She points to the development of what she suggests is a new ‘peace jurisprudence’ in which courts show themselves aware of this constructivist role. This peace jurisprudence involves courts using active purposive interpretation to protect the underlying political settlement from constitutional attack, because they view such settlement as essential to the constitutional order and effectiveness. Sapiano suggests that courts reviewing peace agreement constitutions pay particular attention to the relationship of the constitution to an underlying elite settlement, in ways which while appearing politically activist are legitimate. Interestingly, however, in a review of how international human rights courts have adjudicated in the same or similar cases, she points out how the deference to the underlying political settlement shown by domestic courts, is rejected by less politically-sophisticated international human rights courts.

IV. Cross-cutting themes

Together the articles usefully open up a broader set of questions about the role of constitutions as enablers of transition to peace and democracy. These transitions pose a challenge as to the general applicability of constitutional theory, and also have clear policy implications for divided societies. The questions raised as to the relationship between political pact and constitutional order, go beyond what each short article can hope to deal with, forming a wider research agenda which deserves greater attention, and to which I now turn.

First, and perhaps most problematically for traditional constitutional theory, the articles all show the need to have a better theoretical account of the need for shared constitutional ownership and group accommodation in fundamentally divided societies. The pieces all question how the tension between the constitution as a product of the ‘dirty deal’ of the moment, and the constitution as speaking to more universal normative ambitions, can best be navigated. This tension between the particularistic pact of the constitutional moment and the normative ambitions of the constitution to set out more general rules for the future, is familiar to constitutional lawyers in more settled contexts. However, constitutional theory has little to say about the need for constitutions to ensure the
inclusion of the groups that are central to fundamental societal cleavages.\textsuperscript{20} The practical difficulty of ensuring the stability of the political settlement and the constitutional order in divided societies, arises from the fact that often parties whose support for such order is determinative of its existence, move only reluctantly from conflict positions into some sort of shared political arrangement. When they do so move, they often do so experimentally and try to use the new order, including the new constitution, to pursue their battlefield objectives. Common informal agreement would seem to be a necessary pre-requisite to framing social and political relationships within formal institutions: bringing people into formally institutionalised relationships without having informal ones in place is almost always highly problematic. However, creating constitutional agreement in the face of fundamental disagreement as to the nature, territorial and political configuration of the state is exactly the aim of constitution-building in divided conflict societies. Without a good understanding of the contingencies of the underlying political settlement and its very partial nature, any attempt to support constitutional development is likely to be outwitted by local elite game-playing. Unthinking support for liberal democratic constitutionalism can itself undermine the political settlement, because liberal democratic international interveners often remain ambivalent about the group accommodation that lies at its heart.\textsuperscript{21} Their commitment to individual rights and equality and indeed the very commitment to move from the ‘constitution as deal’ towards some more normative sort of order mean that they are often committed to unravelling the underlying political settlement, without fully appreciating that this is what they are doing. In the push for a more ‘normal’ form of liberal democratic constitution, liberal peacebuilders tend to underestimate the nature of the underlying political deal, its fragile balances, and its central importance to any possibility of stable government necessary to the delivery of equality and human rights. However, in failing to understand the nature of the political settlement, international actors also fail to grapple with the ways in which the political settlement can also be an obstacle to the delivery of equality and human rights, and so lack clear strategies for supporting its transformative possibilities even as they seek transformation.

Second, the articles illustrate the need for further analysis of available process choices relating to constitutional design and analysis as to how particular process choices assist or make more difficult the move from the constitution as an elite pact, to the constitution as having a more normative transcendent ambition to be a document of good government. International actors concerned with ‘good constitutionalism’ and steeped in traditional understandings of constitutional design in more settled contexts, often fail to understand the ways in which the constitution is being expected to broker agreement between elites where there is very little agreement. They consequently fail to understand the burden born by traditional constitutional mechanisms such as eternity clauses, or apex courts, as mechanisms for consolidating and extending agreement in contexts of fragile elite balances.

\textsuperscript{20} There are of course some exceptions, notably Choudhry, S. (ed) \textit{Constitutional Design for Divided Societies: Integration or Accommodation?} (Oxford University Press, 2008).

\textsuperscript{21} For an interesting discussion of this dynamic see C. McCrudden & B. O’Leary \textit{Courts and Consociations, or Human Rights versus Power-sharing} (Oxford University Press, Oxford, 2013), discussing the European Court of Human Rights’ approach to power-sharing in Bosnia Herzegovina.
of power. As a result they also fail to anticipate the ways in which these mechanisms can become tools for ‘spoiling’ the fragile consensus on which the state rests and on which its stability depends. Even the short accounts in this special issue illustrate the unintended consequences that can result when the traditional constitutional devices interact with elite political bargaining processes that are on-going, incomplete and contested. Each of the articles points in a different way to the need to understand the operation of constitutions as fundamentally determined by the elite balance of power, and the implementation problems which ensue when there is an attempt to shift the balance of power by one group or by unwitting international actors.

Thirdly, each piece essentially implicitly raises the question of the international politics of engaging with domestic politics, and questions of international capacity to play an effective role. Those who seek to support constitutional orders as works in progress need to both understand the politics with which they are engaging, and to engage politically with that politics. What might this look like? It might involve being prepared to articulate the importance of forms of inclusion to political settlement, even when achieving inclusion sits in an uneasy relationship with individual rights protections. Or it could involve articulating political opposition to a party’s attempt to move the constitution away from protection of a plural agreed political settlement, back into a unilateral political arrangement, even when it takes place within the frame of the constitution. Such interventions would require political rather than legal analysis to articulate the constitutional wrong, particularly when the move to ‘own’ the constitution and undo the inter-group bargain at its heart, is formally compliant with the procedure for constitutional amendment.

However, international interveners often do not understand the subtlety of the often implicit or underlying political deal on which the constitution rests, and are often inept at spotting or articulating how forms of ‘takeover’ are happening until it is too late. Moreover, most international interveners understand their own mandate and legitimacy to limit them from overt political engagement, or at least the admission of it, and this restricts both the capacity and the will to name political problems in political terms. Indeed to some extent the very move from standard-setting around democracy, to standard-setting around good constitutionalism has had an attraction because it appears to call for legal rather than political judgments. Paradoxically, the recent investment in ‘the constitution’ and ‘constitutional change’ as crucial to underpinning a democratic political order, can make it particularly difficult to internationally challenge actions which are deeply undemocratic when they have good claim to be compliant with the constitutional text.

To come in a full circle: at the outset I presented the international turn to promote and protect constitutions in an era of disillusionment with institutionally-focused state-building as paradoxical. However, these two moves are not necessarily as paradoxical as they at first appear. It is in part the failure of transitions as driven by international law and organisations that is forcing a ‘local turn’ in the form of tying international intervention to the production of a domestic set of norms and understanding. Internationalised ‘constitution-promotion’ appears to provide a way for international actors to promote democracy and human rights as an indigenous political and legal exercise without appearing to be acting ‘politically’,
because supporting constitutional development often appears as a more ‘legal’ technical
matter than ‘promoting democracy’.

However, there is a need for development actors to move from a technical understanding of
countries, to an understanding of the process dimensions of constitutions capable of
seeing their relationship to politics and to controversies over the nature of the state and its
capacity for inclusion. Similarly, constitutional theorists and lawyers should understand
better the speedy constructivist role being given to constitutions in the most inauspicious of
circumstances, and direct some energies to understanding how traditional design features
might play out somewhat differently in such contexts. Constitution-building and state-
building interventions are often rooted in completely different epistemic communities
within the academy, and distinct policy communities in the world of practice. While
constitution-making in development organisations is often paid for (or promoted) as part of
human rights interventions, conflict management approaches emanate more from conflict
advisers and statebuilding experts. These are not only different people, but are also in
different departments in most of the key agencies. However, there are profound
ontological reasons why statebuilding and constitution-making discourses have difficulty
speaking to each other: while international relations scholars and practitioners are moving
to embrace ‘failure’, ‘hybridity’ and ‘post-liberalism’ and respond with concepts of
‘promoting reliance and capacity’, the idea of a post-liberal constitution as having any
progressive potential is almost beyond imagination.

The contributions of this special section, suggest that the turn to constitutionalism is
unlikely to fare any better than past state-building approaches unless it takes on board
lessons learned from that intervention regarding the need to be more politically savvy. A
fast-developing international legal regulation of constitution-making stands to benefit from
paying more attention to the relationship between the constitutional text and the
underlying attempts to support a more inclusive political settlement. While international
organisations caution against ‘a blueprint approach’ to their interventions, they tend to
revert to blueprints as a default position because engaging in a politically smart way with
elite power structures and agendas at the domestic level is difficult, defies any standardised
analysis, pushes to the limits of mandates, and is not easy to provide human resources for.
If the task is to be approached politically there is a need not just to talk about the politics of
the local but also to talk about the political restraints on international norm-promoters and
understand the ways in which each interacts.

Conversely, the political settlement focus of development organisations which focus on the
political dynamics of elite bargaining and view constitutions as ‘once-off’ moments within
the broader political settlement process, could benefit from a more process-driven notion of
constitutional design. The current emphasis on the political settlement as involving on-
going bargaining relegates constitutions to once-off institutional ‘moments’. This
conception of constitutions needs to be re-thought in light of their use in transitions to both
capture and guarantee elite bargains and enable those bargains to grow and transform into
broader social contracts over time. The constitution is the key power-map in which political
commitments to inclusion are held together, and it establishes the institutions through
which they are to be developed and negotiated in the future. There are few constitutional lawyers who view constitutions as static texts, and indeed the move from talking about ‘the constitution’ to talking about ‘constitutionalism’ recognises the process dimension of the enterprise and a distinction between having a constitutional text and having a political and legal order which acts as a restraint on public power being used for private ends. Political engagement by development actors – who are increasingly involved in supporting constitution-making processes - could be assisted by a more process-oriented view of constitutions and better understanding of the dialectical relationship between political settlement and constitutional development. International interveners might view the challenge as one of intervening in more politically smart ways, taking account of their own political constraints, and the political constraints of the complex contexts they seek to influence, without completely capitulating to either.

V. Conclusion
We suggest that this special section raises fundamental questions as to the promotion of constitutions as a device for ensuring better transition management. These questions are central to the wider project of this journal. The concept of global constitutionalism should address not just the constitution of the global, or the global rise of constitutionalism, but a new internationalised practice of promoting and regulating the domestic production and implementation of constitutional texts. This third relatively neglected dimension of global constitutionalism implicates the first two because it places centre stage the ways in which the domestic constitution, and international law vie to ‘create’ the state and assert different forms of authority and legitimacy to do so.
Letting off Steam: Interim Constitutions as a Safety Valve to the Pressure-Cooker of Transitions in Conflict-Affected States?

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Abstract
Recent years have seen considerably more attention being given to constitution-making as a field of deliberate study and practice, particularly with regards to the challenges and opportunities posed by constitution-making in conflict-affected states. A consequence of this work has been a more explicit recognition of the interconnectedness of peace processes and constitutional processes as mechanisms of political settlement. Within this context, this article argues for the more deliberate use of interim constitutions as a peacebuilding mechanism with potential to be effective in highly divided contexts in grounding a more inclusive and sustainable political settlement. This article argues that while interim constitutions are indeed commonly found in conflict-affected contexts, their use appears ad hoc and their design poorly conceived. The article reflects upon the potential strengths and weaknesses offered by interim constitutions in fragile and conflict-affected states. Reflecting on both the existing scholarship and the author’s own practical field experience, the article concludes that if a more modest and realistic approach to what constitution-making can achieve in fragile and conflict-affected states is coupled with more attention to design, interim constitutions can provide space and time to undertake more comprehensive discussions regarding the longer-term settlements.

Keywords
Interim constitution, peacebuilding, political settlement, post-conflict constitution-making

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Introduction
Over the last decade, constitution-making exercises have increasingly occurred in highly fraught environments, oftentimes while violent conflict is still ongoing. In such circumstances, fragile and/or conflict-affected states (FCAS) have commonly sought to
entrench their political aspirations via a new constitutional dispensation, usually in advance of elections for a new government. Historical decolonization processes typically saw constitutions drafted and agreed in sterile rooms in European capitals by elite (male) leaders. However, recent experience has seen constitutional processes designed and undertaken in intensely pressurized environments, with political elites and populations attempting to urgently redesign their constitutional frameworks while concurrently grappling with an uncertain political environment, deteriorating security situation and shaky economy. Following the Arab Spring, for example, Tunisia, Egypt, Yemen and Libya all attempted to design constitutions as an urgent post-revolution priority, while in the Central African Republic, Somalia and South Sudan, constitution-making exercises were and are underway while violent conflict is ongoing.

Despite the increasingly highly – and oftentimes violently – contested space in which many constitutions are being developed, local and international actors have tended to design constitution-making processes which envisage a final constitution being drafted and agreed in a relatively short period of time that will nonetheless have sufficient legitimacy to permanently guide the country’s governance into the foreseeable future. Stakeholders have tended to prioritise “completing” the political transition over the need to take time to (re)build consensus in the aftermath of violent division. Immediate, yet transformational, constitutional reform is envisaged as a necessary step towards that goal. Despite transition by definition being a fluid process, the traditional assumption is that a permanent constitution can and should be urgently produced as a matter of good practice. This is despite the fact that research has shown that over the last two hundred years constitutions have tended to last on average only 19 years.

Taking into account the reality that more and more constitutions are being drafted in highly unstable contexts, this article seeks to explore whether and how a more deliberate and careful use of an *interim constitution* as a peacebuilding tool can contribute to the development of more tractable constitutional outcomes and a more sustainable peace. As

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2 For example, as discussed below, the original 2011 Libya *Constitutional Declaration* envisaged a 6-month constitution-making process, in Egypt multiple constitutions were drafted between 2011 and 2014 in the wake of the revolution in timespans of one, three and six months, and in the Central African Republic the 2014 peace agreement envisaged a revised constitutions within approximately six months (to align with the anticipated deadline for elections).

3 “Completion” of the transition has often been proxied with the holding of national elections, with a new constitution being considered a precedent step, in order to set in place transformational post-conflict political arrangements before holding elections for a new executive and/or parliament.

4 O Varol, “Temporary Constitutions” (2014) 102 Calif. L. Rev. 409: 411-2. (The counterpart to the so-called Ackermanian “constitutional moment” is the belief in constitution-making as a profound, long-enduring form of lawmaking that transcends ordinary politics); V Hart, “Constitution-making and the Transformation of Conflict’ (2001) 26 Peace & Change 153 (“The constitution is thus enshrined, isolated, representing a moment of unity and consensus. This is the constitution as icon. The contract is signed, the covenant made.”)

Arato observed in his seminal paper on “post-sovereign constitution-making”, interim constitutions have increasingly been used as a mechanism for managing complex constitutional transitions. Over the last decade, they have been utilized in conflict-affected contexts such as the Central African Republic, Egypt, Libya, Nepal, South Sudan and Somalia. Despite this, to date there has been only relatively limited scholarship directed explicitly at assessing the value or limitations of this particular form of constitution-making mechanism.

Building on the existing scholarship, this article develops a deeper set of reflections on whether and how an interim constitution-making process can most effectively be harnessed for peacebuilding purposes, drawing on a number of relatively recent and/or little referenced examples that highlight the complex settings in which interim constitutions are used. The article concludes with some reflections on what might be done to more deliberately harness their value for peacebuilding. These conclusions centre around an underlying recommendation based on the author’s practical field experience as a constitutional assistance specialist for the United Nations Development Programme (UNDP) that constitution-making and peacebuilding efforts must be much more realistically designed and assessed on the basis of what is possible to achieve and not what is ideal according to theories of constitution-making.

I. Constitution-making and peacebuilding

Over the last decade, as more attention and scholarship has been directed at the special needs of FCAS, the process of constitution-making has come to be recognized as a central element to many peacebuilding efforts. As the New Deal for Engagement with Fragile States recognizes, strengthening “legitimate politics”, including through the development of a new constitutional dispensation, can be a crucial element in rebuilding the state and a new peaceful sense of nationhood. Constitutional reform represents a tangible move from one form of governance to another – for example, from autocracy to democracy, from one-party rule to multi-party rule – and is commonly demanded (by local constituents as well as the international community) as a precursor to elections for any new form of government.

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6 A Arato, “Redeeming the Still Redeemable: Post Sovereign Constitution Making” (2009) Int J Polit Cult Soc 22:427–443. (There is a “new reliance on two drafting stages that foresee from the outset the interlinked production of two constitutions, an interim and a final one, where the rules of the first constrain the making of the second. The existence of a fully developed, explicitly interim constitution is the most important documentary evidence of the new paradigm of constitution making.”)


8 For UNDP’s engagement with constitution-making see UNDP, Guidance Note on Constitution-Making Assistance (UNDP: 2014).


Nonetheless, there is still debate regarding how closely peace processes should be connected to constitution-making processes. Jamal Benomar (most recently, the UN Special Envoy to Yemen during part of their constitutional review process) has argued that there are benefits in separating the termination of violent conflict and the signing of a peace agreement from the process of drafting the constitution. Most notably, separation avoids the trap of entrenching the short-term agreements necessary to achieve conflict termination rather than building constitutional consensus around longer-term visions of state- and institution-building. More recently, Hallie Ludsin wrote a compelling piece arguing that it is inappropriate to assume that peace processes and constitution-making processes are always compatible. Conversely, Christine Bell has recognized that peace agreements and constitutions are increasingly being intertwined, with some constitutions arguably operating as quasi-peace agreements and many peace agreements being embedded (at least partially) in post-conflict constitutional texts.

For the purposes of this article, it is less important to contemplate whether and how constitutions may operate as peace agreements than to recognise that constitution-making processes and outcomes are increasingly being included as part of the overarching package of peacebuilding responses to violent conflict. Constitution-making is no longer seen as simply a technical legal exercise but in conflict-affected countries is being harnessed as a deeply political, transformative process. One of the foremost peacebuilding experts in the world, Lakhdar Brahimi reflected that “the way a constitution is made in a war-torn country can play a key role in rebuilding or strengthening state and political systems as well as in securing a durable peace.” In some countries, the demand for constitutional reform may emanate from the complete absence of constitutional democracy in the first place, for example, in Libya due to Gaddafi’s use of ‘the Green Book’ rather than a constitution to govern the country for four decades; in Somalia due to its long term civil conflict and

12 J Benomar, Constitution-Making and Peace Building: Lessons Learned From the Constitution-Making Processes of Post-Conflict Countries (UNDP: 2003), p15. (“The cases surveyed point out that, when these two processes are collapsed into one, long-term concerns of institution building may be compromised. Also, in such cases, public participation is usually minimal.”)
13 Ludsin (n 7) 241. (“The assumption of compatibility of the peacemaking and constitution-drafting processes is inappropriate. While theoretically the goals of the two processes can be harmonized, in practice peacemaking needs are likely to subordiate constitution-making goals. The subordination of one set of goals to the other risks the sustainability of peace and weakens the foundation of the state.”)
15 UNDP (n 8); Brandt, Cottrell, Ghai and Regan (n 9); Samuels (n 11).
17 Brandt, Cottrell, Ghai and Regan (n 9) I.
18 In 1975, Libyan President Muammar Gaddafi published Al-Kitab al-Akhdar, better known as The Green Book: The Solution to the Problems of Democracy; The Social Basis to the Third Universal Theory. The Green Book was written as a political manifesto but officially operated as the constitution of Libya. It was widely recognized as unimplementable in
“failed state” status which reflected its complete lack of governance institutions and processes; or in South Sudan where a new state with limited existing democratic institutions, systems or culture was created post-secession. In other countries, arguably the existing constitution may have been “technically” sufficient to underpin democratic institutions and processes, but long-term flouting of the rule of law meant that the public demanded a new opportunity to engage in the development of their constitutional democracy. In Burkina Faso, Yemen and Tunisia, for example, decades of dictatorship were undertaken under the auspices of relatively well-drafted constitutions, but in reality the public were not meaningfully democratically empowered. In many FCAS, the outbreak of conflict was so shattering of existing institutions and the social contract that constitution-making was also an attempted exercise in nation-building.

II. “Interim” constitutions

To date, there has been only limited dedicated scholarship around the deliberate use of an interim constitution as a specific peacebuilding tool. In 2014, Ozan Varol published one of the only papers to date focusing specifically on interim constitutions, undertaking a general analysis of their value as a constitution-making approach generally. Varol focused on a temporary constitution or constitutional provision...[which is one that] limits its own term and lapses at its expiration date unless reenacted through regular constitutional amendment procedures. The temporal limitation may apply to the entire constitution...or only to a specific constitutional provision.19

Also in 2014, IDEA held a global seminar which attempted to unpack some of the issues and ideas surrounding the use of interim constitutions in post-conflict contexts. While avoiding a rigid definition of what constituted an interim constitution, the IDEA seminar positioned its analysis by noting at the outset that:

Interim constitutions are functionally and conceptually distinct from two similar types of arrangements—peace agreements and final constitutions...they are intended to serve as a bridge between an illegitimate and a more legitimate regime, generally providing both a temporary institutional framework for government during the transition and a bargaining framework for negotiating a new structure of government and the procedural requirements for drafting the final constitution.20

19 Varol (n 4) 412.
20 IDEA (n 7).
Caitlin Goss, will also shortly publish the results of in-depth research on the topic of interim constitutions. Goss has a more prescriptive definition of interim constitutions, describing them as temporary documents that have permanent effects; they utilise a two-stage constitutional drafting procedure as a new method of obtaining greater constitutional legitimacy; they enjoy a complex supremacy due to high levels of judicial review and amendment; that they rely on international law and international organisations to foster legitimacy; and that they can have a mutually reinforcing relationship with transitional justice mechanisms.\(^{21}\)

For the purposes of this article, rather than resolve the differences between the various definitions proposed, the article uses the above definitions to focus on cases where a temporary constitutional text was developed which (i) limits its own term and (ii) lapses at a specified expiration date. The definition used in this paper responds to the proposal by Vivien Hart that constitution-making in FCAS should be considered as part of broader *process* of conflict transformation,\(^{22}\) with an interim constitution characterized as one part of a multi-phase process of constitution-making and peacebuilding.\(^{23}\) This definition does not cover individual temporary constitutional provisions, although these devices may also be used to support peacebuilding efforts by deferring decision-making on controversial issues.

Interim constitutions can be used refer to both explicitly and implicitly transitional documents such as:

(i) Interim constitutions which are named as such, for example, the 1994 Interim Constitution of South Africa, the 2008 Interim Constitution of Nepal, the 2011 Interim Constitution of South Sudan and the 2012 Provisional Constitution of Somalia;

(ii) Interim constitutions which are not named as such but are explicit in their transitional status, for example, the 2011 Constitutional Declaration in Libya, and March 2011 Constitutional Declaration in Egypt;

(iii) Temporary constitutional arrangements included in internationally managed post-conflict transitions leading to an eventual domestic constitutional process, for example, in Cambodia through the UN Transitional Authority in Cambodia (UNTAC) in 1993, in East Timor through the UN Transitional Authority in East Timor (UNTET) in 2000 and in Iraq through the Law of Administration for the State of *Iraq* for the Transitional Period (TAL); and

\(^{21}\) Goss, C. unpublished. “Chapter 8: Success and failure of interim constitutions”, p.315, part of an untitled book to be published on the topic of interim constitutions, copy on file with the author.

\(^{22}\) Hart (n 4) 153.

\(^{23}\) Ludsin (n 7).
(iv) A constitution which includes a full set of provisions to guide the state, but which includes some form of major in-built review point whereupon the constitution may be replaced, for example, the 2005 Bougainville Constitution which requires a referendum on secession from the state at the end of 10 years.

III. Potential strengths and weaknesses of using an interim constitution

Elkins, Ginsberg and Melton have used their extensive empirical data to suggest that on average, constitutions last only 19 years\(^\text{24}\) while 406 out of 964 of those lasted more than 10 years.\(^\text{25}\) Considering the short-term traction that characterizes the majority of constitutional outcomes, it seems surprising that both domestic and international policy-makers continue to contemplate constitution-making processes as aimed at setting in place a final constitutional framework in perpetuity. Arguably, this goal is particularly problematic for fragile and conflict-affected states, where too fast a push for a permanent constitution can unhelpfully exacerbate political pressures and undermine an already fragile peace. Taking into account the practical reality that constitutions are often relatively short-lived, this next section examines a number of case studies to explore the strengths and weaknesses of interim constitutional processes.

Potential strengths

Varol\(^\text{26}\) and Ludsin\(^\text{27}\) have both canvassed a range of potential benefits from using interim constitutions. This article builds on that scholarship, arguing that in contexts suffering from conflict or dealing with the immediate aftermath of conflict, an interim constitutional process can: (i) give parties a critical window of time during which to (re)build trust; (ii) facilitate an iterative process through which consensus can be built around complex or controversial issues; (iii) enable constitution-makers to test out new political and institutional arrangements and (iv) allow for more meaningful public participation.

An interim constitution can provide a roadmap out of conflict and allow time for trust building

Interim constitutions have commonly been implemented in highly conflict-affected contexts as a mechanism for addressing immediate political demands, while setting in place a legal

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\(^{24}\) Elkins, Ginsberg & Melton (n 5).


\(^{26}\) Varol posits four benefits: (1) facilitating consensus building where decision costs are high, (2) promoting incrementalism and experimentation where error costs are high, (3) reducing cognitive biases where cognitive biases predominate in constitutional design, and (4) relaxing the "dead hand" problem by easing intertemporal control by the constitutional framers. Varol (n 4) 414.

\(^{27}\) Ludsin (n 7) 288. (“The primary advantage of a multistage process is that an interim constitution can secure the immediate constitutional changes necessary for a cease-fire without rushing into a final drafting process and sacrificing long-term constitutional goals. An interim process allows negotiators room to address immediate crises without entrenching provisions for governance that would be inappropriate for a stable and representative state.”)
framework within which to discuss a more final political settlement. In such a situation the interim constitution acts as a national political roadmap towards reform while giving both elites and the public time to work their way through contentious issues. A specific outcome of a more extended period of deliberation is that the process of negotiation and discussion can provide space for a concurrent process of political and social reconciliation, as trust is rebuilt through the process of consensus-building.\(^{28}\) Such a process also lays the groundwork for a political culture of multiparty consultation and cooperation,\(^{29}\) while reassuring the public that they will be able to participate as the process moves forward.

The South African 1994 Interim Constitution is often held up as one of the most effective examples of an interim constitutional agreement. It set out a clear constitution-making roadmap that enabled the peaceful political negotiation and participatory drafting of a successful final constitutional settlement (which has now held for more than twenty years). Responding both to the concerns of the white minority community that they would lose any influence on a post-election constitution-making process, and the expectations of the oppressed majority that the constitution could only be drafted in conditions of democracy, the 1994 Interim Constitution skillfully struck a balance between both sets of demands\(^ {30}\) by using the mechanism of an interim constitution. The African National Congress (ANC) was able to take some of the sting out of the transition as perceived by the white minority, by setting a negotiated constitutional framework in place which gave those stakeholders time to acclimatize to the new post-apartheid environment and use the interim process to reassure them as to what would be guaranteed in a constitution drafted after a transfer of power. Thirty-four constitutional principles ensured that the fundamental elements of the negotiated constitutional agreement would be translated into the final constitution.\(^ {31}\) While falling short of the minority rights entrenchment the white South African Government had wanted, the device of the interim constitution provided some reassurance as to minority rights. At the same time, it enabled the ANC to satisfy its own constituency as to the democratic basis of the new constitutional arrangements, with the election of a new National Assembly in 1994, the creation of a Constitutional Court, and ultimately the final Constitution being produced incrementally through a highly transparent process.

Significantly, the 1994 Interim Constitution itself took three years to negotiate, with various setbacks stalling the process.\(^ {32}\) Significantly, in July 1996, the draft of the final Constitution was sent to the South African Constitutional Court for certification, but in September 1996 the court rejected the draft text for non-compliance with the constitutional principles which

\(^{28}\) Benomar (n 12).
\(^{29}\) Ibid.
\(^{30}\) Ibid. p6.
were an integral part of the interim constitutional process. This led to another round of negotiations and drafting before another text was finalized and finally certified by the Constitutional Court, backed by one of the most participatory and open constitution-making processes undertaken up to that point. While the Final Constitution was not endorsed at a popular referendum it was still widely seen as popularly legitimate. The case study illustrates that taking proper time to build trust around the interim political consensus enshrined in the 1994 Interim Constitution was crucial. The use of the Constitutional Court as an oversight mechanism for the final constitutional settlement, also illustrates the value of forms of guarantee: the certification mechanism reassured those committing to the interim constitution, that the processes and the principles agreed therein as the basis for a new political settlement would be honoured, while the process of judgment helped establish the legitimacy of the Court as guardian of that settlement.

An interim constitution can allow for an incremental political settlement process in difficult circumstances

In FCAS in particular, the context in which a constitution-making process is characterized by its extreme complexity. Violent conflict may still be occurring, national and community politics may be highly polarized (whether for ethnic, religious, historical, social or other reasons), regional geopolitics may be impacting on the national scene and the international community may be exerting diverse influences. In such fluid environments, an interim constitution can allow time for such issues to be addressed, ideally in a way which will enable the process of finalising a permanent constitution to be undertaken in a more conducive, peaceful environment.

A complicated and controversial example is provided by Somalia, where not one but two interim constitutions were used to set out a roadmap to peace which could build towards a more comprehensive political settlement. Both interim constitutions were intended to stand up new institutions in the context of Somalia’s transition from being a so-called “failed state”, while also building trust amongst a highly divided society in order to lay the groundwork for a more sustainable political settlement. While Somalia is often considered one of the most challenging constitution-making processes of this century, in actual fact, the slow but steady development of institutions and stability over the last decade could well be assessed as relatively successful given the context, in using an interim period to build trust

Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution 1996, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC); see also IDEA, “Constitutional history of South Africa” (ConstitutionNet, 2015).

Ex Parte Chairperson of the Constitutional Assembly: In the Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, 1997(2) AS 97 (CC); 1997 (1) BCLR 1 (CC); see also IDEA (n 33).


Benomar (n 12) 6.

Ludsin (n 7) 288-9.
and make adjustments to the constitution-making process along the way, or at least enabling some form of constitutional process to iteratively emerge.

In 2004, following decades of civil war, Islamic insurgency and warlordism, national counterparts working with the international community put in place the 2004 Transitional Federal Charter, which sought to establish new Transitional Federal Institutions (TFIs) for the country that could work together to develop a long-term constitution for Somalia. This was an unusual process, in the absence of any formal overarching peace agreement (which was impossible in the context of an ongoing insurgency against the state by Al-Shabab and warlords), but was an innovation that sought to build on hard-fought security gains to put in place political processes and administrative institutions that could guide a transition to more stable governance. A new Independent Federal Constitutional Commission (IFCC) was established to draft a federal constitution by 2007 using a participatory process. The entire process was significantly delayed for a range of political and security reasons, not least the fact that the country was still suffering from major violent conflict and the new TFIs initially had very limited functioning. Nonetheless, arguably the very existence of the TFC and the new TFIs was a contributing factor in Somalia’s slow progress towards implementing the rule of law and more democratic institutions. By putting in place an interim constitutional framework, the previous lawlessness of Somali powerbrokers was reined in to some extent and a symbolic message sent to the people of Somalia that political power was to be exercised in accordance with some form of written legal text. New government institutions were established, including the new Transitional Federal Government and Transitional Federal Parliament. Both institutions were flawed and plagued by corruption, however they nonetheless represented the first formal central government institutions for many years and the first trial of democratic power-sharing bodies.

In August 2012, after numerous delays and political breakdowns, pressure from the international community resulted in the signing-off (by six high level political signatories and the UN Special Representative of the Secretary General, following a hastily convened National Constituent Assembly process) of a Provisional Constitution to replace the TFC. Interestingly, the decision to endorse a second interim constitutional framework was made only months before its endorsement, after years of effort aimed at producing a final constitution. In actual fact, the development of the 2012 Provisional Constitution as interim rather than final appears to be the result of a simple inability to reach agreement on key issues (namely, the states comprising the new Federal Republic, the division of powers between levels of government and the form of the federal government), coupled with a recognition that some constitutional output nonetheless needed to be agreed to meet the

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39 Ibid.
timelines being pushed by the international community.\textsuperscript{40} As an aside, the case of Somalia’s first interim constitution is an interesting example of the impact of ‘interimness fatigue’ by the international community during a peacebuilding process. At the time the Provisional Constitution was agreed, the UN and development partners who wanted the TFG to “get the job done” had very little patience for continued delay and pushed hard for a final constitution.\textsuperscript{41} Arguably, their persistence may eventually come to be seen as an effective tactic, as the peaceful agreement of an updated interim constitutional framework in the form of the Provisional Constitution at least set a precedent of Somali political leaders working together to reach some basic consensus, even if they were not able to agree on all issues. Using an initial elite bargain at this stage of the constitution-making process was contentious,\textsuperscript{42} but reflects the absence of a broader political settlement and may well therefore prove to have been a “necessary evil” on the road towards a more inclusive and sustainable process.

Under the 2012 Provisional Constitution, a four-year timeline was provided to create federal states, negotiate a final text, hold a referendum and then organize national elections, all of which was to be achieved by no later than September 2016. Considering that Somalia continues to face a major civil conflict/insurgency and had virtually no formal democratic institutions in existence at the time the Provisional Constitution was finalized, a four-year timeline to agree a final constitutional was highly optimistic. However, Somalia may prove to be an example of stakeholders who are learning to balance the useful pressure provided by an interim constitutional deadline with the need to allow enough time to enable stakeholders to consult, build trust and negotiate over contentious issues. In fact, the last three years have been relatively productively spent on building up the federal government’s administrative structures, while also establishing the building blocks of the new federal state through negotiating the creation of new sub-national units.\textsuperscript{43} This process of federal state formation was a crucial phase in the overall constitution-making process, but it remains to be seen how the current Somali political leadership addresses that fact that the state formation process has taken up the majority of the constitutional review timeline.

A key lesson from this case study is the need to balance clarity around the process with flexibility to respond to a fluid operating environment. The Provisional Constitution should have been clearer on the actual process to be used to move from the current text to a final


\textsuperscript{41} This assessment is based on the author’s own experience of this period, during which she worked at the United Nations Development Programme Headquarters to provide support of the UNDP Somalia Country Office’s constitution-making programme.

\textsuperscript{42} Abdi (n 40).

agreed constitution, including permitting for amendments to the process if necessary, to accommodate unexpected political challenges. The Transitional Chapter of the Provisional Constitution reads as if the constitutional review and finalization process was to be run primarily as a technical exercise, rather than an ongoing process of fraught political negotiation over the possibility of a political settlement. The approach of the Provisional Constitution was one which contemplated legal drafting to be led by the Parliament with support from a Commission of experts. It did not recognise that there were key elements of the political settlement that were clearly still unagreed (eg. the federal division of powers and money, separation of powers, federal member state borders) and that without that settlement, there could be no final constitutional text. Reflecting upon the drafting of the Provisional Constitution, it both lacked sufficient detail on the process to be clear on how political consensus is to be agreed before the technical drafting commences, while having too much detail on the institutions responsible for the constitution-drafting to allow for flexibility in the constitution-negotiating process. Considering that the September 2016 deadline is now looming, it remains to be seen how the parties will now deal with the imperative for an extension.

An interim constitution can test out new institutional arrangements

In FCAS where institutions have been gutted or rundown by years of conflict, an 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. As mentioned above, this was the case with Somalia, whereby the 2004 Transitional Federal Charter established an initial set of Transitional Federal Institutions, and the 2012 Provisional Constitution updated and built upon these initial institutional arrangements. Somalia provides a good example of the use of an interim constitution to “test out” new arrangements and update them as necessary in the next constitutional iteration. For example, the form of government was strongly presidential under the TFC, with the President wielding strong powers and supported by a weak Prime Minister, but the Provisional Constitution inverted the power balance and gave the Prime Minister executive authority in an attempt to rein in the powers of the presidency to limit their corrupting influence. This trialing of new arrangements can be a particularly valuable use for an interim constitution, allowing a newly democratizing state such as Somalia to experiment with different arrangements before the (usually) high bar of constitutional amendment is introduced via a permanent constitution.

Another very interesting, but rarely discussed, example of this approach is the Autonomous Region of Bougainville (ARB) in Papua New Guinea, where the Bougainville Peace

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45 Transitional Federal Charter of the Somali Republic 2004, Chapter 7, Part II.
46 Federal Republic of Somalia Provisional Constitution 2012, Chapters 7 and 8.
Agreement\textsuperscript{47} saw agreement to an ARB Constitution as part of the peace process between the PNG Government and the rebel Bougainville Revolutionary Army. The Peace Agreement and ARB Constitution brought an end to more than a decade of civil conflict and provided an initial breakpoint in the push for immediate secession by Bougainville from the greater state of PNG.\textsuperscript{48} It enabled the establishment of a new ARB Government with a more autonomous local budget and institutions. The ARB has its own President, Cabinet and legislature. Although not explicitly named as an interim constitution, the ARB constitutional framework is clearly provisional as it anticipates a fundamental review after a decade, at which point the people of Bougainville will have an opportunity to participate in a referendum in order to determine the final form of their legal/constitutional relationship with PNG.\textsuperscript{49} If the people of Bougainville vote to secede and this is implemented, a new constitutional process will need to be undertaken. Arguably, by disconnecting the question of secession from PNG from the initial constitutional negotiations (which focused on power-sharing, resource-sharing and new government institutions for Bougainville) some of the heat was taken out of the first round of constitutional decisions. A decade of breathing space was given to all parties during which they have been able to build trust, gain experience of democratic governance and develop their own local political processes. This now leaves open the way for a second round of peaceful constitutional negotiations, as needed, although this is not entirely without risks.\textsuperscript{50}

\textbf{An interim constitutional process can allow for more meaningful public participation if the interim period is sufficiently long}

In FCAS contexts, peacebuilding efforts often result in an initial “elite bargain” to broker a ceasefire and/or an initial political settlement.\textsuperscript{51} However, the inherently undemocratic nature of such bargains means that there is often an urgent push to transition from an unelected transitional government to a (presumably) more legitimate elected government reflecting the public’s will as expressed at the ballot box. The desire to see a more principled bargain put in place is also often one of the reasons why there is often a demand for a quick final constitutional settlement. Where the context of the transition or conflict requires a speedy peace agreement enshrining that initial settlement in an interim document rather than a permanent one can help avoid the immediate balance of power constraints on principled constitutionalism being translated into a permanent legal document. In particular, it limits the possibility of a “victor’s peace” and/or the exclusion of

\begin{thebibliography}
\bibitem{48} Ibid.
\bibitem{49} Ibid.
\bibitem{51} C Bell, “What we talk about when we talk about Political Settlements”, Political Settlements Research Project (University of Edinburgh, 2015); C Castillejo, “Promoting inclusion in political settlements: a priority for international actors?” (NOREF: 2014).
\end{thebibliography}
the voices and needs of non-combatants.\textsuperscript{52} An interim constitutional process can allow more time to engage in public consultations and to implement participatory process that can contribute to reconciliation through dialogue across different sectors and levels of society, opening up the initial constitutional ‘deal’ to broader normative ambitions.\textsuperscript{53} The challenge in countries grappling with conflict or its immediate aftermath, however, is that the mechanics of enabling public participation and dialogue can be very difficult logistically and, in some contexts, ongoing conflict can make it impossible. In Somalia and the Central African Republic for example, both countries have had to manage constitution-making exercises during periods when both have had sizeable portions of their citizenry in areas of the country suffering from ongoing violence and insurgency.

An interim constitutional process can be useful in allowing more time to focus on initial efforts to stabilize the security situation, while at the same time creating space for innovative ways to reach out to communities in conflict zones. This benefit can only be harnessed where the interim constitution ushers in an interim period sufficiently long to enable time for stabilization and the development and implementation of meaningful public outreach. In Somalia for example, the four year timeline for revision of the 2012 Provisional Constitution has allowed time for the Government to focus on basic institution-building and planning in the initial years of the current process, with efforts to undertake public outreach now being rolled out to more communities as military successes create a more conducive environment and/or sub-national state formation efforts build more effective institutional capacities.\textsuperscript{54} Even so, it is likely that more time will be needed for public consultations and the process of finalizing the constitution.\textsuperscript{55}

Similarly, the Central African Republic enacted an interim constitutional charter in August 2013 allowing for an 18 month period for a new Transitional Council and the Government to develop a new constitution for the country.\textsuperscript{56} This was an optimistic deadline, considering the extent of conflict underway, but the parliamentarians/Transitional Council nonetheless pledged to undertake public consultations.\textsuperscript{57} The process stalled a number of times as violence continued to undermine the efforts of the transitional government. However, as the country started to stabilize in 2015, the constitutional process picked up again and more

\textsuperscript{52} Ludsin (n 7) 272.
\textsuperscript{56} Central African Republic Constitution of 2013, Article 102.
public engagement was possible. Significantly, the interim constitution allowed for an extension of the interim period by 6 months, presumably envisaging that the process would be a fraught one. This extension period was invoked with the final constitution being approved by the Transitional Council two years to the day from the enactment of the interim constitution.  

This case study highlights the challenge of balancing the time needed for meaningful public consultations and negotiations amongst elite political stakeholders with the imperative to have deadlines which propel some momentum towards moving from transitional governance arrangements to something which is seen as more “legitimate” and democratic (though whether or not elections in highly conflicted contexts actually do service as a legitimising process remains an area for debate). In this context, the inclusion of an extension process within the interim constitution was an important constitutional design element which served to enable the process to maintain its momentum without causing further political complications.

Using an interim constitution to allow more time for participation and to facilitate greater inclusiveness has clear benefits for the overall constitution-making process. Where constitution-making processes are closely connected to peacemaking processes, non-violent groups (in particular women, but also minorities and peaceful civil society) are often excluded from negotiations as the emphasis remains on the immediate need for a cessation of hostilities and a political settlement. An interim constitution-making process which takes place over a longer-period and covers a process of ceasefire and demobilisation can enable a shifting of emphasis from an elite bargain amongst combatants to a broader, more participatory process and constitutional bargain.

**Potential drawbacks in using interim constitutions**

While interim constitutions offer a number of benefits to countries attempting to undertake constitution-making during or immediately after a period of violent conflict, they also carry inherent risks. These include, for example, that constitution-makers become complacent about reaching a final constitution, that an extended interim period may lead to default entrenchment of interim provisions and that there may be a bias in final decision-making towards the interim status quo.

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59 Ludsin (n 7) 277-81.

60 Ibid. 281
Domestic stakeholders may be unwilling or unable to wait for a permanent constitution

While it would appear to be an obvious benefit that an interim constitution allows time to build critical trust amongst stakeholders in FCAS recovering from violent conflict and/or transitioning from dictatorship, experience has shown that the pressures for a quick and permanent transition can still be difficult to resist. Despite the now well-accepted observation that participatory constitution-making takes time, it has been a marked feature of constitution-making in FCAS contexts that time has been considered to be of the essence, with very tight timelines often put in place for the completion of constitution-making processes. While peace agreements often resort to the establishment of extra-constitutional transitional mechanisms – such as transitional unity governments and/or transitional constitutional charters – their temporary and unusual legal status contributes to the impetus for a quickly drafted final constitutional settlement which will enable the transition process to end. Arguably, the expectation that a new constitution can be drafted quickly reflects a historical tendency to negotiate constitutions (and/or peace agreements) amongst a small coterie of elites – usually men, often ex-combatants and/or unelected technical experts – rather than via more broad-based participatory processes that, by their nature, require substantial time to educate the public, consult on their views and build support for the final constitutional text. More simply, the revolutionary push for a new constitutional dispensation in FCAS often brings an impetus of its own, as the people’s demands for a new government and/or new elections to choose their new leaders takes precedence over all other factors. Exacerbating this demand, the apparently undemocratic nature of transitional governance arrangements – particularly where these involve interim military governments and/or unelected/unrepresentative interim leaders – means that there is a strengthened demand for a speedy permanent constitution to enable elections and ‘legitimate’ government as soon as possible.

All of these factors affected the constitution-making processes in Egypt following the January 2011 revolution, where the drafting of a permanent constitution was seen as a necessary and urgent pre-condition to presidential and/or parliamentary elections to usher in a new order. In the heady post-revolutionary days after the toppling of a president who had been in power for decades, an interim military government was put in place within days. Of itself, the installation of military leaders strengthened the demand for as quick a transition as possible, with the military agreeing to step aside only after elections. Responding to the vocal demands of crowds of protesters still occupying the streets, the interim military government set up a constitutional committee within four days of suspending the constitution, with a mandate to draft an Interim Constitution within ten

61 UNDP (n 8); Brandt, Cottrell, Ghai and Regan (n 9); Benomar (n 12) 15.
62 Franck & Thiruvengadam (n 1) 8.
days, which was ratified within one month.\textsuperscript{64} This was then to be used as a stopgap until a permanent constitution was drafted within six months (though in the end this period pushed out to more than 18 months).

As the subsequent course of the Egyptian political transition shows however, an attempt to push for a speedy constitutional rewrite, without taking time to reflect on the past, engage in serious dialogue and reconciliation and address underlying drivers of conflict (such as Islamist vs secularist, between regions, between religions) severely undermined the Egyptian constitution-making process and its outcomes.\textsuperscript{65} Where the strategic use of an interim constitution could have given stakeholders breathing space to meaningfully reflect on the revolution, build consensus and carefully negotiate through their disagreements, instead, the unconsultative development of the interim constitution by a self-appointed interim military council in early 2011 arguably sowed the seeds for the ongoing discontent. The ineffective use of the 2011 interim constitutional process to build constitutional consensus was a critical problem, but illustrates the difficulty of balancing the need for immediate legitimate government (particular when the public is demanding transformational change), with longer-term constitutional development.

As a result of massive public distrust of the interim military government immediately following the fall of Mubarak in January 2011, there was an urgent push for a new constitution and elections, in the absence of any kind of national dialogue or consensus-building effort. Contentious issues were left unresolved and a majoritarian system then allowed for the endorsement of a constitutional text that did not represent a broad-based political settlement, resulting in constitutional breakdown within less than 12 months of the promulgation of the 2012 Constitution.\textsuperscript{66} Even more problematically, the same process and mistakes were repeated a year later when, following the 2013 overthrow of the Government by the military, another interim constitution was hastily drafted by a small group of 10 technicians, and a 100-member group was then selected to draft a constitution within 3 months.\textsuperscript{67} The tension between the need for a quick transition to ‘democratic’ institutions, and the need for a political settlement which reflects a genuine agreement between different sectors of society is a complex challenge, which plagues constitution-making processes howsoever they are designed. That said, the case study illustrates, less the failure of the concept of the ‘interim constitution’ and more the need for it to be used to design a process with sufficient checks, balances and incentives for parties to reach consensus as regards the most polarizing aspects of complex political transitions.


\textsuperscript{67} Storm (n 63).
An interim constitution may enable self-interested stakeholders to delay progress

While some interim constitutions suffer from being used as mere legal window-dressing for rushed constitutional drafting processes, conversely, the use of an interim constitution runs the risk that power-holders operating within the new interim constitutional regime will become comfortable in their new roles and may unconsciously or even deliberately stall efforts at more permanent constitutional reform. As an interim period starts to lengthen, the imperative for agreement may wane, with negotiation fatigue setting in amongst constitution-makers, goodwill amongst the public giving way to cynicism and/or international attention and support subsiding. Nepal provides a well-known example of all of these problems. Following a ten year civil war, in 2006 a peace process commenced amongst the warring parties which involved the immediate development of an Interim Constitution.68 Similarly to the South African process, the Nepal Interim Constitution contained sufficient detail to enable a new government regime to be elected (to replace the monarchy), but left more contentious issues (such as the structure of the new federal state, the electoral system and the judicial system) to subsequent negotiations. This process recognised the absence of a fully developed political settlement and the need for time to build consensus and trust necessary to reaching it. The Interim Constitution which came into force in January 2007 called for an elected Constituent Assembly that would be responsible for negotiating and drafting a new permanent constitution within two years (as well as operating as the new national parliament), although the Constituent Assembly was only elected a year later in April 2008.69 Stakeholders and observers were optimistic that the two years allotted to negotiations and public consultations sufficiently balanced the need for a timely transition with the imperative to build widespread support for the fundamental political transformation which the new constitution was anticipated to put in place,70 but this proved not to be the case.

The Nepal case study is characterized by the repeated failure of the key protagonists to agree a constitution and resolve the fundamental disagreement between the key parties on the approach to decentralisation/federalism which dominated the entirety of the negotiation process and arguments over the form of government.71 As the process repeatedly stalled, it became less and less inclusive over time, with the federal options under consideration becoming less accommodating of different interests. Repeated failures to reach consensus on key issues resulted in the May 2010 deadline for agreement on a final

69 Ibid.
constitutional text being missed, and amendments to the Interim Constitution were passed to extend the process twice. The national Supreme Court finally responded in an attempt to curtail the extended delays, ruling in November 2011 and again in May 2012 that the Interim Constitution timelines meant that no more extensions would be permitted and the Constituent Assembly would have to be disbanded if agreement was not reached by 27 May 2012. This was, in fact, what transpired.

The dissolution of the Constituent Assembly left the country without an interim legislature, but political disputes again caused delays, with elections only held in November 2013 for a new Constituent Assembly. The second Constituent Assembly also faced challenges of government formation, and consensus continued to be elusive on critical outstanding issues. The process stalled again until the devastating earthquake which hit Nepal in April 2015 had the unintended consequence of reinvigorating the process. Political leaders under pressure pushed to agree a way out of the extended impasse, with the four major parties (out of a total of 31 parties in the Constituent Assembly) finally reaching agreement on a form of federalism. The smaller parties resisted what they felt was an exclusive deal between the major powerbrokers and had the backing of the Supreme Court which rejected an initial set of 16 Principles for the new constitution as failing to accord with the federalism principles agreed as part of the initial peace agreement framework for negotiations. Despite the intense resistance of the minor parties and their constituents, a new constitution was endorsed by the Constituent Assembly in September 2015 – almost a decade after the initial peace agreement was signed. However, the rush with which the major parties finalised the constitution in part reflected a move away from a broad approach to political settlement towards a more limited and exclusive form of settlement, and undermined wider public trust-building that had taken place over the seven years of the Constituent Assemblies’ tenure. Drawing out the interim process has led to a move away from the inclusivity ambitions of the initial peace process, towards a narrow form of deal-making based on the self-interest of the larger groups. As a result, disagreement still exists regarding the federal structure in particular and there remains strong resistance to the final agreement from indigenous groups who argue that they have been marginalized.

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72 Kroc Institute for International Peace Studies (n 70).
77 Ibid.
Government has been forced to reconsider the final agreement on federalism and contemplate amendments to create additional federal units,\textsuperscript{79} a sign itself that the ‘final’ constitution remains to some degree ‘interim’, as fundamental amendments are still under consideration.

Again, any assessment as to whether Nepal constitutes a ‘failure’ of interim constitution-making as a device, or merely a failure of this process, needs to consider whether a process which had attempted to push for a permanent constitution in the immediate aftermath of conflict would have had a better outcome. Although the situation is still in flux, and hindsight judgments difficult, it can be argued that there was still significant benefit to allowing more time for negotiations because the parties were not forced to agree on contentious issues within a highly pressurized environment in the immediate aftermath of the cessation of conflict, which realistically risked a reversion to war. Considering the distrust that still permeates the process, arguably a permanent constitution would have been virtually impossible in the short-term following the cessation of hostilities.

However, again the process could perhaps have been better designed. More systematic and entrenched use of the Supreme Court as an arbiter of the final constitution as was used in South Africa might have bolstered Supreme Court interventions. Nonetheless, despite the deaths that occurred during the eight year transition period and the numerous public protests and strikes that took place to protest the delays,\textsuperscript{80} a reduced period of violence over a fairly long time was still a clear improvement over the thousands left dead by the civil conflict, and the country arguably continues to have possibilities for some level of consensus on the final constitutional outcome. While there was considerable frustration domestically and internationally at the intransigence of the parties during the negotiating process, nonetheless, the final result may show that using an interim constitution to release some of the pressure that built at moment of high tension contributed to an environment in which peace could be built at multiple levels.

\textit{Interimness may lead to default permanency}

A further risk is that using an interim constitution to capture the compromises made during a peace process can create pathway dependencies that operate to entrench problematic outcomes. In South Africa, as discussed, default permanency of the interim constitution’s partial political settlement was avoided by specifically agreeing the “Constitutional Principles” which incorporated a political settlement framework, but left room for further negotiation. In Somalia by contrast, federalism was entrenched throughout the text of both


\textsuperscript{80}Sharma & Najar (n 76).
the Transitional Charter and the Provisional Constitution, despite the fact that many stakeholders have since argued that alternative forms of devolution with a strong central government would have been a preferable option. Without very careful design at the outset of the process, however, there is a substantial risk that the baseline compromises of hastily negotiated agreements will inadvertently become permanent, as powerbrokers who benefit from them resist their amendment. Formal decision-making rules which require a high degree of consensus to amend provisions and/or informal behavioural biases toward retaining the status quo could have problematic and unintended consequences.

Indeed, status quo bias may be accentuated due in part to the very fact of it being given the special status of constitutional recognition in an interim constitution, even though that recognition is only provisional. This is a particular risk where interim constitutions are closely linked to peace agreements, as peacebuilding compromises may be made for highly political strategic reasons and/or in an attempt to defuse the escalation of violent conflict, but may in fact make longer-term peacebuilding and constitution-making processes more difficult. The process through which South Sudan was created from Sudan is arguably a case in point. Following decades of civil conflict as part of Sudan, in July 2002 a ceasefire was agreed between the Sudan Government and the rebel group representing South Sudan, the Sudan People’s Liberation Movement (SPLM). The negotiations were highly complicated, with competing peace processes being supported by African and Arab stakeholders and the United States also playing a major role in the peace negotiations. Eventually, the two processes were captured in the 2005 Comprehensive Peace Agreement (CPA), which agreed a cessation of hostilities, provided for different religious treatment in the South and North, and gave South Sudan a right to self-determination by referendum at the end of six years.

The CPA, in effect, operated as an interim constitution setting out the institutions of democratic governance, power-sharing, federal divisions and wealth sharing. Although the CPA specifically included a clause calling on parties to “design and implement the Peace Agreement so as to make the unity of the Sudan an attractive options especially to the people of South Sudan”, by intertwining the ceasefire with the secession referendum the CPA arguably weighted the interim process heavily in favour of secession, with little likelihood that the so-called “interim” arrangements enshrined in the CPA would be

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85 Ibid. Article 1.5.5.
sustained. Unsurprisingly, at the end of the interim term specified in the CPA, in January 2011 South Sudan exercised its right to self-determination and voted to become an independent nation. In the intervening period before its official creation as a new state, South Sudan developed its own Interim constitution, the Transitional Constitution of the Republic of Sudan 2011, to carry it through the initial period of transition from the CPA framework to independence and beyond. This subsequent Southern Sudanese use of an interim constitution further illustrates some of the weaknesses of poorly designed interim constitutions including: the lack of a sufficiently clear process for reaching a final constitution; delegation of excessive power to the President to fill the initial power vacuum at the time of transition; insufficient checks and balances; resulting increased executive dominance of political processes; and an absence of principles to guide the development of broader political settlement processes rooted in inclusion of key groups and broad participation. Together, these have exacerbated underlying political tensions and have arguably contributed to the civil conflict that continues to plague the country in the absence of a political settlement.

The interim constitution may be too incomplete to deal with constitutional impasses

While interim constitutions may sometimes facilitate political delays by enabling the negotiating parties to push back decision-making dates, more problematically, they may also simply veer off track, as the “interimness” of the agreement leaves the constitutional framework too incomplete to address the unravelling or undermining of a fragile peace and/or the breakdown of already weak or compromised institutions. Of course, one can query whether this is the fault of the interim constitution or whether the fact that only an interim agreement was possible is reflective of the divisiveness characterising the constitutional environment more generally. Libya provides an important, if complex, case study in this regard. At the outset, it is necessary to recognize that an interim constitution was used in Libya in an environment where there was no political settlement, very little public trust, the absence of any form of constitutional democracy on which to build and ongoing violent conflict. In this context, the 37 Article interim Constitutional Declaration now looks woefully inadequate to serve the broad peacebuilding, reconciliation and state-building objectives which should have been at the heart of Libya’s constitution-making project. However, I would still suggest that although in recent years violence has spiralled out of control and Libya has become an increasingly complex and intractable context for peacebuilding and constitution-making, in the early days after President Gaddafi was overthrown there was arguably momentum that could have been harnessed for more


88 Libya Constitutional Declaration 2011.
effective peacebuilding had more consideration been given to the design of the interim constitution.\textsuperscript{89}

Following the 2011 ousting of President Gaddafi, in the immediate aftermath of the revolution a National Transitional Council (NTC) was formed as a transitional government and parliament for the country.\textsuperscript{90} The NTC enacted a Constitutional Declaration in August 2011 which envisaged that a General National Congress (GNC) would be elected as a new parliament, which would then appoint a technical committee to draft a constitution in 60 days that would be submitted to the GNC before being put to a public referendum.\textsuperscript{91} Only weeks before the end of its term, the NTC amended the Constitutional Declaration to require the election (not appointment) of a Constitutional Drafting Assembly (CDA), which would draft a Constitution within 120 days that would be sent straight to referendum, bypassing the elected GNC.\textsuperscript{92} This set off a major political battle: wrangling over both the composition of the new Government and whether the CDA would be elected or appointed followed the GNC elections in July 2012 and saw a major delay in the constitution-making process.\textsuperscript{93} Elections for the CDA were held more than 18 months later in early 2014.\textsuperscript{94} By the time the CDA was finally operational in May 2014, the political situation in Libya had substantially deteriorated: the security situation had unraveled with militia claiming territory across the country and the central government was virtually unable to exercise authority in parts of the country. The deadline for a new constitution continued to be extended as the CDA labored slowly, while the political and security situation worsened. Eventually new elections were held to break the political deadlock gripping the country, but the result contributed to a further political impasse with the old GNC and new House of Representatives both claiming authority as the national legislature following disputed elections.\textsuperscript{95}


\textsuperscript{90} National Transitional Council website: http://ntclibya.org/.


The interim constitution was drafted in 2011 at a time of considerable optimism in Libya, and no conflict mitigation mechanisms were included in the text which could respond to the deteriorating situation. The text of the interim constitution assumed a functional government, parliament and constitution-making process, with the short timeframe allowed for the constitution-making process. Once each of these began to break down, the interim constitution was unable to operate as a meaningful guide to resolving political conflicts, particularly in the absence of any overarching constitutional principles to encapsulate even a minimal political settlement and guide the process, as had been put in place in the South African or even the Nepalese context. At the time of writing, there is still no conclusion to the constitution-making process, with efforts to merge the two competing national legislatures and governments through an extra-legal UN process slowly gaining traction and the CDA still attempting to finalise a draft text in the absence of any overarching national political leadership.

Of the many lessons learned from the Libya transition process, possibly the most useful regarding interim constitutions is the importance of deliberately putting in place an interim constitutional process with a proper timeline, clarity on the overarching issues to be addressed, and mechanisms for breaking constitutional deadlocks and for overseeing the implementation of the interim constitution. In 2011, when the Constitutional Declaration was first being drafted, it is possible that the optimism of the revolution led to the assumption that constitutional consensus would be easy to come by and that the pressure to quickly transition from dictatorship to an elected government mean that detail regarding process was foregone; hence the very short anticipated drafting timeline. However, constitution-making speed has arguably been the enemy of consensus in Libya, and the need to ‘legitimate’ the process by introducing elections in the interim period exacerbated, or at least brought to the fore the lack of underlying political consensus around the process and direction of the constitution-making exercise. While the current political and security breakdown in Libya clearly has many complex causes that are beyond the scope of this article, it is submitted that the unrealistic deadlines for constitutional drafting and the inability of the interim constitution to guide a response when those deadlines were missed, certainly contributed to the highly fraught political environment.

96 Libya Constitutional Declaration 2011.
IV. Conclusion

This article has sought to explore the value of interim constitutions in situations of deep division and conflict in an effort to make sense of the author’s experience as a practitioner with the UNDP working in and on highly conflicted countries in support of constitution-making processes. Constitution-making in the new millennium has been increasingly dominated by processes being undertaken in FCAS, where there is often little trust amongst and between elites and the public, ongoing contested power struggles (whether violent or not) remains, and experience with the culture and practice of constitutional democracy is limited. Despite the fact that constitution-making theory suggests that such complex and unsettled circumstances do not bode well for constitution-making which is normally understood to revolve around pre-existing consensus to demos, polis and territory, in reality there is usually no option but to move forward in some way. In such contexts, the question becomes, not “what is the ideal approach to constitution-making?” but rather “what options are available for engaging in constitution-making that will minimize conflict or a return to conflict and contribute to peacebuilding?”

The reality is that in conflict-affected contexts all constitution-making efforts will be imperfect and difficult. Against that background, this article argues that the use of an interim constitutional process offers a useful approach to minimizing the risks of constitution-making in FCAS which at least carries some possibilities for longer-term, sustainable constitutional processes and outcomes. In deeply divided contexts, reaching even a minimal political settlement that represents a political settlement or “framework for political power to which parties will acquiesce” is enormously difficult. However, experience has shown that where constitution-making processes allow sufficient time for consultations and consensus building, constitution-making may contribute to peace-building and reconciliation and political negotiations may eventually lead to progress. In line with Arato’s post-sovereign constitution-making theory, an interim constitution should be considered as a key tool for constitution-making processes in conflict-affected contexts because it enables space and time for protagonists and their constituents to build trust, forge consensus and negotiate contentious issues. It also enables a balance to be struck between elite pacts and wider participatory processes.

Building on the work of Varol, Ludsin and Jackson in particular, this article has suggested that there are peacebuilding benefits to more deliberately and routinely using the mechanism of an interim constitution as a conflict management tool to address the special circumstances of fragile and conflict-affected states. As Varol has observed, “[r]ather than idolizing constitutions as long-enduring, monolithic documents, temporary constitutionalism acknowledges the empirical reality that constitutional designers make costly mistakes with

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100 Benomar (n 12).

101 Arato (n 6) 427–443.
some regularity, and constitutional evolution must often be gradual and incremental.” The case studies demonstrate the benefits of such an approach in FCAS.

However, while there are clear benefits to be harnessed from interim constitutions, the case studies illustrate that the design of an interim constitution needs to be carefully considered if these potential benefits are to be actually realized. In that regard, this article has argued that it is critical that the interim constitution (i) is itself designed carefully and enshrines some minimum guidance on key principles and/or process elements, (ii) puts in place a realistic timeline, and (iii) includes some sort of oversight mechanism and/or process by which to handle deadlocks (which are sure to arise).

Clearly an interim constitution is not a panacea for all of the challenges facing FCAS. Constitution-making is certainly more complex and more varied than to allow for such a simplistic one-size-fits-all approach that would view interim constitutions as an easy and uncontroversial ‘tool’. Nonetheless, as more and more FCAS engage in constitution-making exercises in contexts which remain highly fluid, the need for an incremental approach to constitution-making which both establishes and lends some legitimacy to the process of constitutional development and enables some form of governance through transition, points to interim constitution-making as here to stay. For that reason, more attention needs to be paid to the opportunities and challenges that interim constitutions present - as this article has hopefully begun to illustrate considerable practice exists from which lessons can be learned. Any assessment of ‘success’ or otherwise needs to be made against a backdrop of the limited possibilities for transformation through constitutionalism of protracted social conflict rooted in long-standing inequalities, poverty and lack of development. These are processes of constitution-making that operate with the task of building some sort of political settlement in the most difficult circumstances, rather than reflecting any pre-existing consensus to the shape of the state. Critique of interim constitutions has to take place against the backdrop of the limited alternative possibilities for ending conflict. Against that backdrop I have sought to argue that further self-conscious attention to the deliberate designing and deployment of interim constitutions, which aim to be responsive to the specific needs and risks of the transitional context, could increase the capacity of interim constitutions to make a critical contribution to longer-team peacebuilding.

102 Varol (n 4) 412.
Eternity Clauses in Post-Conflict and Post-Authoritarian Constitution-Making: Promise and Limits

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Abstract

The literature on entrenchment as a means to achieve constitutional endurance has grown in recent years, as has the scholarship on unamendable provisions as a mechanism intended to safeguard the constitutional project. However, little attention has been paid to the promise and limits of eternity clauses in transitional settings. Their appeal in this context is great. In an effort to safeguard hard-fought agreements, drafters often declare unamendable what they consider the fundamentals to the political deal: the number of presidential term limits, the commitment to human rights and to democracy, the form of the state (whether republican or monarchical), the territorial integrity of the state, the territorial division of power, secularism or the official religion. This article explores the distinctive role and problems posed by eternity clauses in transitional constitution-building, as guarantees of the pre-constitutional political settlement in such fragile periods. The article also compares unamendability to other techniques of constitution-making in uncertain times, such as sunset clauses, deferring hard choices and other forms of constitutional incrementalism.

Keywords

constitutional amendment; eternity clauses; Tunisia; political transitions; political settlements

I. Introduction

Institutional mechanisms adopted in search of the twin goals of legitimacy and longevity of constitutions show great variety. Within that variety, constitutional amendment procedures have gained increasing attention in recent scholarship, having been called just as important
as ‘standard topics of institutional design’. Their multiple purposes include entrenching the constitution, structuring its change, and ‘precommitting’ political actors, but such clauses also serve as sites of expression of constitutional values. Within these, unamendable provisions (also known as ‘eternity clauses’) have also attracted constitution-makers’ interest. They are a type of constitutional provision or judicial doctrine which insulates from amendment certain principles or rights enshrined in a constitution. They represent a special mechanism of constitutional entrenchment, one which might be termed indefinite or limitless. The example of an eternity clause typically given is Germany, whose Article 79(3) or Ewigkeitsklausel declares the inviolability of human dignity and of human rights, as well as of the democratic, federal, and social nature of the German state, the electoral nature of the German democracy, and the rule of law. There are also judicial doctrines of implied substantive limits on amendment, such as India’s basic structure doctrine or the Czech Constitutional Court’s substantive core doctrine. Such judicial constructs are informed by analogous considerations and operate in a similar fashion to formal clauses.

The rise of formal unamendable provisions has been constant in constitutions around the world, with one study estimating that 42 per cent (or 82 out of 192) of post-World War II constitutions adopted until 2011 incorporate some type of eternity clause, and 32 per cent (or 172 out of 537) of constitutions of all time doing so. Even more significantly, this trend does not appear to be abating. The two most recently adopted constitutions—Tunisia’s 2014 and Nepal’s 2015 constitutions—both incorporated formally unamendable clauses. The spread of judicial doctrines of unamendability has similarly continued, with the Pakistani Supreme Court adopting its own version of a basic structure doctrine in 2015. Significantly, their incidence amidst post-conflict and post-authoritarian constitutions seems

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6 Constitutional Petition No. 12 of 2010 etc., Supreme Court of Pakistan, 5 August 2015.
to suggest that eternity clauses have become an especially attractive tool to constitution-makers.

In what follows, I propose to examine the rise of unamendable commitments in constitutions resulting from political transitions and to suggest a third goal they pursue in these contexts: that of facilitating and later safeguarding a political settlement. The technique of taking certain agreements off the table in a nascent constitution has long been employed as a mechanism of constitutional design in transitional situations. But in such contexts, a political agreement between rival parties is both hard-fought and especially fragile. As such, I will argue, the promise of constitutional unamendability is taken as a guarantee of the terms of the agreement both before and after the adoption of the new fundamental law.

This role of eternity clauses—as themselves an instrument of political negotiation and conflict resolution—has thus far been ignored by the growing literature on unamendability. Insofar as this literature has addressed their inclusion in post-conflict constitutions, it has focused on ‘reconciliatory’ elements such as unamendable amnesties, without considering the different dynamics of post-conflict constitution-making and the resulting difference in justifications for, and expectations from, unamendability in these basic laws. One author has noted the role of higher amendment thresholds in facilitating ‘a political bargain entered into by the constitutional designers for the sake of ratifying an otherwise “unratifiable” constitution.’ The case he discusses is that of the US constitution’s entrenchment of state voting rights in Article V, explaining the heightened level of protection as a condition precedent to the Union itself. Beyond this insight, however, the literature on eternity clauses has not explored how they may condition political compromises underlying constitution-making today. This article seeks to fill this gap by investigating the bargaining dynamics conditioning political settlements in the contexts where most of today’s new constitutions are being written: post-conflict and post-authoritarian transitions.

The article further argues that eternity clauses pose problems of a different nature from other conflict resolution techniques which have found their way into constitutions. If taken seriously, these clauses remain at the heart of the political settlement, both as the embodiment of its core elements and as guarantees of the settlement’s survival. Unamendability, however, is a qualitatively different choice from deep entrenchment such as a supermajority requirement for constitutional amendment or a sunset clause. It purports to forever close off certain avenues for constitutional change in a manner which may safeguard the political settlement in the first instance but severely frustrate its development further down the road—in particular when longer-term demands of peace require the elite pact to give way to some more normative commitment to constitutionalism.

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10 Ibid.
In part because eternity clauses are a fairly common constitutional feature, constitution-makers in post-conflict settings may not always be aware of the full array of implications flowing from the inclusion of eternity clauses in constitutions, nor of how these provisions fit within the broader constitutional architecture—notably with institutions for constitutional openness (such as legislative initiative provisions) and for constitutional enforcement (such as constitutional review). Formal unamendability tends to result in the empowerment of constitutional courts, by way of constitutional review of amendments on substantive grounds, in a manner these bodies may not have been equipped for. In this sense, then, this article also links to the contributions of Jenna Sapiano and Tom Gerald Daly and their studies of the judicial role in the jurisprudence of peace and democratisation.

I proceed by first outlining the prospects and limits of eternity clauses as mechanisms of constitutional rigidity, and how these may be impacted by the special dynamics of political settlements in conflict-affected and post-authoritarian contexts. I then propose to look at substantive elements declared unamendable by taking Tunisia’s recently adopted constitution as an example. I explore the complex bargaining behind the adoption of Tunisian unamendable provisions in their final form. I also suggest that the choices of what to declare unalterable in the basic law mirror the concerns of constitution-makers in other post-authoritarian and post-conflict settings. Thus, declarations of immutability of certain fundamental characteristics of the state, of human rights commitments, or of executive term limits are frequent in emerging or fragile democracies and there is growing evidence of how these operate in practice. Eternity clauses may thus be read as indicators of what drafters have considered to be the ‘public goods of constitutionalism’ which Christine Bell discussed in her article. However, they may simultaneously operate to reduce the risk for elites in entering the new dispensation: presidential term limits and human rights provisions appear to give some protection against either party using the new order to reinstate or achieve a reversion to domination. Unlike in the Tunisian constitution, amnesties granted to former warring parties are also sometimes constitutionalised as unamendable and I briefly touch upon these as well as a more overt confirmation of the elite pact.

The final part of the article explores potential alternatives to eternity clauses in post-conflict constitutions. Rather than aiming at prescriptive conclusions, this section considers alternate design choices which also aim at constitutional legitimacy and endurance. These include: interim constitutions (discussed in greater depth by Charmaine Rodrigues); sunset clauses; as well as deferral; deliberate ambiguity; or silence. Where evidence is available, I explain why these were not chosen in Tunisia but were preferred in other transitional contexts. Based on this brief analysis, I suggest that more work is needed in order to evaluate the extent to which these options are viable alternatives to unamendability’s capacity to broker, and promise to safeguard, the political settlement. The article concludes by reiterating the need to complement our understandings of the recourse to unamendability in constitution-making with insights from post-conflict and post-authoritarian processes. Within these, eternity clauses play a distinctive and possibly unique role as guarantees of the pre-constitutional political settlement and as such may be justified on political and not merely normative grounds.
II. Constitution-making in political transitions

Constitution-making in political transitions as referred to in this article pertains to both post-conflict and post-authoritarian contexts in which a democratic constitution is adopted with a view to entrenching a new political settlement. As the introductory piece to this special issue makes clear, there are overlaps between the burdens placed on post-conflict and democratisation constitutions: they both must accommodate antagonists—whether warring parties or powerful elites—and introduce new political and legal institutions which can navigate between old and new political settlements. Understanding the politics of doing politics in fragile and conflict-affected states is a key step towards untangling the delicate and often seemingly contradictory compromises enshrined in their resulting constitutions. I acknowledge here that the concept of transition to democracy is itself problematic, seeing as it relies on a thin notion of democracy and on a workable distinction between a non-democratic starting point and a democratic end point.\footnote{Andrea Bonime-Blanc, ‘Constitution Making and Democratization: The Spanish Paradigm’ in Miller and Aucoin (2010), p. 417. See also Juan J. Linz and Alfred Stepan, Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe, Johns Hopkins University Press, 1996, p. 3 (defining the end point of a democratic transition) and, broadly, Juan J. Linz, ‘Transitions to Democracy’, The Washington Quarterly, Vol. 13, No. 3 (1990), pp. 143-64.} Daly in this special issue provides a more comprehensive explanation of the utility of the concept of transition, as well as of the broader concept of democratisation. For the purposes of this article, the reader should retain the use of ‘transition constitution-making’ as an umbrella-concept denoting the processes of negotiating, drafting, and ratifying new constitutions in countries emerging from violent conflict or authoritarian regimes.

Several distinctive features of post-conflict and post-authoritarian constitution-making can be considered likely to have an impact on the negotiation and content of eternity clauses. While these are not necessarily exclusive to such transitional context, they tend to be exacerbated in such a setting. I will highlight three such features.

First, the constitution-making process may be more contested than constitutional reform in established democracies, and as such the legitimacy of the final product may be more readily called into question. The threat of a return to violence, or indeed, the continued violence as background to constitutional negotiations, has an impact on both the process and the substance of constitutions drafted in these conditions. The timeframe for negotiations may thus be shorter; the chance of compromise smaller due to heightened polarisation and potential imbalances of power; and the pressure on the constitution to ‘deliver’ greater.\footnote{See Jennifer Widner, ‘Constitution-Writing in Post-conflict Settings: An Overview’, William and Mary Law Review, Vol. 49, No. 4 (2008), pp. 1513-41.} On the one hand, negotiating fundamental constitutional norms of the sort included in eternity clauses may not be ideal in such a setting. As Vivien Hart has argued, Canada could sustain 30 years of constitutional conversation around Quebec, but Northern Ireland or South Africa could not hope to do the same.\footnote{Vivien Hart, ‘Constitution-Making and the Transformation of Conflict’, Peace & Change, Vol. 26, No. 2 (2001), p. 165.} On the other hand, and as this article will later argue, it is precisely agreement on those fundamentals, and on their
immutability, which may ensure that a political settlement is reached at all and a constitution is adopted. Eternity clauses thus embody the potential tension between the political pacts having made the new constitution possible and the normative elements of the constitutional framework.

Second, the functions post-conflict and post-authoritarian constitutions are expected to play are complex. Post-conflict constitutions are expected to drive the transformative process from conflict to peace, seek to transform the society from one that resorts to violence to one that resorts to political means to resolve conflict, and/or shape the governance framework that will regulate access to power and resources—all key reasons for conflict. [They] must also put in place mechanisms and institutions through which future conflict in the society can be managed without a return to violence.14

Post-authoritarian constitutions are similarly tasked with instituting a new political regime, whose viability may well be determined by the ‘momentous decisions’ of the constitution-makers.15 In addition to the institutional engineering other constitutions are expected to provide, post-conflict and post-authoritarian basic laws are also tasked with providing recognition—they are ‘to recognize, include, give voice to, equalize, or advantage, and to exclude, silence, or stigmatize people and peoples.’16 These constitutions thus bear the dual burden of encapsulating an elite pact while also performing the role of a peace agreement.17 As will be seen below, certain types of eternity clauses are distinctly aimed at achieving reconciliation, such as those enshrining amnesties as unamendable. Others, including unexpected ones such as unamendable commitments to religion, may also be read as rectifying past oppression.

Third and finally, in all cases of post-conflict and post-authoritarian drafting, the resulting constitutions are ‘heavily negotiated outcome[s], often involving an exchange of incommensurables rather than a coherent plan for conflict reduction.’18 Such constitution-making takes place in times of crisis and is shaped by the constraints resulting from this, by the numerous biases of drafters, as well as by generally weak institutional capacity.19 As a consequence, what results is more often ‘partial or even conflicting innovations’ rather than ‘the adoption of coherent designs whose elements reinforce each other.’20 Given this likely incoherence, eternity clauses may not play the role of structuring devices they have

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19 Ibid., pp. 1227-30.
20 Ibid., pp. 1226-27.
performed in other constitutional orders, such as Germany.\textsuperscript{21} Declaring a hierarchy of norms within the constitution, atop of which are certain unamendable principles, may prove more problematic in a disjointed document. The case of Tunisia’s unamendable commitment to Islam as its official religion, sitting as it does alongside protections of religious freedom but also of the state’s role as guardian of religion, will serve as an illustration of such potential incompatibilities.

Other articles in this special issue, notably those by Rodrigues and Sapiano, take up the distinctiveness of post-conflict constitution-making and responses to it more fully. Daly engages with the democratisation context more generally to discuss the heavy burdens placed on constitutional courts in new and fragile democracies. My analysis, while acknowledging the distinctiveness of the transitional setting, will also seek to identify overlaps—in aims, mechanisms, and implementation—between eternity clauses resulting from post-conflict and post-authoritarian constitution-making and those adopted in more peaceful times. As such, examples used to illustrate the promises and limits of eternity clauses will not be limited to unamendability in post-conflict constitutions. This approach warns against easy assumptions over what might or might not work in post-conflict and post-authoritarian constitutions and acknowledges that all constitutions, to an extent, are the product of (often violent) crisis.\textsuperscript{22} All constitution-makers are concerned with achieving durability, and for the constitution to ensure societal stability. However, the distinctiveness of the transitional context becomes clear when one understands eternity clauses as facilitating bargaining and compromise during negotiations and as constitutionalising the \textit{sine qua non}s of the political settlement. To the extent that this settlement would not have been possible without it, unamendability thus shows itself as especially attractive in transitional settings and justifiable on strategic and political rather than normative grounds.

\section*{III. Tunisia’s 2014 constitution and unamendable commitments in post-conflict constitutions}

Tunisia’s 2014 constitution is one of two recently adopted basic laws incorporating a formal eternity clause (the other is Nepal’s constitution, ratified in September 2015, whose Article 274 serves this function). It was drafted during an intensive and prolonged process, following the ousting of president Ben Ali and the so-called ‘Jasmine Revolution’ in 2011.\textsuperscript{23} Heavy expectations loomed over the constitutional assembly elected in October 2011, which simultaneously had to draft a new fundamental law and act as transitional legislative

\textsuperscript{21} For a discussion of the problems of eternity clauses creating an internal constitutional hierarchy, see Albert (2010), pp. 683-84.


body.²⁴ Opinions differed widely on how long the assembly had to deliberate,²⁵ though in the end it completed its work in two years. The final constitution was adopted in January 2014 by a two-thirds majority of the assembly but was not submitted to popular referendum. It would bring to an end what some have seen as a period of ‘extraordinary politics’ in which the Tunisian people actively reconstituted society.²⁶ Despite its shortcomings, Tunisia’s is thus far the only instance of a successful transition amidst the Arab Spring countries, and as a consequence has been promoted as a model for the rest.²⁷ The Nobel Prize Committee, awarding the Nobel Peace Prize for 2015 to the Tunisian National Dialogue Quartet, praised it for having ‘paved the way for a peaceful dialogue between the citizens, the political parties and the authorities and helped to find consensus-based solutions to a wide range of challenges across political and religious divides.’²⁸

The reality of the Tunisian constitution-making process was, however, far messier. It was not immediately clear that a new constitution was to be drafted, with evidence suggesting that the initial transitional government had intended only to reform the 1959 constitution.²⁹ Even once the constituent assembly was in place, consensus could only be reached after significant bargaining between the main players: the majority Islamist block centred on the Ennahda party; the liberal, centre-left Union for Tunisia, the main (secular) opposition force; and the Popular Front, a smaller socialist and ecological block.³⁰ The primary main source of tension during the constitution-making process was the place afforded religion in the new constitution. Despite early promises from the Ennahda party following its electoral success in the October 2011 elections that it would not seek to change the constitution to impose sharia, and from the opposition that it would not refer to secularism explicitly, as will be seen, the drafting process brought to light the deep fears and distrust held by the parties.³¹ These misgivings were not helped by the fact that a leaked early Ennahda draft of the constitution had actually included a sharia provision.³² Some scholars have argued that

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³² Böckenförde (2015), fn. 15.
religion should not be viewed as the only division between the drafting parties, nor as one as rigid as it has been made to seem. It has instead been argued that a better predictor of the positions of political actors during Tunisia’s transitional period were economic cleavages, namely the stance on neoliberal reform agendas held by each party. Thus, despite the main aim of the Jasmine Revolution being economic, an economic revolution in Tunisia has been said to have been relegated to an elusive ‘second phase’. As the conclusion to this article shows, the consequences of this choice may be graver than anticipated.

All actors involved in the Tunisian constitution-making process had to compromise on core demands in exchange for gains elsewhere. On the religious question, the main Islamist party Ennahda and secularist parties had to find common ground by giving in on issues such as whether to include references to sharia and the position attributed to human rights in the constitution, respectively. The bargain they struck is reflected in the unamendable provisions discussed shortly. Another, equally contested site of intense negotiations concerned the choice of system of government. Ennahda, relying on its projected strength at the polls, would have opted for a parliamentary system, whereas other, smaller parties thought a semi-presidential system in which the president was to be directly elected would give them a better chance to capture the office. Without compromises on these issues, achieved by way of many iterations of constitutional drafts debated extensively in the constituent assembly and within broader society, there would not have been a ratified constitution. Indeed, bargaining dynamics and deal-making between moderates and the ruling elites, including the non-exclusion of old elites from the political process and the ability of moderates to marginalise radicals on both sides, have been heralded as key explanatory factors for the success of Tunisia’s transition more generally. The international community also pushed forward the constitution-making process. The United Nations, for example, did so not just by way of financial support, but also by various agencies sending letters and recommendations to members of the constituent assembly and to the government calling for the inclusion or modification of individual provisions on human rights.

33 Ibid., p. 27.
34 Rousselin (2015), p. 36.
or judicial independence. The Venice Commission of the Council of Europe also intervened, at the request of the Tunisian government, by issuing a full report on a later draft of the constitution, indicating provisions it thought problematic from the point of view of international human rights standards.

Read in light of this complicated process, the new constitution’s provisions on unamendability gain new significance. When considered as part of such political pact-making, they appear as the culmination of strategic positioning by the parties to negotiations rather than, or perhaps alongside, being the embodiment of normative aspirations for the new polity.

Up until the final debate in the plenary of the constituent assembly, drafts of the Tunisian constitution had included a separate eternity clause. As Table 1 shows, these iterations referred to the same issues (Islam as the religion of the state, Arabic as the official language, the nature of the state as republican and civil, human rights and freedoms, and presidential term limits) with little variation. This consistency may indicate early and persistent agreement among drafters as to the necessity of unamendability in their constitution, even while it did not survive in this form in the ratified constitution.

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Table 1. Iterations of the eternity clause in Tunisia’s constitutional drafts

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In the end, Tunisian drafters resorted to attaching these declarations of unamendability individually to each affected article, rendering them now scattered throughout the text: in Article 1, which declares the characteristics of the Tunisian state ('Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican.'); in Article 2 on the civil nature of the state ('Tunisia is a civil state based on citizenship, the will of the people, and the supremacy of law.'); in Article 49, the constitution’s general rights limitation clause ('There can be no amendment to the Constitution that undermines the human rights and freedoms guaranteed in this

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43 The texts of the drafts may be found at ‘Constitutional history of Tunisia’, ConstitutionNet.org, available at http://www.constitutionnet.org/country/constitutional-history-tunisia
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will also briefly explore how similar provisions have fared in other contexts and draw out potential lessons for these clauses’ interpretation in future Tunisian constitutional jurisprudence.

**Unamendable state characteristics**

Certain characteristics of the Tunisian state are placed outside the power of amendment by Articles 1 and 2 in the constitution. It will not be surprising that they, and especially Article 1, were among the most controversial during drafting given that they purport to delineate the state’s identity. Among the elements declared unamendable, the assertion of the state’s ‘free, independent, sovereign’ nature appears straightforward, as does the fact that it is ‘based on citizenship, the will of the people, and the supremacy of law’. They are akin to declarations of sovereignty and independence as being unamendable incorporated in several post-colonial or post-Soviet constitutions, such as in Article 292 of the constitution of Mozambique or in Article 114 of that of Armenia. Less clear is whether such declarations carry any more weight than they would were they incorporated in preambles. After all, the preservation of a country’s sovereignty and independence, just like of its territorial integrity (another principle occasionally listed as unamendable in the basic laws of newly independent states) will depend at least in part on external forces beyond the control of internal state organs.\(^{50}\)

Also seemingly uncontroversial is the declaration of the system of government as republican. A similar provision had been included in Tunisia’s former constitution, the 1959 post-independence text, under Article 76. It had entrenched the departure from the previous monarchical system and had been likely influenced by Tunisia’s colonial power, France, whose constitution states in Article 89 that: ‘The republican form of government shall not be the object of any amendment.’ The unamendable commitment to republicanism is also among the most widespread eternity clauses, with one study counting more than 100 constitutions having such a clause.\(^{51}\) The origin of such clauses seems to be the fear of a return of the monarchy in the immediate aftermath of the transition to republicanism.\(^{52}\) For all its influence, both as a colonial power and as a widely imitated constitutional model, France’s experience with ‘eternal’ republicanism does not tell us very much about how such a clause might work in practice, including in Tunisia. This is because the Conseil Constitutionnel has consistently refused to engage in the review of constitutional amendments.\(^{53}\) However, while virtually eradicated in France, monarchism has not fully

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\(^{50}\) An example would include Ukraine’s Article 157, which barred amendments ‘oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine’. The 2014 Crimean crisis was a blunt demonstration of the impotence of state independence or territorial integrity as constitutional principles and exposed them as serving a mostly aspirational function. See Yaniv Roznai and Silvia Suteu, ‘The Eternal Territory? The Crimean Crisis and Ukraine’s Territorial Integrity as an Unamendable Constitutional Principle’, German Law Journal, Vol. 16, No. 3 (2015), p. 570.


\(^{53}\) Decision No. 62-20DC, 6 November 1962; Decision No. 92-308DC, 9 April 1992; and Decision No. 2003-469DC, 26 March 2003. See also discussion in Baranger (2011), pp. 391-98.
disappeared from other republics. For example, calls for monarchical restoration exist in Libya, where a constitutional monarchy has been advocated as the solution to the country’s turmoil.\(^{54}\) Thus, while republicanism may seem a particularly uncontested unamendable constitutional commitment, and raised little debate among Tunisian drafters, one cannot assume it is without consequence simply because a return to monarchy appears impossible at a given time. Moreover, whether the republicanism principle will have been trespassed will also depend on how broadly the constitutional court interprets such transgression. It could also be that curtailing rights of political participation or altering the separation of powers to such an extent as to \textit{de facto} extinguish popular sovereignty, or even the open-ended delegation of governmental authority\(^{55}\), would be deemed violations of the commitment to republicanism.

Unamendable declarations of an official language such as Tunisia’s are to be found in a number of constitutions, including post-authoritarian ones.\(^{56}\) When commenting on the Tunisian draft, the Venice Commission thought ‘this provision requires no particular comment’,\(^{57}\) presumably because it deemed it a statement of fact in the same vein as that on an official religion (see below). Indeed, given the linguistic homogeneity of the country, Arabic may have been a unifying element of identity rather than a divisive one. Turkey exemplifies how such a clause can result in discriminatory enforcement against minorities.\(^{58}\) The Turkish Constitutional Court has invoked the language element of the eternity clause to deem calls for the use of the Kurdish language as ‘a display of separatism’ and direct affronts to the unity of the nation.\(^{59}\) Insofar as Tunisia’s eternity clause will not be similarly interpreted to discriminate against the language rights of minorities, its inclusion in the 2014 constitution will not pose immediate concern.

By far the most disputed of all the elements of state identity rendered unamendable in the constitution has been the reference to religion in Article 1. Three aspects of Tunisia’s unamendable commitment to Islam are noteworthy. The first is that it was the result of much negotiation between opposing parties. Ennahda initially pursued the constitutionalisation of sharia but faced fierce opposition from civil society as well as from secularist parties. Ben Jafaar, the president of the constituent assembly, threatened to leave the coalition if the clause concerning sharia was not withdrawn; he referred to the provision

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\(^{55}\) Laurence Tribe discusses this scenario as a potential violation of Article IV, section 4 of the US constitution, which declares that ‘the United States shall guarantee to every State ... a Republican Form of Government’. Laurence Tribe, \textit{The Invisible Constitution}, Oxford: Oxford University Press, 2008, p. 90.

\(^{56}\) See Article 178 of the constitution of Algeria, Article 120 of that of Bahrain, Article 143 of that of Moldova, Article 152 of that of Romania, and Article 4 of that of Turkey.

\(^{57}\) Opinion on the Final Draft Constitution of the Republic of Tunisia, para. 211.


on Tunisia being a civil state (Article 2) as a ‘red line not to be trespassed’.\(^{60}\) It may be true, as some have argued, that the main fault line during negotiations was not so much around religious issues, but around entrenching gains against the old elite.\(^{61}\) To Ennahda members and supporters, entrenching Islam may have amounted to a guarantee against persecution on religious grounds as the Ben Ali regime had engaged in and as such was less about ideology and more about adopting ‘political “fencing” measures that would preserve the gains of the revolution and...keep the country from sliding back into an authoritarianism that targets religiously minded individuals’.\(^{62}\) The bargain between these two seemingly incompatible positions took place in March 2012, when the Shura Council of the Ennahda party renounced the constitutionalisation of sharia in exchange for secularists renouncing the constitutionalisation of the Universal Declaration of Human Rights and agreeing to language in the preamble that watered down the scope of rights protection (more on this shortly).\(^{63}\)

The second important aspect to note, then, is how Article 1’s mention of religion sits within the larger constitutional apparatus. Optimists view it as being tempered by the declaration of the state’s civil nature, although whether all sides mean the same thing when interpreting the principle of civil state is doubtful.\(^{64}\) The Venice Commission has attempted to reconcile official endorsements of religion with principles of non-discrimination and found the declaration of an official religion in the Tunisian constitution of 2014 to be a mere statement of fact to the extent that it only recognises that Islam is the religion of the majority of citizens.\(^{65}\) However, the inclusion of this declaration as an unamendable principle, coupled with the unamendable civil nature of the state and with other provisions on religion in the constitution—notably Article 6, which stipulates that ‘The state is the guardian of religion.’—may become problematic.\(^{66}\) Tunisian authorities have explained the intent behind Article 6 to be for the state to be responsible for the maintenance of religious infrastructure and the remuneration of religious ministers, in line with similar provisions in other national constitutions.\(^{67}\) Nevertheless, the ambiguous language of the Tunisian text, coupled with potential incongruities between the various provisions on religion, may lead to discriminatory interpretation. This ambiguity has led one commentator to observe that: ‘The response of the Tunisian draft constitution to the fundamental question of the polity – a community of believers or citizens? – remains ambivalent.’\(^{68}\)

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\(^{60}\) Hachemaoui (2013), p. 25.


\(^{62}\) Ibid., p. 17.

\(^{63}\) Hachemaoui (2013), p. 25.

\(^{64}\) The main difference between Islamists and secularists on this point has been said to be their respective attitudes to individual rights: as an end in themselves for the latter, versus as only instruments for the moral development of the community for the former. See Nadia Marzouki, ‘From Resistance to Governance: The Category of Civility in the Political Theory of Tunisian Islamists’, in Nouri Gana, ed., The Making of the Tunisian Revolution: Contexts, Architects, Prospects, Edinburgh: Edinburgh University Press, 2013, pp. 212-13.

\(^{65}\) Opinion on the Final Draft Constitution of the Republic of Tunisia, para. 15.

\(^{66}\) Ibid., paras. 27-37.

\(^{67}\) Ibid., para. 32.

A third and final aspect worthy of mention here is the relationship between Article 1 in the constitution of 2014 and Article 1 in the 1959 constitution. Their language is identical, safe for the inclusion of unamendability in the new constitution. However, there is more than meets the eye behind this resemblance. The mere fact of being able to discuss such core issues related to religion and identity was novel, with the chair of the Rights and Liberties Committee in the constituent assembly observing that ‘[in the past] we couldn’t have a real conversation, let alone determine the boundaries of these issues.’\(^{69}\) As stated, the language of the current Article 1 was chosen very carefully, however, so as to leave open whose religion Islam actually is: Tunisia’s (as a statement of fact) or the state’s (carrying with it the endorsement of state power). This has been deemed evidence of ‘strategic positioning’ of the drafters, resulting in normative flexibility.\(^{70}\) It clearly leaves the resolution of this ambiguity in concrete cases to the newly-established constitutional court, whose role is that much more important.\(^{71}\) The new language may also be read as a correction, by way of constitutional law, of past constitutional jurisprudence. Under the old constitution, the previous Article 1 had been interpreted as altering Tunisia’s Personal Status Law (which had instituted significant departures from Islamic family law) to limit inheritance, property, and various parental rights according to Islamic law.\(^{72}\) The identity in language between these two constitutions is therefore misleading if not analysed in the wider jurisprudential context.

References to official religion as unamendable such as in Tunisia’s Article 1 are not unprecedented and parallels come in two guises: the entrenchment of an official religion\(^{73}\) and the unamendable protection of secularism or of the separation of church and state.\(^{74}\) More problematic than Tunisia’s ambiguous reference to religion as unamendable are eternity clauses which entrench religious sources of law. For example, in Afghanistan’s 2004 post-conflict constitution, Article 149 reads, in part: ‘The principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended.’ The problem with such a clause is that it raises the difficulty of delineating the boundaries of religious principles and their infringement. This difficulty is even more complex in the Afghan constitution, which combines Islam and international law as sources of law (Articles 3 and 7, respectively), without guidance as to how they are to be reconciled if in conflict.\(^{75}\)


\(^{71}\) Ibid., p. 22 and Böckenförde (2015), p. 28.


\(^{73}\) Such as the entrenchment of Islam in the constitutions of Algeria (Article 178), Bahrain (Article 120), Iran (Article 177), Morocco (Article 100).

\(^{74}\) Such as the entrenchment of secularism in the constitutions of Angola (Article 236), Congo (Article 220), Portugal (Article 288), or Turkey (Article 4).

\(^{75}\) On this point, see Mohammad Qasim Hashimzai, ‘The Separation of Powers and the Problem of Constitutional Interpretation in Afghanistan’ in Rainer Grote and Tilmann J. Röder, eds., Constitutionalism in Islamic Countries: Between
Scholars have listed both official religion and secularism amidst the elements of preservative eternity clauses, seeing them as ‘an expression of the importance of religion or non-religion in that constitutional regime, either as a reflection only of the views of the constitutional drafters or of the views of citizens as well.’ This argument is reminiscent of those who view religion as expressive of constitutional identity, whether by achieving official status or by its banishment from public life in the form of a commitment to secularism. Either way, the decision is viewed as fundamental to the nature of the state. The full significance of Tunisia’s unamendable commitment to Islam will only become apparent once interpreted in practice. Only once a challenge is brought and the Constitutional Court delineates the boundaries of this provision will we know whether the political agreement behind its current formulation in Article 1 will hold and whether it will build in eternal conflict, or enable the transformation of relationships or even a more modest achievement of stable government.

Unamendable human rights and freedoms

Article 49 in the Tunisian constitution, the limitations clause, also precludes amendments that would ‘undermine the human rights and freedoms guaranteed in this Constitution.’ As noted above, individual rights protections were a battleground during constitutional negotiations, with secularists having to give ground in order for Islamists to back away from calls for the constitutionalisation of sharia. This tussle occurred not just over the eternity clause, but was also evident in compromises over the preamble, the freedom of conscience and belief, and the constitutional requirement to criminalise blasphemy. The preamble of the third draft, for example, referred to ‘[b]uilding on the fundamentals and the open and moderate objectives of Islam, on sublime human values, and on universal human rights that are in harmony with the Tunisian people’s cultural specificity’. This qualification of rights protections according to cultural specificities was opposed by lawyers and civil society members, as well as by international human rights organisations that feared such language afforded authorities great discretion to limit human rights. The current preamble maintains a reference to ‘the teachings of Islam’ but removes references to cultural specificities as qualifiers of rights protections. The right to freedom of conscience and belief also only appeared in the final draft, after sustained pressure from domestic and international actors. Renouncing the criminalisation of blasphemy, however, may have been an even more difficult hurdle for Islamists to overcome. This constitutional

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See Jacobsohn (2010).


commitment has been said to have amounted to a defensive stance of Ennahda members after years of abuses by the old regime.\textsuperscript{80} In the end, however, they compromised and accepted that the constitution was not the appropriate locus for such prohibitory language.\textsuperscript{81} Whether the balance between this issue and protections of freedom of expression and conscience has been struck coherently has been contested\textsuperscript{82} and will become clearer once constitutional jurisprudence builds on this matter.

Eternity clauses entrenching human rights commitments are numerous, in particular in post-conflict and post-authoritarian constitutions.\textsuperscript{83} The language used in these provisions differs considerably, however, from provisions precluding any amendment to, more often, requirements that amendments not lessen human rights protection. A different, and arguably more rigid, type of such clause is Article X.2 of the constitution of Bosnia and Herzegovina, which stipulates that no amendment is possible to the provision enshrining the supremacy and direct applicability of the European Convention of Human Rights and its Protocols in the Bosnian constitutional system.

The preponderance of new democracies amidst countries on this list has led some scholars to interpret unamendable commitments to human rights as serving a transformative function: ‘These examples suggest how formal unamendability may be used to help transform a state’s default posture from rights infringement to rights enforcement.’\textsuperscript{84} However, Tunisia’s provision, and others’, speaks not of outright unamendability of human rights, but of a ban on amendments that would ‘undermine’ existing rights guarantees. This is not an unprecedented drafting choice and may also be found in other post-conflict constitutions, such as in Article 149(2) of Afghanistan’s basic law, which declares that: ‘The amendment of the fundamental rights of the people are permitted only in order to make them more effective.’ It is thus best understood as a ‘non-regression’ or ‘standstill’ clause.\textsuperscript{85} In other words, as instituting a minimum standard of rights protection rather than as rendering human rights and freedoms untouchable. Such an interpretation also seems to have been developed in the case of Germany’s Article 79(3), with the German Constitutional

\textsuperscript{80} Marks (2014), p. 25.
\textsuperscript{81} Ibid., p. 26.
\textsuperscript{83} See Algeria (Article 178(5)), Angola (Article 236(e)), Brazil (Article 60(4)IV), the Central African Republic (Article 101), Chad (Article 223), Congo (Article 185), the Democratic Republic of Congo (Article 220), Ethiopia (Article 10), Guatemala (Article 40 rendered unamendable by Article 281), Kosovo (Article 144(3)), Moldova (Article 142(2)), Morocco (Article 175), Mozambique (Article 292(d)), Namibia (Article 131), Portugal (Article 288(d)), Qatar (Article 146), Romania (Article 152(2)), Russia (Article 135(1)), Sao Tome and Principe (Article 154(d)), Somalia (Article 112(3)(d)), Turkey (Article 2 rendered unamendable by Article 4), and Ukraine (Article 157).
Court having declared it to prohibit ‘a fundamental abandonment of the principles mentioned therein’. 86

How this provision will be interpreted in Tunisia’s context will therefore depend on how its Constitutional Court interprets the prohibition on ‘undermining’ rights. However, given that the very wording itself signifies a compromise between two competing constitutional identities, the Court’s role will inevitably be understood in political as well as legal terms, with reference to how it maintains or tilts the balance between secularist and Islamist interests. The Court is likely to take as its starting point a minimum standard of protection against which to evaluate new amendments, and if so, it might ground this standard in international law and comparative experience. Such transnational elements have come to permeate discussions of eternity clause enforcement in a number of different fora. These fora include: when a supranational human rights court has intervened in cases springing from the contestation of unamendable norms, such as the European Court of Human Rights in a case involving Turkey’s unamendable secularism87; when national courts themselves appeal to (and perhaps misrepresent) international human rights norms in order to justify changes to unamendable commitments, such as to executive term limits in Honduras (more on this below); and when international bodies evaluate the enforcement of unamendable provisions against a country’s international rule of law commitments, such as the Venice Commission with regard to Turkey.88 Constitutional scholarship has started to take notice of these developments and to put forth defences of international interventions in this field89 or theories which suggest the appropriate limits, rooted in transnational values, of doctrines of unconstitutional constitutional amendment.90 In all these defences, eternity clauses have been interpreted as being in line with the country’s international commitments, and the appeal to the transnational as essentially positive. One can also imagine international interventions frustrating, or being perceived as frustrating, good faith attempts at constitutional change which touch upon unamendable human rights commitments.91 The case of Sejdić and Finic, discussed more amply in the Sapiano’s contribution to this special issue, illustrates just how different national and international courts may reason when it comes to fundamental questions of a polity’s human rights commitments.92 Such disagreement may be unavoidable when courts are called upon to decide ‘first-order’

91 An example not involving human rights is the Lisbon decision, Case No. 2 BvE 2/08, 30 June 2009, in which Germany’s Constitutional Court pushed back against European integration on the grounds that it infringed upon the country’s unamendable constitutional identity as rooted in Article 79(3) of the constitution.
92 See Constitutional Court of Bosnia and Herzegovina, Case No. AP-2678/06, 29 September 2006 and Case of Sejdić and Finci v. Bosnia and Herzegovina, Applications nos. 27996/06 and 34836/06, 22 December 2009.
questions of the constitutional order.\textsuperscript{93} It also cautions against expecting the inclusion of an unamendable minimum human rights standard in the constitution to lead to predictable and stable constitutional development in any given polity.

\textit{Unamendable executive term limits}

Article 75 in Tunisia’s constitution contains one of the clearest instances of eternity clauses adopted for the purpose of protecting the integrity of the political settlement: unamendable executive term limits. The previous regime has been described as ‘one of the most personalistic’ models of authoritarian governance in the region\textsuperscript{94}, with president Ben Ali repeatedly amending the 1959 constitution to allow for his re-election.\textsuperscript{95} In such a context, fears of the re-emergence of a strong-man regime dominated negotiations over limitations on executive powers, not just via Article 75, but also via the choice of semi-presidentialism as the form of government.\textsuperscript{96} Similar considerations have been behind the adoption of clauses on unamendable executive terms in Latin American and African countries trying to overcome a history of executive overstay and coups.\textsuperscript{97}

Significantly, regional human rights bodies have also embraced prohibitions on amendments to executive term limits. Article 23 of the African Charter on Democracy, Elections and Governance, for example, lists ‘Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government’ as illegal and a cause for sanctions from the Union. The Venice Commission has defended executive term limits as ‘an important guarantee against any authoritarian dysfunctioning in a country’ and welcomed Tunisia’s Article 75 given that the country’s ‘democratic structures and their cultural foundations have not yet been consolidated.’\textsuperscript{98}

Scholars have similarly interpreted such clauses as inherently linked to countries’ experience with coups and military rule and to their desire to create functioning democracies.\textsuperscript{99} They may be viewed as an extreme version of bans on executive term extension, which are quite common in constitutions around the world, especially in presidential and semi-presidential systems.\textsuperscript{100} The Twenty-second Amendment to the United States constitution, Article 6 of the French constitution and Article 52 of the German Basic Law are examples of such clauses in three of the most influential fundamental laws. Limitations on the number and length of


\textsuperscript{94} Frédéric Volpi, ‘Explaining (and Re-explaining) Political Change in the Middle East during the Arab Spring: Trajectories of Democratization and of Authoritarianism in the Maghreb’, \textit{Democratization}, Vol. 20, No. 6 (2012), p. 978.


\textsuperscript{96} Marks (2014), p. 28.

\textsuperscript{97} Among these are: the Central African Republic (Article 108), El Salvador (Article 248), Guatemala (Article 281), Honduras (Article 374), Mauritania (Article 99), Guinea (Article 154), Madagascar (Article 163), Niger (Article 136), Qatar (Article 147), The Republic of Congo (Article 185), and Rwanda (Article 193).

\textsuperscript{98} Opinion on the Final Draft Constitution of the Republic of Tunisia, para. 215.


term limits have been found to be on the rise,\textsuperscript{101} and they have come to be called ‘one of the defining features of democracy’.\textsuperscript{102}

How unamendable term limits such as Tunisia’s work in practice is less straightforward, however. On the one hand, these types of rules present obvious advantages, particularly in the long run: ideally, they ensure rotation of office, limit incumbent advantage in elections, and encourage political competition; conversely, they can be viewed as an illiberal constraint on citizens’ choice, discouraging experienced governance and underestimating the potential disruptive role of ex-leaders, and are potentially abused.\textsuperscript{103} They are sometimes suspected of inducing constitutional predicaments rather than preventing them, because they may not reduce the likelihood of presidents overstaying—they merely transform presidential overstay into a more acute form of constitutional crisis.\textsuperscript{104} Some empirical studies testing these assumptions have called term limits ‘surprisingly effective in constraining executives from extending their terms, at least in democracies.’\textsuperscript{105} Moreover, the very bluntness, black and white nature of these rules may be linked to their successful enforcement.\textsuperscript{106} The same empirical studies, however, indicate that, while not ‘associated with the death or disability of democracy’, term limits may in some circumstances trigger early constitutional replacement.\textsuperscript{107}

Honduras’s 2009 constitutional crisis and deposition of President Manuel Zelaya may yield lessons for Tunisia’s emerging democracy. The Honduran crisis brought to the fore precisely how destabilising presidential term limits may be in a fragile democracy, especially when they are declared unamendable. Zelaya had attempted to organise a non-binding public consultation around the holding of a referendum on whether to set up a body tasked with changing the constitution’s term limit, but was opposed by the judiciary, parliament and the military. Despite his protestations to the contrary, many in the country saw this as Zelaya’s attempt to override the one-term limit. This included the Constitutional Chamber of the Honduran Supreme Court, which held that the proposed referendum could not go ahead as it was in breach of the constitutional term limit. The constitutional crisis resulted in the president’s forceful removal from office by the military and exile.\textsuperscript{108} A Supreme Court judge would justify this as nothing more than the military carrying out a lawful arrest warrant\textsuperscript{109} and many agreed that, while the methods employed were unfortunate, there was also a

\textsuperscript{102} Maltz (2007), p. 129.
\textsuperscript{106} Ibid., p. 1868.
very real threat to democracy had plans to override the executive term ban gone ahead.\textsuperscript{110} Others, however—including eventually the United States—understood the arrest and removal of Zelaya as a form of coup or unconstitutional regime change.

The role played in the crisis by the Honduran constitution’s eternity clause on executive term limits (Article 374) is therefore complicated.\textsuperscript{111} Some commentators saw the term limit provision and its double entrenchment as the immediate cause for the 2009 crisis precisely because it made for indeterminacy.\textsuperscript{112} Others were careful to distinguish between the substantive prohibition on term limit extension and the ‘second-order proscriptions on debate or proposal of amendments.’\textsuperscript{113} The latter opined that, while some core issues may best be protected by taking them off the table, term limits ‘do not seem so contentious as to prohibit all discussion of [such limits].’\textsuperscript{114} Others still, placing Honduras in a wider Latin American context, saw Zelaya’s bid as an effort at ‘constitutional subterfuge’: using the cover of legality to break down constitutional barriers to their re-election.\textsuperscript{115} Perhaps a more nuanced interpretation would be that the conflicting claims of legitimacy—Zelaya’s on the basis of his popularity in office and that of his opposition on the grounds of clear constitutional language—were not and could not be reconciled on the basis of the constitution’s eternity clause. The Supreme Court intervened in a context of deep political divisions within the country, attempting to halt the capture of the state by one side, and was thus accused of enabling its capture by the other. Whether the eternity clause, or any constitutional mechanism for that matter, could be relied on to resolve this type of fundamental dispute is doubtful.

This reading may have been borne out by subsequent developments in Honduras. In a 2015 decision, the Constitutional Chamber of the Honduran Supreme Court (with a different composition to 2009) declared the ban on presidential re-election unconstitutional and effectively repealed article 239.\textsuperscript{116} It found the article to be in conflict with the freedoms of


\textsuperscript{111}The prohibition on re-election is compounded by additional constitutional provisions which attach severe penalties to its breach or attempted breach (see Articles 239 and 42).

\textsuperscript{112}Albert (2010), p. 692. He states: ‘It was none other than this constitutional clause that pit the leading popular democratic institution in Honduras—the presidency—versus the other national democratic institutions, namely the legislature, courts, and leading independent bodies.’


\textsuperscript{114}Ibid.


speech and thought; to unduly limit political participation and debates; to be contrary to international human rights obligations; and to have been relevant at an earlier time, but no longer because Honduras had stabilized its democracy. Moreover, the court relied on the recommendations of the truth commission set up by Zelaya’s successor to clarify the events of 2009 and to make recommendations meant to prevent such crises. The latter had found the actions of the military in ousting Zelaya to have been illegal and unjustifiable and called for comprehensive constitutional reform. This decision not only made curious use of the unconstitutional constitutional amendment doctrine—declaring a provision of the constitution itself unconstitutional, not an amendment—but it also invoked international human rights standards in a dubious manner, and possibly against their core purposes. It may also have shown unamendability to be surmountable when faced with enough political pressure and arguments about its newfound irrelevance.

Honduras’s case is instructive primarily in showing how serious the consequences of unamendable executive term limits can be, or else how limited their capacity to withstand pressures to capture the presidential office in divided societies. The inclusion of these clauses in the constitution may lead to crisis when actors wishing to repeal such an eternity clause gain sufficient power but find themselves in a standoff with other political actors or with the judiciary. The relevance of debates on the wisdom of entrenching executive term limits has been proven no more recently than during 2015, when a number of African countries struggled with contestations of limits on presidential re-election. For example, the announcement that Burundi’s president would seek a third term in violation of the constitutional limit of two sparked violent clashes in the country; it was subsequently approved by the country’s Constitutional Court but challenged before the Court of the East African Community in July 2015. Rwanda’s president similarly set in motion a process of constitutional change when he indicated a wish to be elected for a third term. While these two post-conflict constitutions do not formally render term limits unamendable, they serve to highlight the continued relevance of constitutional mechanisms for containing executive usurpation. It is unsurprising, therefore, that Tunisia, a country emerging from decades of authoritarian rule, would seek to protect its nascent multiparty democracy by entrenching limits on executive power. Whether those limits could withstand a crisis such as

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Honduras’s is not a given and will depend to a great extent on balance of power considerations at the time.

**Unamendable amnesties**

Also potentially attractive to post-conflict and post-authoritarian constitution-makers are amnesties absolving certain groups and their leaders from responsibility for past actions. The constitutionalisation of amnesties for human rights violations was first achieved in South Africa, where it was made conditional upon the fulfilment of certain conditions such as public apology and voluntary confession.\(^{123}\) Amnesties have been elevated to unamendability in basic laws such as the 2010 constitution of Niger or the 2013 Fijian basic law.\(^{124}\) The former protected Article 185, which had declared that ‘An amnesty is granted to the authors, co-authors and accomplices of the coup d’état of eighteen (18) February 2010.’ The latter included extensive provisions on immunities and amnesties for conduct during the 2006 Fijian coup d’état and declared a 2010 decree having provided for these immunities and amnesties as not subject to review (Chapter X). In Tunisia, the approach taken was precisely to stipulate that no amnesties would prevent transitional justice (Article 148(9)), although that article was not declared unamendable.\(^{125}\)

Amnesties may be viewed as the best example of how the normative aspirations of a constitution—to the consolidation of democracy, the rule of law, and human rights protections—come into tension with the elite deals necessary for political settlements in post-conflict settings. On the one hand, the intention behind the entrenchment of such amnesties seems clear: it provides guarantees to formerly warring parties that they will not face prosecution once the new constitution comes into force and as such ensures their buy-in for the broader political settlement. Some scholars agree and view these as a separate type of eternity clause they call ‘reconciliatory’, whose aim is:

to avoid a contentious and potentially destabilizing criminal or civil prosecution of wrongdoers by putting prosecution off the table altogether. The goal is instead to allow opposing factions to start afresh, free from threat of legal action, and sometimes in tandem with a Truth and Reconciliation Commission to give victims the opportunity to air their views.

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and to record their memories but without invoking the consequence of legal duty and violation.126

Other scholars, writing on the Fijian provisions, point to their origin in backlash against a Court of Appeal decision declaring the 2006 seizure of power as illegal; the 2013 Fijian constitution thus sought to legitimate the regime but also to curtail the expansion of judicial power.127

On the other hand, the constitutionalisation of amnesties will not extinguish the complexity involved in addressing past wrongdoings during post-conflict transitions. The South African Constitutional Court acknowledged as much in a case involving a challenge to amnesties for criminal and civil liabilities granted to perpetrators having disclosed the truth about past atrocities.128 The Court upheld the granting of amnesties but limited its analysis to a review of constitutionality, while at the same time acknowledging that the case involved a difficult, sensitive, perhaps even agonising, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future... It is an act calling for a judgment falling substantially within the domain of those entrusted with law-making in the era preceding and during the transition period.129

In other words, the Court deferred judgment on the appropriateness of amnesties as reconciliation devices to lawmakers and restrained its own intervention on the matter to a constitutionality check, but perhaps with inadequate consideration of international human rights law.

Unamendability in this case thus primarily serves to indicate the commitment of drafters to maintaining amnesties beyond the ratification of the new constitution. Such pledges are especially important to minority or weaker parties, who may otherwise fear that the majority would amend constitutional amnesties once the basic law is ratified. The granting of amnesties in general carries legitimacy problems which hark back to peace versus justice debates and to controversies over the rise of individual criminal responsibility in international law.130 Alternatively, problems may arise if an eternity clause enshrining amnesties is one-sided, for instance where amnesties are granted to one party to the conflict but not to the other. The few examples of unamendable amnesties we have thus far suggest that the primary objective behind their adoption is reaching agreement around a political settlement and the legitimation of a new regime, all of which are sought before the adoption of the new constitution. How such unamendability would fare were it to be seriously contested post-ratification remains at the level of speculation for now. Without a doubt, however, any such contestation would expose the uneasy relationship between the

128 Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others 1996 (4) SA 672 (CC), 25 July 1996.
129 Ibid., para 21.
political agreement having made the constitution possible and the latter’s normative aspirations.

IV. Alternatives to unamendability in post-conflict constitution-making

Given the many unknowns of unamendability highlighted in section III, and the possibility that it fails to conserve the consensus which makes the constitution possible, are there more attractive design tools which may achieve the same endurance of the political settlement while avoiding the pitfalls of too rigid a constitution? Conversely, is the entire pursuit of one or more discrete institutions of constitutional survival misdirected? Given the fragility of post-conflict and post-authoritarian political settlements and the weak institutional milieus in which they operate, should we instead focus on strategies to bring about a democratic constitutional culture rather than on placing certain commitments outside the reach of constitutional amendment? Are there constitutional design options which combine these two aims? These questions will be briefly explored here, with the caveat that this is merely a preliminary foray into the matter. The discussion is intended to place eternity clauses within a broader constellation of constitutional mechanisms for entrenchment or expression and as such to raise questions about the utility of resorting to unamendability. References are again made to the Tunisian case and, where evidence of this exists, to the concrete reasons why drafters there discarded these alternatives and chose unamendability instead. The reader should not expect prescriptions based on this unavoidably cursory exploration, but begin considering what renders the promise of eternity clauses distinctive as a tool for reaching and entrenching political settlements in transitional contexts.

Interim constitutions

Several alternative institutions have been used with a view to preserving an initial agreement. One such tool, interim constitutions, has been discussed in detail by Rodrigues and by other scholars.131 They act as mediating tools, gaining more time for the constitution-making process and may facilitate the adoption of ‘a more durable and more optimized constitution’.132 Rodrigues’s argument—that given the extremely fluid political and security environments in which post-conflict constitution-making occurs, the drafting process itself should have some in-built fluidity such as the use of an interim constitution—resonates with other scholars’ advocacy for a ‘multi-track constitutionalism’.133 It is an argument with particular relevance to eternity clauses and can work in two ways. Insofar as

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eternity clauses aim to insulate from amendment values or principles deemed essential to the polity, their drafting may benefit from a more inclusive and transparent process once conditions on the ground are more stable. A society-wide debate on whether unamendable language or religion are opportune may stand better chances of taking place once the situation has become more peaceful in the country.

Conversely, interim constitutions may themselves contain unamendable commitments which are then taken up, or not, in the permanent constitution. This was in a sense the method adopted in South Africa134 and arguably, given the initial temporary nature of the Basic Law, in Germany.135 An interim constitution may have the advantage of securing consensus around certain non-negotiable principles without which there may not be any political settlement at all. Given that the 1996 South African constitution does not contain an eternity clause, the inclusion of such immutable principles in its 1993 interim constitution (Section 74) functioned similarly to a sunset clause. The permanent South African constitution includes a differentiated amendment procedure with a high threshold of seventy-five per cent for amendments to Article 1, which lists the values underpinning the state, the supremacy of the constitution, citizenship, the national anthem and flag, and the official languages, and to Article 74, which stipulates the amendment procedure itself. Thus, constitution-makers in South Africa opted for a high degree of entrenchment of certain values but not complete unamendability. They also entrusted the interpretation of the new constitution to an empowered constitutional court, whose task it would be to act as guarantor of rights and democracy.136

After the Jasmine Revolution, the newly-elected Tunisian legislature also assumed the role of constituent assembly, invalidated the 1959 constitution, and instituted a provisional legal regime, under which the basics of power arrangements in the state were stipulated together with the working rules of the constituent assembly itself.137 This transitional legal regime has been criticised as insufficient for the needs of the post-authoritarian Tunisian context and as containing discriminatory provisions, and the absence of a mechanism of judicial review has in particular been pointed to as problematic.138 Presumably, drafters

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135 However, it has been argued that the temporary nature of the German Basic Law was meant in a geographic sense and did not refer to its substantive commitments: ‘[t]he Basic Law in general and especially the decision to institute democracy as well as for the rule of law was...definite.’ Werner Heun, The Constitution of Germany: A Contextual Analysis, Oxford: Hart Publishing, 2011, p. 10. See also Ernst Benda, ‘The Protection of Human Dignity (Article 1 of the Basic Law)’, in Fifty Years of German Basic Law: The New Departure for Germany, Conference Report, American Institute for Contemporary German Studies, Johns Hopkins University (1999), p. 36.


137 For a more in depth discussion, see Carter Center Report, p. 25.

were well aware of the option of adopting more comprehensive interim legal provisions. Neighbouring Egypt had itself adopted a fraught Constitutional Declaration in March 2011 and Iraq had also experimented with the well-known (and also fraught) Transitional Administrative Law. The level of detail and scope of issues covered by interim constitutions in conflict-affected states has historically varied, and Tunisia’s choice to invest its post-revolutionary energy into drafting a new permanent constitution was likely a deliberate choice.

*Sunset clauses*

Sunset clauses are another alternative to eternity clauses and may be understood as mechanisms of temporary absolute rigidity which are set to expire at a given point in time or once certain conditions have been fulfilled. One of the best known examples of constitutional sunset clauses was incorporated into the constitution of the United States: amendments to Article I, Section 9, clauses 1 and 4, which protected the importation of slaves and prohibited some capitation taxes, were prohibited until 1808. The lineage of this type of law-making, however, goes back as far as ancient Athens, and continues to be employed in constitutional design today. The presumed advantage of sunset clauses is that they allow stability to trump constitutional flexibility, but not indefinitely. The implicit suppositions behind their use are that something significant will change in the intervening period, that entrenchment is required during democratic consolidation but will not be later, and that the need for ‘gag rules’ will diminish and spirits will cool. Jennifer Widner has highlighted the potential utility of sunset clauses in post-conflict situations for precisely their capacity to reduce passions and has given the examples of South Africa, Bougainville, and Uganda as places where sunset clauses have played a positive role in constitutional transitions. Interestingly, the second Tunisian draft had included a sunset clause alongside an unamendability provision, banning amendments for a period of five years after the constitution would enter into force. Entrenching the hard-fought gains of the drafting process was clearly on the minds of its architects.

When compared to eternity clauses, on their face, sunset provisions seem to achieve many of the same objectives without the downsides of long-term rigidity: they may facilitate and safeguard initial agreement without frustrating constitutional evolution further down the road. However, to the extent that unamendability is resorted to precisely so as to preclude any renegotiation of principles, irrespective of democratic consolidation or any changes in circumstances, then sunset clauses may not be adequate replacements. Indeed, sunset

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clauses themselves have been viewed as especially rigid constraints on future generations to the extent that they may trigger the artificial abandonment of an otherwise well-functioning constitution. More significantly, however, is the fact that sunset clauses are accompanied by much insecurity: the delicate balance of powers achieved at the time of drafting the constitution may change dramatically by the time a sunset clause is set to expire. Parties to a political settlement may thus not wish to take the risk of their initial bargain unravelling in a context in which they do not wield sufficient power and may opt for permanent unamendability instead. In Tunisia’s case, the final compromise on Article 1 may be especially sensitive to changes in the balance of power, as may be the unamendable presidential term limit.

Deferral

Other means of reaching agreement over a constitution which may function as alternatives to unamendability may be less obvious. One mechanism would be the deferral—understood as the deliberate choice of drafters to postpone deciding on certain contentious elements of constitutional design—defensible on grounds similar to those underpinning sunset clauses: that a solution can be reached once passions subside. There is some evidence that in cases where deferral was not embraced in the constitutional design, the likelihood of ‘significant pressures for whole-scale constitutional replacement, as opposed to amendment’ increased.147

Applying this to eternity clauses which were adopted in a non-inclusive, contested manner, one might expect them to be the source of continued instability in the polity and potentially to trigger early constitutional replacement. More generally, the literature on incrementalism suggests that not deciding everything during drafting may allow for the gradual development of consensus which a more specific initial draft would preclude.148 However, in cases where no initial consensus is possible without certain ironclad guarantees, included in the eternity clause, prospects for more consensus down the line may not be better. To the extent that unamendable provisions in the constitution provide assurances without which constitutional negotiations would break down, deferral of the principles these provisions enshrine may not seem to be a feasible solution. Considering this option in the case of Tunisia, it is impossible to imagine a political settlement being reached at all if the most contentious issues during negotiations, later declared unamendable, had been postponed. The climate of insecurity and distrust among the political actors have likely prevented deferral from amounting to a meaningful constitutional design option, at least with regard to the elements of the eternity clause.

**Ambiguity**

Similar to deferral is deliberate ambiguity in constitutional language. It is a mechanism for accommodating diversity in spite of deep uncertainty at the time of drafting a new constitution. The Indian constitution, for example, had to fit but also unify a diverse society rife with religious, social, ethnic, linguistic, and regional tensions, a mission accomplished via what one scholar has termed ‘constructive ambiguity’: embracing such conflicts and importing them into the constitution via the deliberate ambiguous formulation of constitutional provisions.\(^{149}\) This was a strategy to accommodate diversity and allow room for the uncertainties at the time of founding (such as the fate of Muslims in newly independent India) and led to the development of a distinctive type of legal pluralism.\(^{150}\) Ambiguity has broader application and has been used as a tool in the constitutional adjudication of contentious issues such as sub-national secessionist claims.\(^{151}\)

In a sense, ambiguity is already embedded in eternity clauses by their very nature: unamendable commitments to democracy, the rule of law, or human rights will only lose their vagueness once operationalized in legislation or case law. In the case of other unamendable provisions such as executive term limits, it is precisely their unambiguous statement which renders them appealing to drafters. However, describing the relationship between the state and an official religion or language in more ambiguous language as the Tunisian constitution does may leave room for more inclusive constitutional evolution. This ‘semantic ambiguity’ in the Tunisian constitution was a deliberate choice made by drafters who sought compromise on the religious framework, and was coupled with the ‘terminological polysemy of Article 6’ (which declares the state the ‘guardian of the sacred’).\(^{152}\) This shows ambiguity to not necessarily be an alternative to eternity clauses but to be compatible with declarations of unamendability.

**Silence**

Both deferral and ambiguity are cousins of another, perhaps more controversial drafting technique: constitutional silence. Also termed ‘abeyances’, constitutional silences have been explored as useful in mediating constitutional crises.\(^{153}\) They have been referred to as ‘an intermediate layer of obscurity’, between uncodified custom and positive law, which ‘accommodates those implicit understandings and tacit agreements that could never survive the journey into print without compromising their capacious meanings and ruining their effect as a functional form of genuine and valued ambiguity.’\(^{154}\) Vicki Jackson has also recently speculated on the potential usefulness of silence in constitution-making.\(^{155}\)


\(^{150}\) Ibid., p. 149.


\(^{152}\) Bousbih and Yaalaoui (2015), pp. 17, 19.


\(^{154}\) Ibid., pp. 8-9.

\(^{155}\) Vicki Jackson, ICON-Society Annual Conference, New York, 1 July 2015.
Thus, whereas deferral postpones decisions on disputed matters and ambiguity addresses them in purposefully obscure language, constitutional silence implies drafters say nothing at all on a particular issue. In that way, it is the starkest alternative to eternity clauses. In practice, opting for silence might take the form of no provision at all on official languages, religion, or on other controversial state characteristics. Presumably, some of these could be legislated on at a later time, but not constitutionalising them may lower the stakes of such later negotiations. However, the meaning of silence in the constitutional text will invariably depend upon its subsequent interpretation. This would in turn raise the stakes of negotiations over the body entrusted with such interpretation, presumably a constitutional court, with the battleground over safeguarding the political settlement fought over issues of judicial appointments, independence, and powers. This is already apparent in Tunisia, where the draft law to finally establish the new constitutional court has generated fierce debate. Moreover, the same conditions of uncertainty which reduced the likelihood of drafters in post-conflict settings resorting to deferral or ambiguity may also apply to silence. To the extent that their concern is precisely with enshrining the hard-fought political agreement into the constitution, they are likely to be unwilling to be content with not doing this explicitly, or to risk its undoing by way of later judicial interpretation.

V. Conclusion

The recourse to constitutional unamendability has hitherto been explained on mostly normative grounds and in terms that emphasise the importance of fundamental value commitments for the development and endurance of constitutionalism in a given order. Less attention has been paid to eternity clauses as tools of elite pacting, particularly in post-conflict settings. As Jonathan Di John and James Putzel remind us, the political settlements which precede the ratification of new constitutions should not be idealised as embodying a ‘common understanding between elites’ – they are instead the result of arduous bargaining and contending claims that are resolved only partially and incrementally.156 This article has argued that these bargains are especially difficult during post-conflict constitution-making, and that unamendability in post-conflict constitutions plays quite a different role than in peaceful transitions. Eternity clauses thus serve as guarantees which facilitate the pre-constitutional political agreement necessary for the constitution to come into being, and offer reassurance to parties that their interests will not be amended out of the fundamental law once it is adopted. It is a promise which other, less rigid mechanisms of constitutional design may not be able fulfil. Moreover, by exploring other transitional contexts where eternity clauses have been adopted, this article has argued that these provisions may have unpredictable consequences. In other words, unamendable provisions may facilitate an initial political settlement, but the latter’s survival will nevertheless depend on subsequent dynamics (especially their interpretation by constitutional courts).

The case of Tunisia has been used as illustration for the distinctive problems and prospects of unamendability in a post-conflict constitution. The 2014 constitution has been heralded as a significant achievement on the country’s path to democratisation. Commitments to human rights standards and the curtailment of executive power were hard-fought and may be seen as attempts to minimise the risk of authoritarian backsliding. However, this article has shown that other unamendable provisions on the identity of the state, notably its relationship to religion, may prove to be more problematic because they speak to on-going contestation and a fragile elite pact over the nature of the state. The ability of such clauses to protect the political settlement can only be proven in practice and depends on constitutional interpretation. Given that the law on a Tunisian Constitutional Court has still not been adopted as of the time of writing means there is still some way to go before constitutional jurisprudence can shed light on these issues. The constitution’s capacity to balance forces within Tunisian society may be tested sooner than its drafters may have expected, however. Threats to the delicate bargains struck in the constitution already loom, such as the rise of the radical Islamist group Ansar al-Sharia, spurred by Salafism’s appeal to marginalised groups,157 or the parliamentary crisis triggered by the November 2015 resignation of members of parliament due to fears that the president was trying to institute a new dynasty.158 How Tunisia’s constitution fares in the face of such challenges will tell us much, not just about the utility of eternity clauses in transitional constitution-making, but about the capacity of constitutions themselves to safeguard the political settlements which made them possible in the first place.

The Alchemists: Courts as Democracy-Builders in Contemporary Thought

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Abstract

Can courts really ‘build’ democracy in a state emerging from undemocratic rule? In contemporary thought, courts are perceived as central components in any political settlement aimed at achieving a functioning democratic order in a previously authoritarian state (this piece, unlike others in the special collection, does not specifically address post-conflict contexts). The past four decades have witnessed an increasing tendency in post-authoritarian states to place significant faith in courts as guardians of the new democratic dispensation—a trend replicated in contemporary democracy-building projects (e.g. Tunisia). Constitutional courts (including supreme courts) are expected not only to breathe life into the paper promises of the democratic constitutional text, but also, increasingly, to guard and build democracy itself by policing political adherence to emerging transnational norms of democratic governance. Outside the state, regional human rights courts have also been cast as democracy-builders, acting as a support, back-up mechanism, and even surrogate for domestic courts. Yet, despite this ‘court obsession’, our understanding of courts as democracy-builders remains critically underdeveloped. This article argues that while it has been assumed that courts have a central role to play in democracy-building, this assumption is based on rather slim evidence and undermined by yawning gaps in existing research.

Keywords
Courts; judicial review; democracy-building; democratisation; political settlements

I. Introduction: Tunisia’s court-centric new democracy in perspective

Since the Second World War, rights and review have been crucial to nearly all successful transitions from authoritarian regimes to constitutional democracy [...]. Indeed, it appears that the more successful any transition has been, the more likely one is to find an effective constitutional or supreme court at the heart of it...

Alec Stone, 2012¹

¹ A Stone, ‘Constitutional Courts’ in M Rosenfeld and A Sajó (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press, 2012) 827.
Courts have become central to our thinking on democracy-building in post-authoritarian states in the past four decades, including contemporary movements toward democratic rule worldwide, from Nepal to Zimbabwe. Take Tunisia. Five years ago, street vendor Mohamed Bouazizi struck the match that ended his life and sparked the Arab Spring, ushering in a phase of revolutions, constitutional reforms and potential democratic transitions in a region that had long been viewed as culturally hostile to liberal democracy. Fast forward to 2016, and Tunisia remains a fragile seat of hope for the entrenchment of democratic rule in an increasingly volatile neighbourhood. The state has achieved the enactment of a democratic constitution drafted in an inclusive process, and the potential for a functioning democratic politics—albeit beset by significant threats from terrorism, remnants of the old regime and profound distrust between Islamist and secular political forces.

As Silvia Suteu highlights elsewhere in this collection, the Tunisian democracy-building project is doubtless occurring in a more difficult regional context than previous region-wide democratisation processes, in Southern Europe, South America, and Central and Eastern Europe from the 1970s to the 1990s, as well as single-state transitions in other regions (e.g. South Korea, South Africa). These generally occurred in an overall atmosphere of peace and relative stability. Yet, the Tunisian story to date has followed a pattern that has become increasingly familiar worldwide since the so-called global ‘third wave of democratisation’, which began with Portugal’s Carnation Revolution of 1974. This pattern is rather simple: movement toward electoral democracy is made in an authoritarian state, whether by revolution or more peaceful means, and the resulting free and fair elections are accompanied by a novel or wholly revised constitution giving voice to the new democratic political settlement. Each time, a court is placed at the centre of the new order, not simply to guard the new constitution, but, more widely, to serve as a central engine of the democracy-building project. In essence, courts with the power to have the ‘final say’ on constitutional and governance matters (i.e. ‘strong-form’ judicial review) have become ‘standard equipment’ for states transitioning from authoritarian rule—mirroring the adoption of strong-form judicial review in post-conflict states analysed by Jenna Sapiano.

Faithful to this pattern, as discussed by Silvia Suteu, Tunisia has placed emphasis on a court as the central guardian of the new democracy. The drafters of the 2014 Constitution opted to replace an existing advisory constitutional council with a constitutional court enjoying an expansive array of powers, as ‘the centerpiece of the Tunisian legal order.’ The new court, which has yet to be established, is empowered not only to assess the validity of legislation,
Bills and even international treaties against the Constitution, but also to assess proposed constitutional amendments, decide on impeachment of the President, and to act as an arbiter in potential constitutional crises (e.g. disputes between the president and prime minister, states of emergency, or temporary vacancy of the presidency). This is far from an isolated case. Courts are centre-stage in other democracy-building processes across the globe; such as those in Nepal, Libya and Kenya.

The spread of democratic rule globally has also seen adjudication beyond the state increasingly linked to democracy-building: the Inter-American Court of Human Rights began to carve out its role in the late 1980s, as a democratic wave swept Latin America; the role of the European Court of Human Rights assumed a democracy-building role in the 1990s with the accession of new democracies from the former Communist sphere; and, most recently, the African Court of Human and Peoples’ Rights began issuing strong merits judgments in 2013 on matters such as electoral rules, free speech and fair trial. Other developments have added to a heightened ‘court obsession’ linking international adjudication with democratic rule, including the Arab League’s announcement in September 2014 that it will establish an Arab Court of Human Rights (now reportedly close to establishment, albeit widely derided as a democratic ‘fig leaf’), calls for the establishment of human rights courts for the remaining world regions (Asia and the Pacific), and even calls for a World Court of Human Rights. Perhaps the most explicit linkage of courts and democracy-building is a (now defunct) formal Tunisian proposal for an International Constitutional Court, to issue decisions on mass rights violations, the holding of elections and serious violations of international law principles related to democracy. Other courts could also be included here—for example, the South African Development Community (SADC) Tribunal, the East African Court of Justice (EACJ), or the International Criminal Court (ICC). However, this article confines its focus to constitutional courts and regional human rights courts, which have generally been presented as the central judicial ‘democracy builders’ in both scholarship and policymaking.

Yet, this growing ‘court obsession’ and the decades-long trend toward freighting courts with an ever-increasing democracy-building role is significantly undermined by the highly fragmentary and underdeveloped nature of our understanding of the roles these courts play

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6 See Articles 118–125 of the 2014 Constitution. Articles 80, 84, 88 and 144 set out additional functions.

7 For instance, Kenya’s constitutional reform process, centred on the new Constitution of 2010, included the establishment of a ‘new’ Supreme Court with broader jurisdiction and powers than its previous iteration. Libya’s draft constitution of April 2016 envisages the establishment of a powerful Constitutional Court (Article 150).


11 See e.g. M Nowak, ‘On the Creation of a World Court of Human Rights’ (2012) 7 National Taiwan University Law Review 257.

This article, by anatomising contemporary thinking on courts as democracy-builders and focusing on the most important gaps in our knowledge, argues that dominant conceptions of courts as central to democracy-building are based on disquietingly shaky foundations. The first section briefly maps existing scholarship, the second section addresses the meaning of ‘democratisation’ as a concept central to democracy-building, the following two sections address the source of our obsession with constitutional courts and the debate surrounding their roles as democracy-builders, and the final section addresses the state of thinking on regional human rights courts as democracy-builders. The article concludes by proposing a research agenda to address these knowledge gaps.

II. Mapping the landscape of contemporary thought

There is no defined research area devoted to courts as democracy-builders. Existing research is scattered across a wide array of distinct but overlapping research fields, generally consisting of a shared terrain between two key disciplines—political science and law. On even a short roll-call are legal theory, political philosophy, comparative constitutional law, judicial politics, transitional justice and international human rights law. Scholars in these areas, as may be expected, address the roles of courts from different angles: constitutional comparativists tend to focus on the extent to which constitutional courts in new democracies resemble those in long-established democracies, or one another, as well as institutional and jurisprudential innovations, and forms of ‘international constitutionalism’; legal theorists and political philosophers are preoccupied with the democratic legitimacy and source of these courts’ authority; while political scientists analyse courts at both the domestic and regional levels as ‘political’ actors, comparable to other sites of political power (e.g. executives, legislatures).

Throughout this scholarship, the analyses of leading thinkers often give the impression that both constitutional courts and regional human rights courts have played key roles to date as democracy-builders. Alec Stone, quoted at the outset, has stated: ‘The [constitutional court] has proved its worth as an instrument for consolidating constitutional democracy.’ Samuel Issacharoff, in his recent work Fragile Democracies, pursues this argument at length:

In country after country, the transition to democracy is eased by the creation of a court system specifically tasked with constitutional vigilance over the exercise of political power. All the new democracies have either created constitutional courts or endowed supreme courts with ample power of judicial review to enforce the democratic commands of the constitution. What is striking, and perhaps distinct, about the Third Wave of

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14 Stone (n 1) 819.
democratization is the central role assumed by these apex courts in sculpting democratic politics.  

As regards regional human rights courts, James Sweeney asserts that the European Court of Human Rights ‘has been a vital part of European democratic consolidation and integration for over half a century’. Nina Binder opines that the Inter-American Court’s ‘far-reaching exercise of authority in the field of amnesties and the broad interpretation of its own mandate seem to further democratization in various Latin American countries.’

Of course, to some extent the role of courts in ‘building democracy’ is a perennial. John Hart Ely’s theory of judicial review in his seminal work *Democracy and Distrust*, for instance, argued that the US Supreme Court’s core role should be to reinforce democratic governance by ensuring broad participation in electoral and decision-making processes, and fair representation of all (including minorities) by those elected. However, the focus here is not on courts reinforcing democratic governance in Western states which enjoyed a slow march toward democracy, such as the US or the UK, but on the trend since the 1970s in particular to expect courts to act as central engines of a more rapid democratisation process in the first decades of a post-authoritarian polity.

Systematic analysis of the roles of constitutional courts as democracy-builders in such states can be traced to a focus on the highest courts of Latin America in the early 1990s, as countries in that region grappled with the task of entrenching democratic rule. In the intervening quarter-century, successive regional studies, and country-specific studies, have shone light on the roles played by constitutional courts (including supreme courts) in the post-authoritarian democracies of Central and Eastern Europe, Asia, Latin America (again) and Africa—although, with the exception of South Africa, the latter region remains relatively unexplored. On one level, this scholarship simply suggests that courts in new democracies carry out concrete tasks similar to courts in mature democracies: vindicating fundamental

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rights; adjudicating on inter-branch (and often centre-periphery) disputes; and providing authoritative interpretations of contested provisions in the constitution.

However, scholars have also consistently identified distinctive aspects of the roles constitutional courts carry out in new democracies, as compared to mature democracies: addressing transitional justice questions, such as the validity of amnesty laws and trials of former regime officials; invalidating unconstitutional and authoritarian-era laws; and, in some cases, addressing the very constitutionality of constitutional amendments in order to combat what David Landau terms ‘abusive constitutionalism’\(^{21}\)–where democratically elected actors seek to hollow out democracy and constitutional constraints through procedurally legitimate constitutional procedures.\(^{22}\) For instance, Silvia Suteu discusses attempts to do away with executive term limits in Honduras and various African states in another contribution to this collection. Less tangible roles suggested by various scholars include fostering a new legal and political culture wedded to democratic constitutionalism;\(^{23}\) providing a focal point for ‘a new rhetoric of state legitimacy, one based on respect for democratic values and rights’;\(^{24}\) and educating the people on ideals of representative democratic government, thereby ensuring the informed citizenry on which the principle of popular sovereignty rests.\(^{25}\) These roles all tend to place the court centre-stage in navigating the shift from the old to the new regime, as a key actor in the after-life of the initial political settlement underlying the democratic transition.

It is only since the late 2000s that there has been any sustained focus on the role of regional human rights courts as democracy-builders, and the lion’s share of attention has gone to the European Court of Human Rights.\(^{26}\) The dearth of research on the African Court of Human and Peoples’ Rights is understandable, given that it did not issue its first merits decision until 2013.\(^{27}\) However, the relative lack of research on the Inter-American Court of Human Rights as a democracy-builder is rather surprising, given that it has been operating fully since 1988 in a region dominated by new democracies, although recent ground-breaking work by Alexandra Huneeus in particular has begun to fill this gap.\(^{28}\) What scholarship exists suggests that these courts carry out a somewhat similar role to constitutional courts, such as


\(^{22}\) See generally the works cited at (n 20).


\(^{24}\) Stone (n 1) 827.

\(^{25}\) I Stotzky, ‘The Tradition of Constitutional Adjudication’ in Stotzky (n 19) 349.

\(^{26}\) See A Buyse and M Hamilton (eds), Transitional Jurisprudence and the ECHR: Justice, Politics and Rights (Cambridge University Press, 2011), which includes analysis of the Inter-American Court; Sweeney (n 16); C McCrudden and B O’Leary, Courts & Consociations: Human Rights versus Power-Sharing (Oxford University Press, 2013); and D García-Sayan, ‘The Inter-American Court and Constitutionalism in Latin America’ 89 Texas Law Review 1835 (2010-2011).


vindicating core human rights, constraining arbitrary exercise of State power, and addressing the validity of transitional justice processes—albeit one that is shaped by the very different institutional position and powers of a regional court, which lies outside any particular democratisation process and which is charged with upholding a pan-regional bill of rights, rather than a constitution. Some even characterise the step of ratifying a regional human rights convention and submitting to a regional court as important in themselves, as ‘symbolic and legal markers which reflect key steps in a transition process’.29

There is, then, a dominant narrative that courts are central to democracy-building, and that there is something special about the roles both domestic and constitutional courts play as democracy-builders. However, there remain crucial gaps in our understanding of the roles courts actually play, and how they interact. The following sections address four key deficiencies.

II.  Democratisation: A conceptual tangle at the heart of current thinking

If we generally agree that there is something distinctive about the role courts play in ‘building’ new democracies, when does this distinctive role begin and end? In other words, when does the extraordinary context of a ‘new’ democracy cede to a ‘normal’ functioning democracy, and presumably, a more ‘normal’ role for courts? At present, no satisfactory theoretical account has been provided to address these questions, and contemporary thinking about courts as democracy-builders tends to be clouded by the way relevant concepts and terminology concerning democracy-building are employed. This section therefore briefly canvasses these deficiencies.

To begin, what do we mean when we call courts ‘democracy-builders’? Democracy-building, a term with increasing currency in international development,30 might simply be defined as activity aimed at supporting a process of democratisation in a given state. Any discussion of ‘democracy-building’ therefore requires some understanding of the central concept of ‘democratisation’. This is no easy task. Encompassing everything from the initial concrete movement to elections in a non-democratic regime, to the progressive realisation of a democratic order in the mould of a long-established liberal democracy of the Global North,31 democratisation is a prismatic and expansive meta-concept, referring to a system of processes which is almost unknowably complex, along a continuum of indefinite length. Its ultimate horizon—the ‘quintessentially contested’32 concept of democracy—compounds and underpins its problematic nature. Two key research fields take divergent approaches: democratisation theory and transitional justice.

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29 Buyse and Hamilton ibid 287.
30 The term is used by a variety of organisations, including the European Union and International IDEA.
31 However, recent scholarship challenges the place of mature Western democracies as the ultimate empirical referents for young democracies: see CK Lamont, J van der Harst and F Gaenssmantel (eds), Non-Western Encounters with Democratization: Imagining Democracy after the Arab Spring (Ashgate, 2015).
First, democratisation theory, which has developed since the 1970s, separates the overall process of ‘democratisation’ into two separate phases that are the focus of separate but overlapping research areas: ‘transition to democracy’, defined as the movement toward full, free and fair elections in post-authoritarian states, whether through revolution, a political pact, or the gradual ceding of power by an authoritarian regime; and ‘consolidation of democracy’, which might be defined as the development of a minimal level of democratic governance in the period following the first democratic elections.

While transition as a concept is relatively settled, consolidation has been highly contested. Theorists diverge starkly on when a democratic regime might be considered to be ‘consolidated’, which depends on the underlying definition of democracy itself: for those adhering to a more minimal procedural conception—centred on the electoral process—consolidation can be considered achieved when, for instance, a state has experienced two peaceful transitions of power through full, free and fair elections and there are no significant threats to democratic rule. However, the weight of scholarship has shifted toward more demanding conceptions of democracy, such as Robert Dahl’s concept of ‘polyarchy’, which encompass a functioning separation of powers, rights protection and core freedoms, such as a free media and freedom of assembly and association.

In an allied development, the notion of ‘constitutional democracy’, which conceptually fuses constitutional order and democratic governance, has supplanted ‘democracy’ as the gold standard.

Real-world trends in the post-war era, especially since the 1970s, have confirmed the triumph of ‘thicker’ conceptions of democracy and the constitutionalisation of democracy, as bills of rights have grown progressively longer and constitutions have become more prescriptive regarding the functioning of democratic institutions. Indeed, as Silvia Suteu addresses in her analysis of ‘eternity clauses’ elsewhere in this collection, constitutions increasingly seek to constrain the power of democratic majorities not only to legislate, but to amend the constitution itself. Complicating the picture further in recent years has been an intensifying focus on additional elements increasingly seen by some as central to any conception of ‘true’ democracy, particularly the protection of social and economic rights.

At the extreme, the vogue for ‘transformative’ constitutionalism, aimed at wholesale transformation of political, social and community structures and values, appears to hold to an unprecedentedly thick conception of democracy, which is expected to deliver all manner

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33 An alternative conceptual framework from the 1990s, aimed at examining ‘quality of democracy’, places much less emphasis on the temporal aspects of democratisation and has never quite supplanted the other two.
35 Huntington (n 2) 266.
38 See e.g. S Issacharoff, ‘Constitutional Courts and Democratic Hedging’ (2011) 99 Georgetown Law Journal 961, 967.
of social goods beyond mere political empowerment of the people.\textsuperscript{40} There remains, in short, no consensus on how to delineate the core of a functioning democracy.

The second strand of literature is centred in the research field of ‘transitional justice’, which developed in parallel to democratisation theory. Transitional justice scholars employ ‘transition’ as an overarching concept that occupies an ever-expanding conceptual space. From its original core preoccupation with understanding the theoretical and practical implications of addressing past human rights violations in post-conflict and post-authoritarian polities (through truth commissions and trials, for instance), transitional justice scholarship has expanded to a broader enquiry regarding the challenges faced by new democracies, including the protection of core democratic rights, such as expressive and associative rights.\textsuperscript{41}

In many ways, then, the central preoccupations of transitional justice have started to overlap significantly with those of democratisation theory. This is, at least partly, a reaction to specific real-world developments: transitions to democracy in South Africa, Guatemala and El Salvador in the 1990s, in particular, featured a clear fusing of the post-authoritarian context and emergence from armed conflict, in a context where all actors agreed that the ‘transition’ involved movement to democratic rule. However, in recent years, transitional justice scholarship has further extended to address attempts to grapple with the past in long-established democracies, e.g. the use of extra-legal detention in Ireland until the 1990s.\textsuperscript{42} Thus, we now see ‘transitional justice’ applied to justice processes which are conducted in stable democracies far removed from any societal transition, conflict or political regime change.\textsuperscript{43}

Both democratisation theory and transitional justice scholarship have suffused thinking on courts as democracy-builders. However, while scholars analysing courts tend to make use of the terminology of ‘democratisation’, ‘transition’ and ‘consolidation’, they often use these terms interchangeably, and generally overlook the contested nature of ‘consolidation’ as a concept in particular, employing the term as though its meaning is settled.\textsuperscript{44} Similarly, the use of ‘transition’ as a catch-all concept, applicable to an ever-expanding variety of contexts, can lead to considerable confusion. When we speak of the Constitution of South Sudan (discussed by Charmaine Rodriguez) as a ‘transitional constitution’, and the UK Constitution as being ‘in transition’\textsuperscript{45} we see that a term of art fashioned for examining post-conflict and post-authoritarian societies can all too easily collapse into the ordinary usage. If ‘transition’

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\textsuperscript{40} See O Vilhena Vieira, F Viljoen and U Baxi (eds), Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa (Pretoria University Law Press, 2013).

\textsuperscript{41} See C Bell, C Campbell and F Ní Aoláin, ‘Transitional Justice: (Re)Conceptualising the Field’ (2007) 3(2) International Journal of Law in Context 81; and Sweeney (n 16).


\textsuperscript{43} See e.g. S Winter, Transitional Justice in Established Democracies (Palgrave, 2014).

\textsuperscript{44} See e.g. Gloppen, Gargerella and Skaar (n 20).

can now mean any form of transformation, how does this concept help us to pin down what is distinctive about the roles courts play in democracy-building, or temporally delineate their distinctive role?

The importance of precise terminology becomes clearer when we consider the various ways in which constitutional courts are said to impact on democracy-building. Tom Ginsburg has proposed a typology suggesting that constitutional courts tend to play four possible roles: (i) triggering the transition to democracy (e.g. in Ukraine, where a Supreme Court judgment ordering Prime Minister Yanukovych to hold fresh elections triggered the Orange Revolution of 2004-5); (ii) protecting the old regime from democratic forces (e.g. in Turkey, after enactment of the post-coup 1982 Constitution, where the Supreme Court (and the Constitutional Court before reforms in 2012) acted to protect the secular regime from emerging Islamist democratic forces); (iii) inertia, where the court remains on the sidelines (e.g. in Chile, where the courts played a quiescent and muted role in governance for at least a decade after the return to democratic rule in 1990); and (iv) consolidation of the new democratic regime. The first three roles listed are relatively rare. The fourth, consolidation, is generally viewed as the paradigmatic purpose of a constitutional court, and is generally the temporal phase scholars are investigating when analysing courts as democracy-builders. Yet, this is obscured by the variable use of terminology across relevant scholarship—what one author calls ‘consolidation’, another calls ‘transition’, even though both may refer to ‘consolidation’ as defined in democratisation theory.

For the purposes of this article, the schema developed in democratisation theory is used for the sake of clarity. ‘Transition’ refers to the movement toward democratic rule culminating in full, free and fair elections; and ‘consolidation’ refers to the temporal phase following the end of transition, in which the basics of a functioning democratic order are developed. A useful working definition of a consolidated regime has been offered by Carsten Schneider as one which

...allows for the free formulation of political preferences, through the use of basic freedoms or associations, information and communication, for the purpose of free competition between leaders to validate at regular intervals by non-violent means their claims to rule...without excluding any effective political office from that competition or prohibiting members of the political community from expressing their preference.

This definition is evidently not immune to contestation: it tends to prioritise core civil and political rights, for instance, which flies in the face of a clear trend toward viewing contemporary democratic transitions as rooted in calls for social justice. However, it serves the central purpose of underlining that while democratisation itself refers to the entire process of developing democratic rule on a par with the mature, albeit wholly imperfect, democracies of the Global North (or a more abstract ideal of fully-fledged democracy), ‘consolidation’ sets a lower bar. The importance of how we define consolidation is discussed further in the penultimate section, but it suffices to note here that our definition of

consolidation will tend to shape how we view the role of courts as democracy-builders: an expansive definition will place a more significant burden on the courts, across a longer period of time, than a more restrictive definition. It will also tend to shape what we view as priorities in the democracy-building role that any given court should play.

IV. The slim foundations of our ‘court obsession’

If, as discussed above, constitutional courts play a variety of roles as democracy-builders, with the paradigmatic role to act as an engine of democratic consolidation (as defined above), how has this paradigm arisen? Surprisingly, at present no comprehensive account exists in the literature to explain the historical emergence of courts as key democracy-builders, and the ways in which they have operated to ‘build democracy’. Rather, we encounter three strands of scholarship that have together fuelled a perception of courts as effective democracy-builders: accounts of the proliferation of strong-form judicial review in new democracies worldwide, which accords the ‘final say’ on constitutional matters to the judiciary; analyses of a select number of these constitutional courts; and dominant presentations of past successes in court-led consolidation.

First, the global diffusion of strong-form judicial review is relatively well documented, at least in broad brushstrokes—although the main focus is on ‘European-style’ constitutional courts with exclusive constitutional review powers, to the detriment of supreme courts.48 This gives us a basic sense of how constitutional courts developed from a form of niche institutional experiment for the democracies of pre- and post-war Europe, to the now established reality that a strong constitutional court has become ‘standard equipment’ for a new democracy. Working backwards from Tunisia today, we pass clear landmarks in the proliferation of such courts in new democracies: their virtually universal adoption in post-Communist Central and Eastern Europe in the 1990s; the establishment of a constitutional court as part of South Africa’s era-defining democratic transition in the early- to mid-1990s, the emergence of constitutional courts in South Korea and Latin America in the 1980s and 1990s; and in both Spain and Portugal in the 1970s as they emerged from dictatorship. Establishment of the latter was heavily influenced by the Federal Constitutional Court of Germany, which had been created in 1951, and themselves influenced institutional choices in later transitions.

However, scholars have tended to focus strongly on a relatively small number of case-studies from the immediate post-Cold War era; particularly those of Hungary, South Africa and Colombia. This is largely due to the ways in which these courts expanded the frontiers of judicial review in response to their political contexts—and, in the South African and Colombian cases, on the basis of expansive ‘transformative’ constitutions that placed a significant governance burden on the constitutional court. The unprecedented assertiveness of the Hungarian Constitutional Court in the 1990s aimed at holding government to account

in a state where parliament was unable to do so,\(^{49}\) and where the Court bore the burden of symbolising the new democratic order in the absence of a wholly new constitution.\(^{50}\) The South African Constitutional Court occupied an odd meta-constitutional position, not only in its formal power to assess the validity of the draft 1996 Constitution against the provisions of the 1994 Interim Constitution (and its decision to find certain provisions invalid), but in its overall function as a central guarantee in the political settlement underlying the democratic transition, to protect the rights of the white minority from the newly-empowered majority as well as consolidating democracy for South African society as a whole.\(^{51}\) The Colombian Constitutional Court’s vigorous activity from 1992 onward derived from its place as sole State defender of the 1991 Constitution, which was disowned by other political actors not long after its adoption as part of a wide-ranging effort at a political settlement to achieve peace in that state. That court remains perhaps the high-water mark of judicial assertiveness, with not only a strident approach to the separation of powers, abuse of emergency powers, and civil and political rights, but also social and economic rights. The Court has, for instance, invalidated constitutional amendments aimed at changing presidential term limits, and has asserted the power to recognise an ‘unconstitutional state of affairs’, which allows the Court to address structural deficiencies in rights protection and order wide-ranging measures to the State for their amelioration.\(^{52}\) As Jenna Sapiano discusses in her piece, the Court has also been central in setting outer limits on, and providing a constitutional imprimatur to, the peace process that recently led toward a comprehensive agreement.

However, overall, the inordinate focus on these ‘star’ courts, and their admission to the international pantheon of courts alongside the US Supreme Court and Federal Constitutional Court of Germany, has generally left a rather skewed picture of courts as democracy-builders. First, ‘European-style’ constitutional courts in other young democracies (e.g. South Korea, Poland, Senegal) have been underexplored. Perhaps even more importantly, the marked focus on ‘European-style’ constitutional courts has left states which eschewed this option often ignored, despite a large number of new democracies in the post-war era choosing alternative means of empowering the judiciary (e.g. by amplifying the powers of the existing supreme court, reforming the court, or adding a ‘constitutional chamber’ to the court). The experiences of diverse states, from the majority of South American states (e.g. Brazil, Uruguay), to African and Asian states such as Tanzania and


Taiwan, remain at the periphery. Greater focus on these courts, which have generally not evinced the same assertiveness as the Hungarian, South African and Colombian courts, would help to provide a more balanced picture.

The principal exception to this is another ‘star’ court: the Indian Supreme Court, which has garnered significant international attention for its ground-breaking jurisprudence since the 1970s. This includes its ‘basic structure’ doctrine, through which it arrogated the power to assess the validity of constitutional amendments during the authoritarian rule of Prime Minister Indira Ghandi, and which has influenced courts from Colombia to Tanzania, as well as its ‘public interest jurisprudence’ vindicating social and economic rights.

Third, beyond the ‘greatest hits’ of the third-wave era, are general claims for the effectiveness of courts as consolidators of democracy. The bold assertions from Alec Stone and Samuel Issacharoff in Section 2, above, place emphasis on the global diffusion of constitutional courts as a recognition of past success. However, the popularity of an institution is hardly conclusive evidence of its effectiveness. Other scholars point to a variety of reasons for the diffusion of strong constitutional courts: not least their use as a form of ‘political insurance’ to ensure adherence by all parties to the bargains in the political settlement; a developing perception that they form part of a ‘normal’ democracy; and, perhaps, as a way of reaching political settlement by allowing greater flexibility in the constitutional scheme, through deferral, ambiguity and ‘silence’, as discussed by Silvia Suteu–preferred to other options such as interim constitutions discussed by Charmaine Rodriguez elsewhere in this collection. Issacharoff’s characterisation of these courts as ‘integral structural parts of the moment of original constitutional creation’, for instance, casts courts as secondary constitutive forces beyond the constitutional text. This produces what Vicki Jackson calls an ‘incremental constitutionalism’ which requires the court to address the gaps and fudges left in the constitution.

Yet, concrete evidence for the grander claims regarding the democracy-building capacities of constitutional courts remains somewhat slim. Going back to the grandfather of contemporary democracy-building courts, for instance, there is no clear evidence that the Federal Constitutional Court was central to successful democratisation in West Germany. The increasing centrality and power of the Court from 1951 onward may have simply been facilitated by, rather than the driver of, the advance of democratisation in that state, which was substantially aided by various factors, including: direct oversight by Allied powers in the

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53 This is not to overlook treatments of ‘peripheral’ courts, such as those of Tanzania, Bolivia and Taiwan, in, for instance, Gloppen et al., Courts and Power in Latin America and Africa (n 20); Gargarella et al., Courts and Social Transformation (n 39); and Ginsburg, Judicial Review in New Democracies (n 20).
54 See, in particular, Kesavananda Bharati v State of Kerala (1973) 4 SCC 225.
55 See Vilhena Vieira, Viljoen and Baxi (n 40).
56 See e.g. Ginsburg (n 20) 22 et seq.
58 Issacharoff, ‘Democratic Hedging’ (n 38) 986.
early years; a clear commitment to democratic governance by the main political forces; a functioning competitive electoral system; a ‘rapid and robust economic revival’,\(^{60}\) and a strong desire to rehabilitate the state in the international arena. Indeed, when Stone Sweet, as quoted at the outset, opines that ‘the more successful any transition has been, the more likely one is to find an effective constitutional or supreme court at the heart of it’, there is a clear risk of mistaking *correlation* for *causality* (although, of course, this may not be his intended meaning). Most successful post-war democratisation processes have occurred in post-war Europe, where similarly propitious conditions existed for both successful democratisation and the accretion of judicial governance power—precisely the conditions that have so often been lacking in democratisation processes in other world regions.

Of course, various scholars present a more balanced picture. Tom Ginsburg cautions that courts may ‘play an essential role in structuring an environment of open political competition, free exchange of ideas, and limited government’, but do not lead the democratisation process itself.\(^{61}\) Lach and Sadurski’s observation that constitutional adjudication in Central and Eastern Europe has been ‘a mixed bag of undoubtedly courageous and democracy-strengthening decisions as well as of decisions which seem like a set-back to these values’\(^{62}\) can be applied to other regions. For instance, in Latin America, although there is a sense that ‘there have been remarkable advances in the consolidation of the rule of law and constitutionalism’\(^{63}\) there remains a palpable air of disappointment that judges are not ‘blazing the way to robust constitutional democracy in the way many hoped they might.’\(^{64}\) Most starkly, the stalled, problematic or even backsliding democratisation processes in Hungary, South Africa and Colombia underline that there are clear limits to court-centric democracy-building. This alone should provide pause for thought in contemporary democracy-building processes.

In short, it appears that constitutional courts are neither a guarantor of, nor a short-cut to, a functioning democratic system. Moreover, underlying any analysis of the roles played by courts as democracy-builders is the core methodological challenge of discerning how and whether a court has an impact on *any* process, especially a process as multi-faceted and multi-causal as democratisation. Yet, looking at the faith placed in courts in contemporary democracy-building projects, one gets a strong sense that the dominant presentations of the virtues and effectiveness of such courts have overshadowed more nuanced presentations.

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\(^{64}\) Kapiszewski, Silverstein and Kagan, *Consequential Courts* (n 20) 1.
V. The contested role of courts as ‘consolidators’

Evidently, to say that claims for the capacities of courts as democracy-builders appear to rest on shaky foundations is not to say that they have no role to play as democracy-builders. Yet, questions concerning dominant presentations of the capacities of courts to act as consolidators of democracy are further compounded by the absence of any clear consensus on the core of the ‘consolidation’ role constitutional courts carry out in new democracies.

At the level of constitutional design, post-war courts worldwide have been endowed with a wide variety of powers. Some courts have relatively few powers, limited to assessing the validity of legislation against the constitution. Others are empowered to address everything from failure to legislate, or ‘legislative omission’ (e.g. Hungary), to the capacity of elected leaders to hold office (e.g. Mozambique), to political corruption (e.g. Brazil) and the constitutionality of international treaties (e.g. Tunisia). At the level of empirical experience worldwide to date, despite the impression provided by the ‘star’ courts discussed above, the reality is that highly assertive courts are in the minority, different courts have taken divergent approaches in facing a difficult political environment (from quiescence to incrementalism to defiance, or a mixture), and even assertive courts face significant challenges in exerting their power.

Perhaps even more problematic is the diversity of normative arguments concerning the role courts should play in supporting democratisation. Five basic positions can be identified, which lie outside the ‘core’ debate on the legitimacy of judicial review between scholars such as Jeremy Waldron and Ronald Dworkin, who expressly focus their attention on well-functioning (i.e. mature) democracies.65

First, scholars such as Wojciech Sadurski generally appear to expect constitutional courts in young democracies to operate in a similar manner to their counterparts in mature democracies, remaining within the format established by courts such as the US Supreme Court by focusing primarily on rights protection.66 Second, scholars such as Roberto Gargarella and Samuel Issacharoff emphasise a court’s central role in constraining the power of the State. Gargarella’s concept of ‘democratic justice’ suggests two key roles of guarding against, first, the gradual establishment of restrictions on basic civil and political rights, such as the rights to freedom of expression and fair trial, and second, the executive’s tendency to amplify its powers and distort or overcome democratic controls.67 Issacharoff suggests, similarly, that the core role of a constitutional court should be aimed at shoring up the worst inadequacies of a new democratic political system and thus facilitating the persistence and development of democratic rule rather than its decay after the initial transition to electoral democracy through capture by dominant political forces. A court can


66 See Sadurski’s works at (n 20).

do this, he argues, by filling gaps in the governance structure and ensuring the openness of electoral competition.\footnote{Issacharoff, ‘Democratic Hedging’ (n 38).}

The third and fourth positions argue for a much broader role for courts in new democracies. Daniel Bonilla Maldonado and Upendra Baxi, on an analysis of highly assertive courts in Colombia, Hungary, India and South Africa, see courts as capable of an even broader governance role that addresses economic governance, socio-economic inequality and even constraining state violence.\footnote{See D Bonilla Maldonado (ed), Constitutionality of the Global South: The Activist Tribunals of India, South Africa, and Colombia (Cambridge University Press, 2013); and Vilhena Vieira, Viljoen and Baxi (n 40).} Fourth, a more audacious argument by Kim Lane Scheppele, based on the Hungarian experience in the 1990s, holds that, where the elected organs are unable to fulfil their functions in the same manner as their counterparts in mature democracies, a constitutional court can act as a substitute for deliberation and reflection of the popular will, with judicial review thus recast as a democratic process.\footnote{Scheppele (n 49).}

Fifth, and finally, is an argument from Stephen Gardbaum that, rather than the prevailing model of strong judicial review, ‘weak’ review should be embraced as a means of establishing and maintaining the independence of the judiciary in a new democracy and reducing political attacks on courts. Concerned by the growing backlash against constitutional courts in ‘third wave’ democracies worldwide, he argues that weak review, by leaving the final say to the other branches of government, would allow courts to nevertheless play a significant role by providing a more “dialogical” mode of judicial intervention’.\footnote{S Gardbaum, ‘Are Strong Constitutional Courts Always a Good Thing for New Democracies?’ (2015) 53 Columbia Journal of Transnational Law 285.}

Despite this variety of positions, this normative debate has yet to catch fire: there is a lack of intense engagement by scholars with the positions of others, and the above is even the first mapping of the debate as it stands. Five particular points, which go to the heart of how we view courts as democracy-builders, have yet to be fully thrashed out.

First is what we view as central to the consolidation of ‘true’ democracy. Carsten Schneider’s working definition, discussed in section 3 above, would suggest that courts should focus on deciding on key electoral issues and protecting core civil and political rights central to the functioning of the electoral system, such as free speech, assembly, association and media freedom. Yet, this would appear unduly restrictive to scholars who appear to embrace a much ‘thicker’ conception of democracy, which would suggest a more intensive role for courts as democracy-builders.

Second is whether the ‘consolidation’ role, in particular, is primarily positive or negative: Issacharoff and Gargarella suggest the former; others suggest a more mixed picture, but do not suggest what they consider to be priorities. Both the first and second questions relate to questions of capacity: can constitutional courts meet our expectations if their consolidation role is expanded to encompass a much thicker conception of even consolidated democracy?
Can courts perform a strident negative and positive consolidation role in tandem, or are there trade-offs to be made between these roles?

Third is how we conceive of the very nature of courts themselves as democracy-builders: are they guardians of the constitution, or of democracy itself? This question comes to the fore not only in Issacharoff and Jackson’s characterisation of courts as secondary constitutive forces, but also, more specifically, in Issacharoff’s argument that courts in new democracies should espouse a version of the Indian Supreme Court’s ‘basic structure’ doctrine in order to assess the validity of constitutional amendments,72 as a way of combating ‘abusive constitutionalism’. That this approach transforms a court from a mere ‘constituted’ power under the constitution and bound by its limits, to a meta-constitutional entity standing somewhat apart from the constitution, is not systematically addressed in Issacharoff’s work, despite the existence of a significant body of literature on the subject since the 1970s at least.73 As his approach is, he admits, ‘unreservedly instrumental’,74 he does not address crucial theoretical questions: are courts in this role acting as the high priests of Carl Schmitt’s notion of ‘political theology’, by stepping into the exceptional liminal space where law ends and politics begins?75 How does this role fit with our understandings of the two possible bearers of constituent power?–the prince or the people, as Loughlin puts it.76 In whose name do courts assume this role?: As the ‘true’ representatives of ‘the people’, as some claim;77 or of a transnational epistemic community of courts and other organs (e.g. the Council of Europe’s Venice Commission) which itself increasingly identifies transcendent norms of ‘true’ constitutional democratic governance? These questions raise the perennial question concerning the democratic legitimacy of judicial review in perhaps its most acute form, and the existing literature on this role needs to be integrated into discussion of the roles played by courts in new democracies.

Fourth, the debate concerning the role a constitutional court should play as a democracy-builder has paid relatively little attention to the role of comparative law in the stances courts take in new democracies. Johanna Kalb has recently argued that constitutional courts in new democracies engage in ‘strategic’ citation of the case-law of foreign constitutional courts and international courts (especially regional human rights courts) to bolster their adjudicative role and to fill in gaps in the new legal order.78 However, her valuable work has only begun this investigation: she does not, for instance, make reference to one of the most striking examples; that some version of the Indian ‘basic structure’ doctrine has been adopted by many courts (e.g. in Belize, Colombia and Tanzania) to combat concrete

72 Issacharoff, ‘Democratic Hedging’ (n 38).
74 Issacharoff, Fragile Democracies (n 15) 241.
75 See P Kahn, Political Theology: Four New Chapters on the Concept of Sovereignty (Columbia University Press, 2011) 2.
77 Ibid 233.
domestic variants of abusive constitutionalism. Partly, this omission reflects the general approach in scholarship, which eschews close textual analysis of judgments by approaching courts mainly as political rather than judicial actors.

The final question concerns whether we can make universal prescriptions for the democracy-building role of courts that will apply across a variety of empirical contexts. The existing normative arguments are strongly tied to a relatively small number of country case-studies, and what different scholars present as possibilities for courts depends largely on the case-studies they use. Arguments for an expansive role appear to be supported by the Colombian experience, for instance, but undermined by the Hungarian experience where, after a relatively brief period of unusually assertive activity in the 1990s, the Constitutional Court had its wings definitively clipped by government and is now a shadow of its former self. Indeed, it is all too easy to overlook the often significant additional constraints faced by constitutional courts in young democracies compared to long-established democracies. For instance, Issacharoff’s views, based on the central case-studies of the South African and Colombian constitutional courts, have been criticised by Theunis Roux as mistakenly assuming these courts (and other courts in new democracies) to be in a position analogous to courts in mature democracies. In sum, we have yet to get a full sense of the divergences and commonalities between courts as democracy-builders across new democracies.

VI. The underexplored regional context

As Silvia Suteu discusses, transnational and international law now looms large in any analysis of how law supports transformation in post-authoritarian (as well as post-conflict) states. The last two sections focused on constitutional courts at the national level, but served also to set up our discussion of regional human rights courts as democracy-builders. Indeed, if our understanding of domestic constitutional courts as democracy-builders is hampered by critical research gaps, this is all the truer of our understanding of the roles of regional human rights courts. Similar problems with terminological and conceptual clarity, grand claims, a limited number of case-studies, and a lack of any full conceptualisation of these courts’ roles as democracy-builders are replicated, if not heightened, in this scholarship. This section focuses on the most pressing deficiencies.

As discussed above, the European Court of Human Rights has been the predominant focus of a very modest literature on regional courts as democracy-builders (and even here the emphasis is on the court’s role as a transitional justice actor). This not only leaves two key world regions with human rights courts underexplored—Africa and Latin America—but raises the risk of approaching these regions through ‘European’ lenses. The most significant difference is that no equivalent to the European Union (EU) exists in the non-European regions. The pronounced diminution of the state in Europe is thus exceptional when set in

79 See e.g. JI Colón-Ríos, ‘A New Typology of Judicial Review of Legislation’ (2014) 3 Global Constitutionalism 143, 145–146; and the Tanzanian High Court’s judgment in Mtikila v Attorney General, Civil Case No. 5 of 1993 (24 October 1994).

the global context. In the other regions, while similar ‘supranational’ language is often used to describe regional integration projects such as MERCOSUR, the Andean Community and the African Union, these still operate largely on intergovernmental lines. As a result, whereas the European Court of Human Rights forms just part of a plural and overlapping legal order that underpins democratic rule in Europe, in Africa and Latin America the human rights systems centred on the American Convention on Human Rights and the African Charter on Human and Peoples’ Rights are the closest these regions come to a ‘supranational’ order that extends beyond mere intergovernmentalism. This appears to simultaneously weaken the capacity of these courts to act as democracy-builders, while placing a heavier democracy-building burden on their shoulders as the central components of anything like a regional constitutional order.

The second significant difference between Europe and the two other regions is the proportion of mature democracies and the vintage of the regional human rights courts. Compared to the high proportion of mature democracies in the European system, they are virtually absent in the latter (with the exception of Costa Rica in Latin America). In addition, whereas the European Court of Human Rights enjoyed a stately rise to prominence from its establishment in 1959 until the accession of post-Communist new democracies in the 1990s, faced largely with stable democracies and less severe rights violations, the Inter-American Court of Human Rights was established just as democratic transitions began to sweep Latin America, which encouraged it to take a generally more strident approach than its counterpart in Strasbourg. It eschewed any margin of appreciation, for example, through which the European Court accords a measure of discretion to the states under its purview. Facing a majority of non-democratic regimes, the African Court has, like the Inter-American Court, foregone any margin of appreciation and has from its first merits judgment in 2013 taken a strong stance on violations of the African Charter regarding exclusionary constitutional rules on electoral candidacy, free speech and fair trial.

These key differences mean that the insights provided by scholarship centred on Europe will have limited relevance to regions outside Europe. Indeed, even within Europe, Nico Krisch’s picture of domestic courts and the Strasbourg Court as co-equal entities in a heterarchical plural legal space is based on analysis of Western European courts, leaving the position of courts in post-Communist young democracies unexplored. Overall, his analysis (though highly illuminating in general) lacks a normative inflection capable of guiding us toward addressing the particular asymmetries between regional and domestic courts in the democratisation setting outside Western Europe, where the relationship may take on a more hierarchical aspect. As Silvia Suteu notes, international human rights law has tended to...
be accorded formal constitutional status in new democracies. Courts have also elevated human rights law in the domestic order; seen, for instance, in Latin American courts fusing international human rights law and constitutional law in a so-called ‘block of constitutionality’ and a ‘creeping monism’ in African courts. Significant reliance by domestic courts in new democracies on international and regional case-law appears, in part, to be related to the challenges of grappling with a new constitution and powers, which may well render them unwilling or unable to offer alternative interpretations even where they disagree with certain lines of regional jurisprudence. There is a clear need for greater exploration and conceptualisation of how domestic and regional courts interact as democracy-builders, and how the democratisation context shapes this interaction.

There is also a need for further analysis of the ways in which the different powers and institutional setting of a regional human rights court, as compared to a constitutional court, affect its capacity to act as an effective democracy-builder. Despite a common and increasing tendency to present regional human rights courts as constitutional courts writ large, there are key differences between the two types of court that are highly relevant here. Certain features may be viewed as an advantage: that such courts are external to any one democratisation process; that the validity of their fundamental normative text transcends the transition to democracy at the state level and is not tied to the old or new constitution; and that, because of this external normative base, they may be able to better address forms of ‘abusive constitutionalism’ that seek to hollow out the new democracy through procedurally perfect means. However, other factors suggest significant limits to a key role for such courts: the often long time-lag before cases reach the court (due, in part, to the need to exhaust domestic remedies—although this requirement can be waived); the limits imposed by ratio temporis requirements (meaning such courts are often prevented from addressing rights violations prior to the state’s acceptance of the court’s jurisdiction); and the fact that such courts, guarding a rights convention rather than a full constitution, are less well-placed than a constitutional court to address structural issues central to building a functioning democracy, such as separation of powers matters.

In addition, echoing the discussion of constitutional courts above, claims for the democracy-building successes of regional courts rest on relatively slight evidence. In Europe, for instance, Sweeney’s own verdict on the European Court’s contribution to the consolidation of post-Communist democracies is mixed. The Court has softened the excesses of new democratic governments in property restitution and lustration programmes, by emphasising

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88 Indeed, Ariel Dulitzky is highly critical of the Inter-American Court’s ‘control of conventionality’ doctrine, which accords little room to domestic courts as potential co-interpreters of the American Convention on Human Rights: A Dulitzky, ‘An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights’ (2015) 50(1) Texas International Law Journal 45.
rights protection and the need for adequate standards of procedural justice.\textsuperscript{90} However, its vindication of free speech and electoral rights has been uneven, partly due to a rather opaque methodology and reasoning.\textsuperscript{91} In the context of its impossible case-load, the overall quality of the Court’s judgments is viewed by some as decreasing,\textsuperscript{92} and ensuring compliance with its decisions, especially ‘pilot judgments’ aimed at structural deficiencies in new democracies, has become increasingly challenging in a climate where partial compliance is now common.\textsuperscript{93} This has all affected its capacity to ‘build’ democracies in post-Communist Europe. Similarly, the Inter-American Court’s case-law has led to the repeal or restricted application of amnesty laws and strict defamation laws across the region,\textsuperscript{94} and to the right to freedom of information being written into law across Latin America.\textsuperscript{95} However, compliance is an even greater problem in comparison to the European Court: full compliance has been achieved for a mere 18 out of over 200 judgments issued by the Inter-American Court to date, and remains particularly lacking regarding orders for reparations beyond compensation, especially where a State is ordered to investigate or prosecute a rights violation.\textsuperscript{96} Both courts have encountered starkly low compliance levels with so-called ‘structural reform’ judgments aimed at addressing systemic deficiencies in the young democracies under their purview.\textsuperscript{97} Implementation has also proved a central difficulty for the African Court.\textsuperscript{98}

While we often see a cascade of jurisprudence at the regional source, then, in terms of impact it can often be reduced to a trickle at its intended destination. This is not to deny, of course, other roles that such courts may play in building democracy, which are less amenable to verification: providing a focal point for the development of transnational pro-democracy and human rights civil society networks, for instance;\textsuperscript{99} addressing contested historical narratives;\textsuperscript{100} or encouraging domestic courts to engage in robust adjudication.\textsuperscript{101}

\textsuperscript{90} Sweeney (n 16) chs 4-5.
\textsuperscript{91} Ibid ch 6, ch 8.
\textsuperscript{92} See N Huls, M Adams and J Bomhoff (eds), The Legitimacy of Highest Courts’ Rulings. Judicial Deliberations and Beyond (TMC Asser Press, 2009).
\textsuperscript{95} See e.g. García-Sayan (n 26) 105 et seq.
\textsuperscript{96} See DA González-Salzburg, ‘Complying (Partially) with the Compulsory Judgments of the Inter-American Court of Human Rights’ in P Fortes, L Boratti, A Palacios and TG Daly (eds), Law and Policy in Latin America: Courts, Transforming Courts, Institutions, and Rights (Palgrave MacMillan, forthcoming).
\textsuperscript{100} See e.g. F Ni Aoláin, ‘Transitional Emergency Jurisprudence: Derogation and Transition’ in Buyse and Hamilton (n 26).
\textsuperscript{101} See e.g. García-Sayan (n 26) 1836-1837, 1839.
Yet, there remains the sense that—especially outside Europe—regional human rights courts struggle to gain visibility. As three Stanford scholars observe in a forthcoming publication: ‘It seems likely that the average Brazilian or Peruvian hardly realises that the Inter-American System exists.’

Similarly, the President of the African Court on Human and Peoples’ Rights has observed: ‘Even here in Arusha [the seat of the Court in Tanzania], there are people who are wondering if there is such a court in the city.’

Finally, unlike the (admittedly somewhat diffuse) normative debate concerning the role a constitutional court should play in building democracy, there is as yet little sustained normative debate concerning the role regional human rights courts should play in new democracies. Some, such as Antoine Buyse and Michael Hamilton, appear to assume that such courts can play a legitimate role as ‘transitional justice’ actors, but do not explore the temporal boundaries of this role. Leading arguments from scholars such as Richard Bellamy against the role of the European Court of Human Rights focus, like the ‘core’ domestic debate between political and legal constitutionalists, on its operation regarding ‘well-functioning democratic regimes’. They therefore present a critique of the Court’s lack of democratic credentials that applies equally to mature and new democracies: chiefly, that it is less familiar with the mores and particularities of domestic societies and legal systems, freer from even indirect forms of (democratic) political accountability in the form of an electorate or co-equal constitutional partners, and threatens the coherence of law by competing with domestic law. Bellamy does acknowledge the possible enhanced legitimacy of such courts as ‘transitionary arrangements’ for the ‘stabilising of democracy’ in young democracies, but this remains an afterthought that is not pursued further—for example, how does he view the Court’s role in this respect, and how would we assess when such a ‘transitional’ phase was complete? Criticism of the Inter-American Court follows similar lines, but can be more blunt: for instance, Ezequiel Malarino’s strident criticism of the Court, bemoaning its ‘illiberal and antidemocratic tendencies’, rests primarily on arguments as to the basic legality of the Court’s case-law, concerning the Court’s perceived illegitimate departure from the text of the American Convention on Human Rights and recognition of norms not expressly laid out therein, thus violating the sovereignty of states, which (he argues) have not agreed to be bound by such norms.

Beyond these standard critiques, which would apply equally to a mature democracy or a young democracy, an emerging debate concerns the extent to which the democratic quality

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102 D Gil, R Garcia and LM Friedman, ‘Media Representations of the Inter-American System of Human Rights’ in Fortes, Boratti, Palacios and Daly (n 96).
104 Buyse and Hamilton (n 26).
106 Ibid 248.
of a state should be a parameter for calibrating the intensity of review by a regional human rights court. Various scholars point to the differential treatment accorded by the European Court to mature and young democracies; while in Latin America some scholars have begun arguing for the adoption of a European-style margin of appreciation doctrine by the Inter-American Court in recognition of the democratic development of some states in the region. Normative discussion of the justification for specific innovations in doctrine aimed at addressing structural deficiencies affecting rights protection in new democracies, such as ‘pilot judgments’ in Strasbourg and the doctrine of ‘conventionality control’ in San José, is needed; particularly how these fundamentally transform the roles played by these courts and more dramatically recast the ‘constitutional’ nature of their respective regional orders in a quasi-federal vein that cuts more deeply across national sovereignty. Whether the particular pathologies of a new democracy generally justify more intense scrutiny or greater deference from a regional human rights court, or whether this is entirely case- and context-specific, and how this affects the coherence of regional jurisprudence, is also a debate that could be usefully developed much further.

VII. Conclusion: Charting a way forward

Can courts really ‘build’ democracy in a state emerging from authoritarian rule? Despite the global emergence of a court-centric model for democracy-building, featuring both domestic and regional courts, we still have no definitive answer to this question. We have yet to achieve a fine-grained understanding of the roles courts play as democracy-builders and to fully conceptualise the roles they play in guarding not only the constitution, but the democratic order inaugurated by the political settlement itself. Yet, policymaking and constitution-making continues to proceed as though the effectiveness of courts as democracy-builders has been proven. Constitutional courts and regional courts are trusted to achieve a feat of alchemy, by transmuting the base materials of a new democracy–an incomplete political settlement, a nascent commitment to democratic rule and imperfect constitutional and international texts–into the gold of a functioning democracy.

The central point of this brief sketch of the contours of contemporary thought—to highlight the highly deficient nature of our present understanding of courts as democracy-builders—is no dry academic problem. Existing court-centric prescriptions for constitutional settlements


111 See Dulitzky (n 88); and Huneeus (n 28). The fundamental transformation of an international treaty regime by its court has been explored in a more general manner in J Arato, ‘Treaty Interpretation and Constitutional Transformation: Informal Change in International Organisations’ (2013) 38 Yale Journal of International Law 289.
in new democracies may hinder rather than help their democratic trajectory. Most importantly, they may blind us to the possibility of alternative or novel constitutional design options that may prove more effective than courts, or at least to the potential of less court-centric models. The urgency of achieving a better understanding of courts as democracy-builders should therefore not be in doubt.

What, then, are our immediate research priorities to achieve this better understanding? We need a more systematic account of the development of courts as democracy-builders in the post-war world since 1945. We need a more sophisticated theoretical framework for understanding democracy-building, which integrates the insights from democratisation theory, transitional justice and constitutional theory (including theories on constitutionalism beyond the state). We need a conceptual framework which provides a better tool for analysing courts as ‘democracy builders’ and how this role and its context differs from adjudication in mature democracies. We need a better understanding of how the roles and institutional capacities of constitutional courts and regional human rights courts differ, how they operate as a system, and how their roles as democracy-builders may clash. We need further empirical work to add to the existing case-studies. We need a systematic analysis of existing normative arguments made for what courts should do to build democracy. This is only the starting point. Ultimately, the stakes are high if the faith of policymakers in courts is misplaced, and we need to begin addressing these knowledge gaps now if we are to achieve more effective legal frameworks and institutions for supporting democracy-building projects into the future.

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Courting Peace: Judicial Review and Peace Jurisprudence

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Abstract

The current debate measuring the trade-offs between democracy and judicial review is unable to analyse the influence of courts in post-conflict states. However, a court with authority over constitutional review is commonplace in new constitutions, including those that have been drafted (or revised) as part of a political settlement. This article suggests that judicial institutions are as important as political institutions in sustaining a political settlement. As this article sets out, the parties to a peace process are required to make numerous compromises to negotiate new (or revised) institutional arrangements. Several cases are considered which illustrate how domestic constitutional courts were asked to mediate between tensions inside the political settlement. In all of the examples, the courts interpreted peace to be the most important constitutional value, or the primary purpose of the constitution. The judiciary played a role in maintaining the constitutional link to the elite pacts of the peace agreement, while acknowledging that the link should not preserve elite pacts permanently or without limit. The article argues, first, that these cases constitute evidence of an emergent global ‘peace jurisprudence’ based on purposive interpretation and a principle of proportionality that protects the foundations of the political settlement, and, second, questions the extent to which international courts are willing or able to adopt this jurisprudence.

Keywords

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judicial review; peace jurisprudence; peace agreements; constitutions; purposive interpretation; proportionality

‘The map metaphor serves to introduce two of the features of constitutions: a map is both schematic and drawn from a particular perspective. However ingenious the cartographer in representing dimensions on the page, an act of imagination is required to comprehend the reality of the terrain from the signs and symbols of the map. Constitutional documents share these features.’

I. INTRODUCTION

Transitions from war to peace often require new (or revised) constitutional arrangements to give clarity to the post-conflict state and to legitimize the emerging political settlement. However, a constitution is not the sole legal or political document required to govern this transition. Constitutions are often preceded by peace agreements as the political and legal pacts that dictate the terms of peace and the intentions of the parties in transitioning out of a state of war. Constitutions then follow, and sometimes even constitute a form of peace agreement (such as the Interim Constitution in South Africa). I use the term ‘peace agreement constitution’ to describe these constitutions rather than post-conflict constitution, as other authors in this special section have done, as it makes clear that such constitutions are not autonomous or free-standing, but are in a mutually constitutive relationship with the peace agreement that provides the legal and political authority for their enactment. Vivien Hart, whose passage is cited above, suggests that constitutions are a part of a canon that, ‘borrowing from its literary counterpart, becomes a whole set of definitive sources rather than just one.’ The peace process and agreement are part of the

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395 Hart (n 1) 157.
canon of a peace agreement constitution, that together form a part of a constitutional discourse that ‘emphasizes process.’

This article considers the role constitutional (or apex) courts in post-conflict societies, and in particular how their adjudicative function relates to the peace agreement and political settlement. In the first part of this article, I outline the traditional debate between political and legal constitutionalism, suggesting that these standard arguments on judicial review are unable to assess adequately the place of courts in protecting the core of the political settlement in peace agreement constitutions. From there, I assess how purposive constitutional interpretation and the principle of proportionality are being adopted into the jurisprudence of courts interpreting peace agreement constitutions. I use cases from Northern Ireland, Bosnia-Herzegovina and Colombia, where courts have addressed the validity of the underlying elite pact at the heart of the constitutional order. In the cases under review I suggest that the constitutional court found peace to be foundational to the

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396 Ibid.

397 I use the term ‘constitutional court’ or ‘court’ in this article for consistency when talking in general about an apex court, although in some jurisdictions the court of last resort on constitutional issues is a separate supreme court.


400 The cross section of variables used to isolate the case studies allow for sufficient difference in context and similarities in structure and implementation for lessons to be drawn from the comparative analysis. The case studies were selected for having protracted conflicts, with high civilian casualties. In Bosnia-Herzegovina and Northern Ireland, the peace agreement and constitution resulted in a termination of the conflict (although the stability of that peace is fragile, it is holding). In Colombia, the civil war continued past the adoption of the 1991 Constitution, however, it ended the conflict between the state and some of the rebel groups, including the M-19. The constitution is relevant in the ongoing peace process. See MJ Cepeda Espinosa, ‘The Peace Process and the Constitution: Constitution Making as Peace Making?’ (2016) *Blog of the International Association of Constitutional Law* available at <https://iacl-aidc-blog.org/2016/07/04/manuel-jose-cepedia-espinoza-the-peace-process-and-the-constitution-constitution-making-as-peace-making/>, accessed 15 July 2016. Northern Ireland, as a sub-state entity, stands out as a case study in this article. However, the Belfast Agreement and the Northern Ireland Act (1998), I argue, are together an example of a peace agreement constitution at a sub-state level. The case, *Robinson v Secretary of State for Northern Ireland*, also stands out as a decision from the Judicial Committee of the British House of Lords as the court of last resort on matters concerning the implementation of the Agreement and Act. This is different from Bosnia-Herzegovina and Colombia, which both established strong-form constitutional courts under the new peace agreement constitution. However, in *Robinson* the House of Lords made a very clear determination on the status of the Belfast Agreement and Act, although the House of Lords (and now the Supreme Court) is an example of weak-form judicial review.
constitution – noting the relationship of the constitution to the underlying political settlement that drove the peace agreement. However, in none of these cases did the court find that the peace agreement was beyond question. In different ways, the courts in all three jurisdictions accepted that the political settlement needed to stay open to other possibilities and re-evaluation. The second part of the discussion briefly turns to the jurisprudence of international human rights courts, suggesting that international courts are less well placed to make reasoned judgements as to how the demands of justice should be balanced with the demands of peace, showing also how different regional courts have taken different approaches. In conclusion, I suggest that there is an emerging global ‘peace jurisprudence’ which requires traditional theories of constitutional adjudication to be re-evaluated.

II. COURTS, CONSTITUTIONS AND PEACE

Peace is a contested term and an ambiguous concept. In an unsophisticated narrative, war is nothing more than the absence of peace and peace the absence of war. Yet, the meaning of peace is ephemeral, moving with international political shifts, so that where peace was once thought of as contrary to being in a state of war, the present understanding of peace is more complex, and requires attaining a certain level of development, satisfying the rule of law, and recognising and complying with basic human rights norms. Furthermore, peace must not be thought of as a momentary event but rather as a process, without a clearly defined (or definable) endpoint. 401

Peace agreements can be understood as written documents agreed by the parties to the conflict that hold the purpose of ending that conflict. There may be several documents, for example, pre-negotiation agreements, ceasefire agreements, negotiation agreements, implementation agreements, and, in some cases, a (interim) constitution,402 which are

401 R Mac Ginty, No War, No Peace: The Rejuvenation of Stalled Peace Processes and Peace Accords (Palgrave MacMillan, Basingstoke, 2008) 18. The recognition that peace is a process is reflected in the idea of the political settlement, which conceives of the peace agreement, constitution drafting and on-going political transition as a continuous negotiation process (V Fritz and AR Menocal, Understanding State-Building from a Political Economy Perspective: An Analytical and Conceptual Paper on Processes, Embedded Tensions and Lessons for International Engagement Report for DFID’s Effective and Fragile States Teams (Overseas Development Institute, London, 2007). While it is believed that many states (the US or Australia, for example) exist in a state of peace, there is also constant contestation in the political space that has the potential to trigger political violence (however mild). For example, there are have been past and ongoing racial tensions in the US and continuing discrimination against indigenous communities in Australia, which have implications on the constitution in both cases. There are also concerns with structural violence that exist long after the cessation of conflict. There is, however, more space and time for constitution drafting or amending where there is no violence or near-violence.

402 For example, the 1993 Interim Constitution of South African. There is scope to argue that the peace agreements can be likened to an interim constitution, an interim constitution may perpetuate the ‘status quo’ or baseline constitution that would be difficult to then later on deviate from when forming a new, permanent constitution. However, interim constitutions
negotiated as part of the political settlement and which may all be categorised as peace agreements. Still, like ‘peace’, the meaning and the legal standing of peace agreements are vague. Christine Bell argues that,

despite the prevalence of documents that could be described as peace agreements, and the emergence of legal standards addressing them as a category, the term “peace agreement" remains largely undefined and unexplored. The label is often attached to documented agreements between parties to a violent internal conflict to establish a cease-fire together with new political and legal structures.\textsuperscript{403}

In fact, peace agreements often go beyond the immediate arrangements necessary to end violence in laying a foundation for a new (or revised) constitution. Many peace agreements set out the principles of a new constitution, such as in Cambodia, where the provisions for a new constitution were outlined in the Comprehensive Peace Agreement (Paris Agreement) or Burundi, where the Arusha Accord laid out the principles for a new constitution. In Bosnia-Herzegovina, the constitution was included as an annex to the Dayton Peace Accord. There are also constitutions that resemble peace agreements, such as the Colombian Constitution of 1991, which was written as part of an ongoing (and continuing) peace process. Some interim constitutions also resemble and perform the function of peace agreements. For example, in South Africa, the Interim Constitution was in fact the main peace agreement. In Nepal the Interim Constitution, passed shortly after the Comprehensive Peace Agreement, outlined the procedures for the drafting of a new constitution. In Zimbabwe and Kenya, the constitution was required as part of the settlement between political parties following disputed elections that resulted in violence, but not full scale civil war. There are also cases that would fall under the category of peace agreement constitution in which the constitution and peace agreement are being drafted concurrently, although not necessarily in collaboration in all instances. Such cases include current the processes in Somalia, Yemen, and Libya. The purpose and intention of the constitution in all of these cases was to further the peace process as part of the political settlement.

There are advantages and drawbacks in connecting peace processes and constitution drafting.\textsuperscript{404} What may be considered negative or positive during the peace or constitution drafting?

\textsuperscript{403} Bell (2006) (n 2) 374.

\textsuperscript{404} M Kaldor, for example, argues that peace-making and constitution drafting need to be kept separate in the context of ‘new wars’. Although, as this article points out, there can be tensions in linking these two processes, I do not agree with this (dated) argument. In practice, peace-making and constitution drafting often cannot be separated. M Kaldor, ‘How Peace Agreements Undermine the Rule of Law in New War Settings’ (2016) 7 Global Policy 146. See also M Brandt et al,
making processes in the immediate after-math of conflict, may have different long-term implications. Peace agreement constitutions, like all constitutions, are living documents subject to the judicial (and legislative) procedures of the state, and which, over time, can begin to resemble something quite unlike the compromise document that emerged at the end of the conflict.

The ideal-type constitutional document finds authority in ‘the people’; the people being a source of authority for a constitution that is intended to be enduring.\textsuperscript{405} However, the moment of constitutional founding is limited in time;\textsuperscript{406} beyond that moment, ‘the people’ become an abstraction rather than a continuous source of authority. In the same way, peace agreements are negotiated and signed by certain people in a moment of time, but the ‘peace’ they bring must be developed and tied to new constitutional arrangements that embody a new political settlement. Peace agreement constitutions, like many constitutional documents (regardless of their origin), are typically elite brokered pacts, often negotiated and signed at the exclusion of broader participation.\textsuperscript{407} A compromise constitution cannot be understood as an end-point if it is to function in a deeply divided state emerging from high-level conflict. To view the constitution as a process (a ‘means’) rather than a codified set of rules (an ‘ends’), perhaps requiring several iterations, breaks with the traditional understanding of the constitution as an entrenched and lasting document.\textsuperscript{408}

Judiciaries (and legislatures) must continually (re)interpret and (re)negotiate their constitution, allowing it to move from its founding political moment and adapt to address unforeseen situations, to progress beyond the customs and norms that were held at the moment of its enactment. Likewise, a peace agreement constitution must move on from the divisions and tensions that existed at its signing to establish a sufficient level of stability, introduce new political and legal institutions, and simultaneously accommodate warring factions while moving towards a more united national identity. However, a peace agreement constitution is, by necessity, a compromised and imperfect document, which may not be able to overcome tensions inherent in it. Courts, in their capacity to interpret

\begin{footnotesize}
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\item See OO Varol, ‘Temporary Constitutions’ (2014) 102 California Law Review 409 who makes a descriptive and normative case against constitutions written with the intention of being permanent, see fn 6, 411 for a list of those who makes a case for enduring constitutions and a short description of their arguments.
\item There are, of course, efforts to make peace processes more inclusive, see V Hart, ‘Constitution-Making and the Right to Take Part in a Public Affair’ in L E Miller (ed), Framing the State in Times of Transition (USIP Press, Washington, DC, 2010).
\item For more on entrenchment and unamendability in post-conflict (and post-authoritarian) constitutions, see Silvia Suteu’s article in this special section.
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and (re)negotiate the constitution, also in a sense (re)interpret the peace agreement as they articulate the nature of the political settlement captured in the peace agreement constitution. Courts must balance the stability of the political settlement captured in the past on the one hand, with more universal and general ways of understanding the constitution’s foundation on the other, in order to enable its more particularistic understandings to be transcended over time.409

III. POLITICAL AND LEGAL CONSTITUTIONALISM

Even with the close connection between peace agreements and constitutionalism, evaluation of judicial review and the role of courts in transitional constitutional orders has focused on democratisation rather than peace. Tom Gerald Daly’s article in this special section goes over much of the key scholarship relating to courts and transitions that focuses on post-authoritarian governments and the role of courts as democratisers. I suggest that a distinctive set of peace agreement constitutions exist and that when we examine cases arising post transition from conflict rather than authoritarianism, peace is the foundation of the constitution and so becomes the concern of courts in ways that produce distinct jurisprudential needs and responses.

Legal and political constitutionalists disagree on the authority of constitutional courts to practice strong-form judicial review410 and on the democratic legitimacy of courts to rule on political questions. I suggest that the disagreement between the two camps is unable to address the particular concerns of judicial review of peace agreement constitutions, as courts in these contexts are often asked to rule on ‘first-order questions about the structure of government’411 and on questions of peace. Peace agreement constitutions attempt to achieve elite pacts that may be more inclusive than before, but risk becoming limited deals. Courts often must both acknowledge and protect the elite pact while recognising its limited


410 I borrow M Tushnet’s definition of strong-form judicial review: ‘the courts have general authority to determine what the Constitution means... [w]hatever limits there are on that authority, such as those imposed by the political question doctrine or interpretive approaches counselling deference to the policy judgments of the other branches, originate from the courts themselves’. M Tushnet, ‘Alternative Forms of Judicial Review’ (2003) Michigan Law Review 101, 2782, 2784.

411 I use S Issacharoff’s phrase to draw attention to his argument that while ‘it is becoming commonplace for courts to confront questions that were long deemed beyond the realm of possible judicial competence [there are] difficulties in confronting an area without clear markers in either legal or political theory’ (S Issacharoff, ‘Democracy and Collective Decision Making’ (2008) 6 International Journal of Constitutional Law 231, 266.) Issacharoff is sceptical of courts engaging with such first-order question, reserving the situations in which courts should ‘override local political arrangements’ (263).
nature and the need to ultimately move beyond it. This involves a difficult type of balancing act which arises directly at the political interface between opposing elites with opposing constitutional preferences.

In his article in this special section, Daly is sceptical of the excessive faith placed in courts in new democracies and suggests that the view of courts as central engines of successful democratisation rests on rather slim evidence. However, regardless of any academic hesitations as to the expected task of a constitutional court, courts with strong-form judicial review are commonplace in new constitutions, including those drafted as a part of a peace process. In negotiating a political settlement, elite actors bargain intensely to protect their political positions, and in agreeing to the inclusion of strong constitutional courts may be motivated by self-interest. Ran Hirschi and Tom Ginsburg argue that parties contending for power make pragmatic decisions in the course of negotiating the constitutional settlement. It may also be that the internationalisation of many peace and constitution-making processes has led to the ‘constitutional migration’ of strong judiciaries. International actors may also push for robust courts with judicial review of rights, as a rule of law ‘safeguard’ that is particularly necessary in cases where the power-arrangements constitute a tightly scripted ‘elite pact’.

No matter what the motivation for the adoption of strong courts into peace agreement constitutions, the current discourse on the legitimacy of judicial review is measured against democratic values, and is unable to assess the place of courts in balancing the demands of peace in holding together the political settlement. Political constitutionalists see democracy as being facilitated primarily through representative, elected legislatures and governments, and so are cautious about the authority and oversight of courts. Legal constitutionalists, in contrast, have understood rule of law and rights-based judicial review as central to democracy. The argument between political and legal constitutionalists is concerned with the sense and functions of democracy. Political constitutionalists ground their position in a

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412 T Ginsburg, ‘The Global Spread of Constitutional Review’ in K Whittington and D Keleman, Oxford Handbook of Law and Politics (OUP, Oxford, 2008). This trend is also present in constitutions written as part of democratic transitions, for more see Tom Gerald Daly in this special section, who takes a more sceptical approach to judicial review.


majoritarian model of democracy, holding that legislatures are the more legitimate institution to protect and interpret the constitution and are sceptical that judges can, or should, hold strong interpretive powers. Legal constitutionalists, on the other hand, look to courts to secure the constitution as a legal document that ascribes authority to other political institutions. Political and legal constitutionalists also disagree on the equality of citizens. Where political constitutionalists look to the democratic process and the will of the majority to provide equality through the electoral system, legal constitutionalists believe that constitutionalism, through judicial review, protects the equality of all citizens by preventing the tyranny of the majority.\footnote{Bellamy (n 24) 5.}

Advocates and opponents of judicial review look to the American and British constitutional systems, respectively, in support of their arguments. Both positions, however, assume a ‘reasonably well-functioning’ liberal democracy.\footnote{I borrow M Tushnet’s definition of ‘reasonably well-functioning’: ‘Reasonably-well functioning institutions are imperfect but not systematically so, nor to a large degree. Such institutions will make mistakes identifying and protecting rights, but those mistakes will be ransom (with respect to both subject-matter and the beneficiaries of rights) and they will not be of a type that leads to a downwards spiral of rights-protection’ M Tushnet, ‘How Different are Waldron’s and Fallon’s Core Cases For and Against Judicial Review’ (2010) 30 Oxford Journal of Legal Studies 49, fn 10.} As Daly argues, these arguments may need to be evaluated differently in post-authoritarian periods of democratic consolidation. I go further to suggest that the political and legal constitutionalism literature arguments on judicial review is unable to assess constitutional courts and peace agreement constitutions, as the demands of peace may be different from (and, possibly, opposite to) the demands of democracy. That is not to say, however, that the demands of both may not also be the same in many ways.

In post-conflict cases, such as Northern Ireland, Bosnia-Herzegovina and Colombia, peace is at much at stake as democracy. A constitution drafted as part of the peace process is intended to end violence (both the actual occurrence of violence and the possibility of renewed violence). Peace agreement constitutions, in fact, intend to move contestation out of violence into politics. However, the threat of violence remains throughout the peace process and constitution drafting phases, and often continues into the implementation and post-transition periods. The requirements for peace are vague, and the potential for renewed violence lingers beyond the enactment of the peace agreement constitution. Moreover, the demands of peace and the demands of democracy may be in tension, as much as they can be mutually dependant. Democracy is hard to achieve without peace, but the ending of conflict can require limits to be placed on democracy in the interest of finding a resolution. The tensions between peace and democracy and the higher order difficulty of
maintaining both, means that traditional approaches of both political and legal constitutionalists are incomplete.

As a case in point, arguments relating to the authority of the constitution are grounded in the traditional understanding of constituent power: that the legitimacy and authority of the constitution is found in ‘the people’ who act in unison and are in agreement with the constitution. Yet the very concept of ‘the people’ is often under dispute in post-conflict transitions, because, firstly, ‘constituent power’ appears to be imposed from above and outside\(^{420}\) and, secondly, divided societies include multiple sources of ‘constituent power’.

\(^{421}\) A peace agreement constitution requires comprise between two (or more) ‘constituent powers’ with the intent of establishing a unified polity, rather than the constitution emerging out of a clear commitment to act as a unified ‘people or polity’. The concept of ‘constituent power’ is complicated and there can be no automatic assumption that the peace agreement constitution is a straightforward manifestation of a common commitment to a common political community, with common values, residing inside a united territory. The commitment to any common concept of the state often remains contingent on continuing political events. In such an uneasy setting, peace agreement constitutions potentially hold authority because they are part of the political settlement. If this source of authority is accepted, courts can claim legitimacy to preserve that settlement, even if they are acting in an activist or political way. A court becomes the instrument to continue the political settlement and to balance the elite pact needed to uphold the peace, against the broader demands of the constitution. In this setting, peace is both the necessary precondition for constitutionalism and the purpose for which the constitution exists.

Conventional discourses on constitutionalism and judicial review often understand democracy as the justification and grounds against which the political and legal constitutionalism debate is set. The reasoning of political and legal constitutionalism take democracy as the normatively appropriate end goal of constitutionalism and so disagree solely on the means to best support that goal. However, if peace is taken as the principal normative aim of a peace agreement constitution, the grounding and reasoning of the discourse on judicial review is unable to capture the place courts hold in the political settlement. This article aims to outline an alternative perspective though which to read the case law of courts interpreting peace agreement constitutions. In so doing, this article brings together the study of constitutional law and political settlements.


III. CONSTITUTIONAL INTERPRETATION AND ‘PEACE JURISPRUDENCE’

The aim of this section, first, is to provide evidence across constitutional jurisdictions concerning the fundamental meaning of a constitutional order, and second, to highlight the impact certain judicial decisions may have on the legal and political order of a state. First, I locate that discussion in a wider understanding of the importance of ‘foundational cases’ which articulate the constitution’s core purpose and values.

Foundational cases

A part of the constitutional canon that goes beyond the text of the constitution and which includes the peace agreement, is the judicial decisions that go to the heart of the relationship between the constitutional text and what might be understood as the political settlement. Such cases are understood as foundational, examples of which can be located in the jurisprudence of courts interpreting non-peace agreement constitutions. The German Federal Constitutional Court, for example, in its first case decided after the enactment of the Basic Law, reasoned that:

A constitution has an inner unity and the meaning of any one part is linked to that of other provisions. Taken as a unit, a constitution reflects certain overarching principles to which individual provisions are subordinate.

The Court found that by using this concept of unity, there were certain fundamental principles in the Basic Law that were superior to other political acts and to lesser constitutional principles, and that the federal government was bound by the decisions and reasoning of the Court. These included, for example, the federal nature of the state itself. Further, in this decision, the Court asserted its authority to respond to constitutional questions at issue in the case, including questions not directly raised in the petition. In so doing, it articulated what it understood to be the essential aspects of the constitution that encapsulated the fundamental political settlement within Germany, and on which the constitution’s continued existence in that form depended.

422 One leading example is Marbury v Madison from the American Supreme Court (5 US (1 Cranch) (1803) 137). That decision altered the interpretation of the US Constitution by allowing courts, once petitioned, to review if legislation complied with the US Constitution. Marbury, like the cases considered foundational in this article, established the legitimacy of courts to conduct judicial review, but, unlike the other decisions considered here, did not go beyond that to articulate the basic meaning of the constitution.

The Indian Supreme Court used similar reasoning in its 1967 decision *Golaknath v State of Punjab*, in which it found that constitutional amendments could not abridge or take away Fundamental Rights enshrined in Part III of the Indian Constitution. In a second landmark ruling that overturned the decision in *Golaknath*, the Court in *Kesavananda Bharati v State of Kerala* protected the constitution from the proposed constitutional amendments of Indira Gandhi, finding that the basic structure of the constitution was outside the political amendment process, and in so doing, the Court established the Basic Structure Doctrine. The doctrine was subsequently applied by the Court to invalidate amendments. It has also been used to uphold the public interest litigation of the Court, which has made the Indian Supreme Court one of the most activist constitutional courts. Again, this case can and has been read as creating an understanding of the political settlement that must be preserved for the constitution to continue to exist in any meaningful form. If these decisions are not to be dismissed (and all these cases remain controversial), they have to be justified in terms of an implicit hierarchy in the constitutional order that involves understanding the core conditions and values that enable the constitution.

Similarly, the French Conseil Constitutionnel struck down a law for breaching fundamental rights found in the Preamble of the 1958 Constitution and the principles of the Republic, in a case concerning the constitutionality of restrictions placed on freedom of association. In its first decision, in 1971, the Conseil struck down a piece of ordinary legislation, and in so doing placed constraints on Parliament. The effect of the decision was to read into the Constitution the declaration of 1789, the preamble of 1946, and the fundamental principles of the law of the Republic. The Supreme Court of Israel is another example where the court has ruled on cases that are considered as ‘foundational’. Here, most of these decisions were issued in the first few decades of the Court’s existence and, despite the absence of a written constitution in Israel, involved limiting government power on quasi-constitutional grounds.

Vicki Jackson and Mark Tushnet question the usefulness of categorising foundational cases; however, I suggest that the concept remains helpful in demonstrating a distinctive form of judicial review that is focused on articulating the basic meanings of the pre-constitutional political settlement that provided authority to the constitution and which

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426 French Conseil Constitutionnel, Decision no 77-44 DC (16 July 1971).
428 See, for example, the Supreme Court of Israel, Kol Ha-am case (1953); the Bergman case (1969); the Elon Moreh case (1979).
429 Jackson and Tushnet (n 35).
remains grounded in the constitutional text. In many of the examples given above, most notably that of the Indian Supreme Court in *Kesavananda*, the decisions have had a lasting and profound impact on the direction of the court and on its subsequent rulings.

There are two additional principles which have been borrowed by courts in decisions on peace agreement constitutions which have an element of similarity of approach between the peace agreement cases discussed in this paper and traditional constitutional cases, albeit operationalised in a different way in ‘peace jurisprudence’. These are purposive interpretation and the principle of proportionality.

**Purposive interpretation**

‘Foundational cases’ find justification in concepts of purposive interpretation linked to the authority of the constitution. Joseph Raz, reflecting on constitutional authority and interpretation, reasons that ‘the grounds for the authority of the law help to determine how it ought to be interpreted.’ 430 The authority of a peace agreement constitution is found in the authority of the peace agreement and in the promise of peace. In intention and principle peace agreement constitutions hold up peace, in its broadest sense, as their purpose. In the domestic cases cited below, the courts determined, implicitly and explicitly, that peace was the main purpose of the constitutional drafters. Locating the authority of the constitution, at least in part, in peace and following the link made by Raz, the interpretation of these constitutions rests on the same grounding.

Aharon Barak proposes that purposive interpretation can be objective and subjective. 431 The objective purpose being found in the ‘interests, goals, values, aims, policies, and function that the constitutional text is designed to actualize’ and understood through the language of the constitution. 432 The subjective purpose of the constitution is in the principles ‘that the founders of the constitution sought to actualize.’ 433 The subjective purpose can be located in the history of the constitution, ‘including its pre-enactment history – the social and legal background that gave birth to the constitution, [including] the history of the procedures by which the constitution was founded.’ 434 In the case of a peace agreement constitution, its ‘history’ is located in the peace process and agreement. Peace agreements, however, tend to be elite driven processes, that may not be representative of the broader population.

431 Barak (n 6).
432 Ibid 377.
433 Ibid 375.
434 Ibid 376.
Peace agreements are also political compromises that are far from the ideal-type. Again, the peace agreement constitution, unlike the ideal constitutional document, is unlikely to find a source of authority in a collective agency or a united constitution maker. Subjective purpose constitutional interpretation, in this context, cannot be settled, as the purpose of the constitution is not settled and is a matter of ongoing contestation. The use of historical intent is therefore not particularly useful or applicable to peace agreement constitutions (and, in fact, also remains contested in more settled contexts).

In both settled and peace agreement constitutions, the trouble with according significance to subjective purposive and authorial intent is that the constitution may become stuck in time. This is perhaps best conveyed by Justice Lamer of the Canadian Supreme Court in his judgement on the meaning of the phrase ‘fundamental justice’ in s. 7 of the Canadian Charter of Rights and Freedoms:

[A] danger with casting the interpretation of s. 7 in terms of the comments made by those heard at the Special Joint Committee Proceedings is that, in so doing, the rights, freedoms and values embodied in the Charter in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing social needs ... If the newly planted ‘living tree’ which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials...do not stunt its growth.435

The danger of a peace agreement constitution being held in time may be greater than it is for constitutions written at other points in history. Peace agreements are compromise deals that, in many cases, have required concessions from both sides (and international actors) in order for agreement to be reached. However, when incorporated into the constitution, there is a risk that these tensions will freeze the social divisions of the conflict in time.

Barak lists six internal and external sources to determine objective purpose.436 The most relevant being the fundamental values of the constitution, ‘embodied in the words of the constitution ... as well as the objective purpose guiding the interpretation.’437 Fundamental values can also be found in documents ‘external to the constitution [which] encompass the constitution and form part of its objective purpose.’438 For a peace agreement constitution, peace is without doubt a fundamental value of the constitution, and the peace agreement is an example of a further source of fundamental values that are external to the constitution.

435 Re B.C. Motor Vehicle Act [1985] 2 S.C.R. 486, 504. The Australian and German constitutional courts have made similar pronouncements. The United States Supreme Court has, on the other hand, engaged with original intent doctrine.
436 Barak (n 6) 377–384.
437 Ibid 381.
438 Ibid
but which must be considered as part of its objective purpose. Peace has no clear meaning, and although the word ‘peace’ is included in the Colombian and Bosnian constitutions\textsuperscript{439} there is no definition attached. It is therefore at the discretion of the constitutional court, when referencing peace, to determine its meaning and scope, which in part explains the differences between domestic and international courts, as discussed below.

Proportionality

Proportionality has become a common tool in constitutional interpretation\textsuperscript{440} and, again, finds a different form in the context of a peace agreement constitution. Limitation clauses, which provide a means for courts to access principles of proportionality, are sometimes included in constitutional texts. Broadly, there are four elements of proportionality: (1) proper purpose; (2) rational connection; (3) necessity; and (4) proportionality \textit{stricto sensu}, or balancing.\textsuperscript{441} In a case before the Canadian Supreme Court concerning the use of s. 1 of the \textit{Charter of Rights and Freedoms},\textsuperscript{442} the so-called ‘limitations clause’, the Court reasoned that ‘[i]t may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.’ The Court held that s.1 had to be interpreted ‘contextually’ as a result of the qualification that the government could limit otherwise constitutionally protected rights if such limitations could be justified in a ‘free and democratic society.’ In so doing, the Court relied on the phrase ‘free and democratic society’ contained in s.1 as evidencing both the justification for limiting a constitutional right and the purpose for which the Charter was enacted, such that ‘the underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit of a right or freedom must be shown...to be reasonable and justified.’\textsuperscript{443} In coming to this decision, the Court articulated the grounds on which a limitation would be found reasonable and justified, namely, that the means chosen must (1)

\textsuperscript{439} See the preambles of the Bosnian and Colombian constitutions; and Art 22 of the Colombian Constitution.

\textsuperscript{440} See above (n 7) for a list of recent publications.

\textsuperscript{441} A Barak, ‘Proportionality (2)’ in M Rosenfeld and A Sajó (eds), \textit{The Oxford Handbook of Comparative Constitutional Law} (OUP, Oxford, 2012).

\textsuperscript{442} The most notable example of a limitations clause is s. 1 of the Canadian Charter of Rights and Freedoms which reads as follows: ‘The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’ South Africa (Art 36, of 1996 Constitution), Israel, New Zealand (Art 5, Bill of Rights) and Australia (s 28, 2004 Human Rights Act of the Australian Capital Territory and s 7, 2006 Charter of Human Rights and Responsibilities Act of the State of Victoria) have also included limitations clauses in their constitutional documents. The European Convention on Human Rights allows limitations that are ‘necessary in a democratic society’ (Arts 8(2), 9(2), 10(2), 11(2)).

\textsuperscript{443} \textit{R. v. Oakes}, Supreme Court of Canada (1986) 1 S.C.R.103.
be rationally connected to the objective served by the limitation; (2) impair ‘as little as possible’ the right or freedom in question and, most importantly; (3) there must be ‘a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”’. The Canadian Supreme Court and the German Constitutional Court have been influential in developing the principle of proportionality, which has been ‘borrowed’ by other constitutional courts and adjusted in meaning to be contextual and contingent.

It has even been suggested, although not without criticism, that proportionality has ‘provided a common grammar for global constitutionalism’, with some going so far as to argue that it is the ‘ultimate rule of law’. I am cautious that the claim being made in this article of an emerging global ‘peace jurisprudence’ based on the principle of proportionality is not evidence of a ‘globalising’ legal trend, rather, it has been taken up by courts – in ways that address, in whole or in part, the four elements, without fully engaging in a proportionality test as the Canadian Supreme Court did in Oakes – to allow for the demands of peace to be balanced gently against the activity of a continuously (re)negotiated political settlement.

For peace agreement constitutions with strong-form judicial review, the court is given the authority to (re)negotiate the constitution. Grégoire Webber provides a particularly useful understanding of the constitution as not as articulating an end-state, but as an on-going activity. Webber reasons that limitation clauses are a ‘promising avenue’ to allow for democratic (re)negotiating. The principle of proportionality is one way for courts to navigate between conflicting constitutional rights. Constitutional limitations clauses often refer to democracy as a justifiable means to limit other constitutionally protected rights. As with the political and legal constitutionalism discussion, democracy is used as the benchmark against which limitations are measured. In a post conflict transition, however, peace and democracy may have different requirements, and so, may require different sequencings. For this reason, democracy may not be the most suitable value against which to determine if the proportional limitation of a right is allowed under a peace agreement.

444 Ibid paras. 69-71.
448 Beatty (n 54).
constitution. Rather, it may be peace that is the more relevant and critical value, since peace is the prerequisite to democracy and not vice versa.

Courts seeking grounds on which to limit constitutional rights recognize that putting an end to conflict is a proper and paramount purpose of any constitution. The constitutional courts in Bosnia-Herzegovina and Colombia, as the cases below will make clear, upheld limitations on constitutionally recognised rights and, in doing so, accepted the need for certain rights to be understood as proportional to peace. Implicit in these decisions is a view that peace is an appropriate constitutional purpose. This is the same conclusion arrived at in the Northern Irish decision (although in that case, they did not use proportionality). However, upholding a limitation using the principle of proportionality also allows space for the court to maintain discretion on which rights can be limited and the extent and time to which such limitations are valid. The use of the principle of proportionality is a mechanism for courts to continuously (re)negotiate the constitution in order to reflect the changing needs and customs of society. Nowhere are the needs and customs of society changing more suddenly and dramatically than in the transition from a state of conflict to a state of peace. In such cases, the principle of proportionality empowers the courts to reinterpret the political settlement between the elite driven compromise and the on-going transition.

IV. A NEW ‘PEACE JURISPRUDENCE’

Cases from jurisdictions considered in this section serve to illustrate what I suggest is an emerging global ‘peace jurisprudence’. The conflict and peace process in Colombia is ongoing, and while the direct conflicts in Bosnia-Herzegovina and Northern Ireland ended, both continue to be constrained by their pasts. The constitutions of Bosnia-Herzegovina and Colombia were both drafted as part of their peace processes, while the Northern Ireland Act (1998), that forms the basis for the Northern Irish judicial decision, operates as the implementing ‘basic law’ or ‘devolved constitution’ for that jurisdiction. In principle and fact the Belfast (or Good Friday) Agreement acts as a constitution for Northern Ireland, as the Judicial Committee of the House of Lords accepted in the case discussed below. It is this continued association to the peace process that make Bosnia-Herzegovina and Colombia interesting examples. The first case involving the Belfast Agreement and the case of Northern Ireland is also noteworthy case, as it involves a sub-state government and constitutional arrangement within a more settled national constitutional setting.

450 Currently, the peace process between the government and the FARC has been closer to settlement than any time previously. On 23 June 2016, the parties signed a ceasefire, that came into effect on 29 August 2016, with the intention of signing a peace agreement in September 2016. This has not impacted on how this article has considered this case study.
Northern Ireland

The Northern Irish case involved a challenge to a failure by the Northern Irish Assembly to appoint a First Minister and Deputy First Minister by the deadline specified in the Northern Ireland Act. The Belfast Agreement, signed by the major political parties, the British and the Irish governments, was a power-sharing agreement for Northern Ireland. The Agreement was accepted by referendum in both the Republic of Ireland and Northern Ireland in May 1998. The British Parliament subsequently passed the Northern Ireland Act implementing the power-sharing arrangement in a devolved assembly for Northern Ireland. The Act outlined the procedure by which the First Minister and the Deputy First Minister were to be elected, stipulating that: ‘Each Assembly shall, within a period of six weeks beginning with its first meeting, elect from among its members the First Minister and the Deputy First Minister’. Section 16 left open what would happen if the six week deadline was overreached, only suggesting in Section 32(3) that: ‘If the period mentioned in section 16 ends without a First Minister and a Deputy First Minister having been elected, the Secretary of State shall propose a date for the poll for the election of the next Assembly.’

By the time of the facts in question in the case, the 1998-elected devolved government had been suspended and restored three times. When the devolved government was restored on 23 September 2001 the positions of First Minister and Deputy First Minister had become vacant. A vote was held on 2 November 2001, which was unable to gain the necessary agreement between the then main Unionist and Nationalist parties. Undesignated members of the Assembly re-designated as Unionists in order to get the required cross-party support needed to elect the First Minister and Deputy First Minister on 6 November, by which time the six-week deadline had expired.

Mr Peter Robinson, a Democratic Unionist Party (DUP) Assembly member, brought a case on the grounds the elections were unlawful and that new elections should be held in accordance with Section 32(3). The DUP, one of the then-potential ‘spoilers’ of the peace agreement which they opposed, were on the cusp of becoming the main Unionist party in

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451 The Democratic Unionist Party (DUP) was the only major party to oppose the Agreement.
452 For more on the Belfast Agreement and the conflict in Northern Ireland see B O’Leary and J McGarry, The Northern Ireland Conflict: Consociational Engagements (OUP, Oxford, 2004).
453 Northern Ireland Act 1998, s 16 (1); reproduced in full in Robinson v Secretary of State for Northern Ireland & Ors [2002] UKHL 32, para 3.
454 Reproduced in full, alongside Section 31, in Northern Ireland Act 1998, s 16 (1); reproduced in full in Robinson (n 61) para 16.
Northern Ireland.\textsuperscript{455} Having not been party to the Belfast Agreement, the DUP were at that time hopeful of dismantling it and who were making electoral gains vis-à-vis the then larger pro-agreement Ulster Unionist Party on the back of their opposition to the agreement. Their challenge therefore was more than technical – had elections had been called, the DUP stood a good chance of becoming the dominant Unionist party and of refusing to enter the power-sharing executive, effectively collapsing the central political mechanism and the Agreement.\textsuperscript{456}

The question before the Judicial Committee of the House of Lords was whether the holding of a vote for the First Minister and Deputy First Minister after the deadline of 5 November 2001 violated the Northern Ireland Act. In what appeared to be an activist, highly purposive reading of a text that was arguably ambiguous, the House of Lords, in essence read the time limit and requirement to hold elections as not applicable.\textsuperscript{457} They did so on the basis of the relationship of the Northern Ireland Act to the Belfast Agreement. Lord Bingham, giving the leading speech in the majority, held that:

[T]he 1998 Act ... was passed to implement the Belfast Agreement, which was itself reached, after much travail, in an attempt to end decades of bloodshed and centuries of antagonism. The solution was seen to lie in participation by the unionist and nationalist communities in shared political institutions ... If these shared institutions were to deliver the benefits which their progenitors intended, they had to have time to operate and take root.

The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody. Mr Larkin [on behalf of the appellant] submitted that the resolution of political problems by resort to the vote of the people in a free election lies at the heart of any democracy and that this democratic principle is one embodied in this constitution. He is of course correct ...

\textsuperscript{455} Unionists (loyalists) support the political union between Northern Ireland and the United Kingdom (and are mostly Protestant). Nationalists (republicans) favour union with the Republic of Ireland (and are mostly Catholic).

\textsuperscript{456} Sinn Féin was also likely to become the dominant Nationalist party in the Assembly had a new election been called. There were concerns that the DUP and Sinn Féin would replace the more moderate Ulster Unionists and the Social Democratic and Labour Party (a nationalist party).

\textsuperscript{457} C Turpin and A Tomkins agree that the ‘majority of the House of Lords interpreted the legislation purposively, the purpose being to maintain devolved government in Northern Ireland’. And that ‘Robinson suggests that, when it comes to the interpretation of what the courts deem to be ‘constitutional statutes’ (whatever that may mean in our unwritten constitution), different rules may apply from those which govern the interpretation of ordinary (i.e. nonconstitutional) legislation.’ C Turpin and A Tompkins, British Government and the Constitution Text and Materials (6th edn, CUP, Cambridge, 2007) 70-71.
[However, while] elections may produce solutions they can also deepen divisions. Nor is the democratic ideal the only constitutional ideal which this constitution should be understood to embody...this constitution is also seeking to promote the values referred to in the preceding paragraph, [namely the values set out in the Belfast Agreement].

The language in this decision reinforces the idea that the 1998 Act, implementing the Belfast Agreement, is in effect a constitution for Northern Ireland, and that as a constitutional document it embodies and protects the values and purposes of the peace agreement. The decision also makes note of the tensions between democratic values, such as election and parliamentary procedure and strict compliance with the constitutional text (in this case the Northern Ireland Act), and values of peace and reconciliation can possibly be worsened by enforcing such democratic processes even when the effect would be to end the possibilities for democratic self-government. The House of Lords does not use the language of proportionality explicitly (which would not immediately have had the same connotation in British constitutional practice in any case), however, they rejected the petition of the appellant on the grounds that the provision of the Act requiring elections should a First Minister and Deputy First Minister not be elected was not intended to constrain the Assembly from acting, and that the provision ‘must be read in context’. The House of Lords sought to preserve the arrangements in the original agreement in its spirit, even at the expense of the strict literal meaning of the implementing Northern Ireland Act. This case was brought shortly after the passing of the Act, making the decision in this case relevant to the success of the peace accord. The position taken in this case is an example in which the underlying political settlement was endorsed and protected by the judiciary, at the expense almost of the wording of the Northern Ireland Act, demonstrating the essential role of this ‘least dangerous branch’ of government in managing the ongoing political settlement process.

**Bosnia-Herzegovina**

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458 Robinson (n 61) para 10-11. It is also worth repeating here an extract from the opinion of Lord Hoffmann (in the majority): ‘According to established principles of interpretation, the Act must be construed against the background of the political situation in Northern Ireland and the principles laid down by the Belfast Agreement for a new start. These facts and documents form part of the admissible background for the construction of the Act just as much as the Revolution, the Convention and the Federalist Papers are the background to construing the Constitution of the United States’ (para 33).

459 Robinson (n 61) para 17.

The Constitution of Bosnia-Herzegovina was drafted as an annex to The General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement), the final peace agreement to resolve the war in the former Yugoslavia.\textsuperscript{461} The Agreement was drafted in November 1995 under the supervision of the European Union special negotiator and delegates from France, Germany, Russia, the United Kingdom and the United States. The Agreement recognised the new state of Bosnia-Herzegovina as a decentralised federation composed of two entities, the Republic of Srpska and the Federation of Bosnia-Herzegovina. A power-sharing arrangement was agreed at the state federal level recognising Bosniacs, Croats and Serbs as ‘constituent peoples’, thereby, limiting election to the presidency and upper house to members of these groups.\textsuperscript{462} The power-sharing arrangement was a necessary compromise needed to allow the Dayton Agreement and in particular its commitment to a central Bosnian state to go forward.\textsuperscript{463} The Constitution also incorporated the European Convention on Human Rights (ECHR) to ‘apply directly in Bosnia and Herzegovina.’\textsuperscript{464}

Over time the foundation of the power-sharing arrangement, the provision that Serbs, Croats, and Bosniacs only were ‘constituent peoples’, was challenged. In a case concerning the constitutionality of the electoral law the Constitutional Court of Bosnia-Herzegovina - comprised of a careful balance of Bosniak, Croat, Serbian and international judges found that:

the provision of Article 8 of the Election Law of Bosnia and Herzegovina [on the election of the Presidency], including Article V of the Constitution of Bosnia and Herzegovina, should be viewed in the light of discretionary right of the State to impose certain restrictions when it comes to the exercise of individual rights. The said restrictions are justified by the specific nature of internal order of Bosnia and Herzegovina that was agreed upon by Dayton Agreement and whose ultimate goal was the establishment of peace and dialogue between the opposing parties ... [The articles] serve a legitimate aim, that they are reasonably justified and that they do not place an excessive burden on the appellants given that the


\textsuperscript{462} The Constitution of Bosnia-Herzegovina sets out in the preamble that the constitution is ‘dedicated to peace, justice, tolerance and reconciliation’ and is determined by the ‘Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina’.

\textsuperscript{463} PW Galbraith, United State ambassador to Croatia between 1993 and 1998, in an interview with B O’Leary in August 2012, suggests that ‘absent explicitly ethnic power-sharing assurances to the three main groups the negotiations would neither have begun or concluded’ (C McCrudden and B O’Leary, Courts and Consociations: Human Rights versus Power-Sharing (OUP, Oxford, 2013) 24).

\textsuperscript{464} Constitution of Bosnia-Herzegovina, Art II (2).
restrictions imposed on the appellants’ rights are proportional to the objectives of general community in terms of preservation of the established peace.465

Justice Feldman, one of the three international judges on the Court, wrote, in his concurring opinion, that he regarded ‘the justification as being temporary rather than permanent’, concluding, however, that ‘the time [had] not yet arrived when the State [had] completed its transition away from the special needs which dictated the unusual architecture of the State under the Dayton Agreement and the Constitution of Bosnia and Herzegovina.’466 Justice Feldman’s reasoning hints that the political process will eventually hit a stage at which time a justification on the grounds accepted in this case would not be constitutional.

In a second case on a similar matter, the Court found that:

The...restrictions are justified by the specific nature of internal order of Bosnia and Herzegovina that was agreed upon by Dayton Agreement and whose ultimate goal was the establishment of peace and dialogue between the opposing parties given that the said provision was intentionally incorporated into the Constitution... [and that such restrictions] are proportional to the objective of general community in terms of preservation of the established peace [and] continuation of dialogue.467

The decisions of the Bosnian Constitutional Court reflect the theories of Richard Pildes468 and Samuel Issacharoff,469 who agree that constitutional courts tend to be restrained when power-sharing arrangements are in tension with human rights provisions. This article goes further than the conclusions made by Pildes and Issacharoff, in suggesting that the Court is picking up the principal of proportionality to safeguard the power-sharing arrangement, although the Court did exercise caution in these cases. Further, as Justice Feldman holds the Court does not hold the constitutional authority to go beyond the constitution in determining legal and constitutional issues to bring the state law or constitution in line with Bosnia’s international obligations under the Convention.470 However, as I discuss below, the European Court of Human Rights (ECtHR) came to the opposite decision in its judgment on the power-sharing arrangement, raising the question of whether and how regional or

465 Constitutional Court of Bosnia-Herzegovina, Admissibility & Merits, Case No. AP-2678/06, 29 Sept 2006, para 21-22.
466 Constitutional Court of BiH (n 73) Separate Concurring Opinion of Judge David Feldman, para 3.
467 Constitutional Court of Bosnia and Herzegovina, Decision on Admissibility and Merits, U-5/09, 25 Sept 2009 cited in C McCrudden and B O’Leary (n 71) 89.
469 Issacharoff (n 19).
international courts apply a ‘peace jurisprudence’.\textsuperscript{471} The ECtHR rejected the reasoning of the Constitutional Court, upholding the individual rights of the applicants over the power-sharing arrangement, in effect, finding the Constitution to be in violation of the Convention and Protocol.

\textit{Colombia}

The 1991 Constitution of Colombia replaced the 1886 Constitution\textsuperscript{472} and formed the culmination of a peace process with a wide range of armed groups,\textsuperscript{473} and reflects this relationship to the peace process in its design.\textsuperscript{474} The Constitutional Court of Colombia, in accordance with Article 24, is entrusted to ‘[safeguard] the integrity and supremacy of the Constitution.’\textsuperscript{475} In an early decision, the Court listed some of the constitutional values and principles that inform the constitution and constitutional interpretation, including peace as ‘captured in the preamble to the constitution.’\textsuperscript{476} The Court has been judicially active and progressive,\textsuperscript{477} rulings on laws that have bearing on the continuing peace process and in a way that supports the idea of an emerging ‘peace jurisprudence’.

In an initiative of the Uribe government from 2003 onwards, the government passed the Justice and Peace Law in 2005 (Law 975)\textsuperscript{478} as part of a ‘peace process’ with the United Self-Defense Forces of Colombia (AUC). These were right wing paramilitary groups who sought

\textsuperscript{471} This case will be discussed below.

\textsuperscript{472} Amended in 1910, 1936 and 1945.

\textsuperscript{473} The constituent assembly that was convened to draft the new constitution did not include representatives of the FARC or ELN, although the ELN had signed past peace agreements.

\textsuperscript{474} Justice MJ Cepeda-Espinosa wrote of the Court: ‘Some people think that the Constitution is best suited for Switzerland. Needless to say, that is not my opinion. Nevertheless, one of the first objections raised against the 1991 Constitution by those who defended the previous 1886 Constitution was that it promised too much for a country like Colombia, and that it seemed to have been conceived for a society that was living in peace. Hence these critics revisited the common phrase with which Victor Hugo disqualified the 1863 Colombian Constitution, which also contained a generous bill of rights and followed the federal model: “it is a constitution fit for angels.”’ (MJ Cepeda-Espinosa, ‘Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court’ (2004) 3 \textit{Washington University Global Studies Law Review} 529, 532.).

\textsuperscript{475} The institution of constitutional review, however, was not unique to the 1991 Constitution. Under the previous 1886 Constitution, the Supreme Court of Justice (CSJ) was called on to rule on the constitutionality of a national law where there was a disagreement concerning its constitutionality between the President and Congress.


\textsuperscript{477} Landau suggests that the Colombian Constitutional Court has adopted a ‘new constitutionalism’ approach to judicial review which considers constitutions as extraordinary documents ‘that should be read broadly and with the document’s hierarchy of ideals in mind’ Landau (n 84) 709.

\textsuperscript{478} Enacted by Congress on 22 June 2005, signed into law by President Uribe on 22 July 2005. This was followed by Decree No. 4760, 30 December 2005, which regulated aspects of the law.
to uphold a ‘pro-state’ agenda and were often alleged to be acting in collusion with elements of the government meaning that the concept of a ‘peace process’ between these groups and the government was contentious. However, both the AUC and the government signed the Santa Fe de Ralito Agreement in July 2003, setting out the terms for the demobilisation and reintegration of AUC members. The Agreement included provisions limiting the prosecution of demobilised members. As a part of this process, in the period between November 2003 and April 2006, more than 30,000 members from thirty-five armed groups under the AUC, participated in the demobilisation process.479 The law established a ‘transitional justice’ mechanism for paramilitaries to demobilise and confess in exchange for reduced penal sentences of five to eight years.480

A coalition of human rights organisations brought a case before the Constitutional Court under Article 241(4) of the Constitution,481 challenging the content of thirty-three of the seventy-two articles of the Law on the grounds that there were irregularities in the legislative process in some of the rules; that the bill allowed for judicial pardons to members of illegal armed groups without procedural requirements; and that the measures were inadequate to the protections of victim’s rights. In its ruling, the Court:

named the pursuit of peace as a complex legal entity, as a collective right, an essential purpose of the Colombian state and a constitutional value. Therefore, the State had the authority to provide reasonable transitional instruments, justified and proportionate, even limiting other constitutional guarantees, in order to achieve peace. However, such limitations could not be based on the understanding of peace as an “absolute value”. Instead, the peace achievement should be compatible with the main aspects of the Rule of Law, in particular the rights of victims.482

The Court determined that the alternative punishment mechanism was aimed at achieving peace, and so, found the law to be constitutional in general. However, the Court issued guidelines on victims’ participation483 and access to reparations,484 the meaning of ‘paramilitarism’ as a crime under the law, and introduced legal consequences to those

479 This is according to official data, cited by the Statement by the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia, OEA/Ser/LV/II.125, Doc 15, 1 Aug 2006, para 7.
481 Under Art 214(4), the Court may ‘[d]ecide on the petitions of unconstitutionality brought by citizens against statutes, both for their substantive content as well as for errors of procedure in their formation.’
483 Ibid para 6.2.3.2.2.1 – 6.2.3.2.2.10.
484 Ibid para. 6.2.4.1 – 6.2.4.1.24.
participating in the mechanism who concealed information\textsuperscript{485} removing some of the more contentious aspects of the law. The Court ‘found that the settlement of the claim depended on the balance between the pursuit of peace and the rights of victims.’\textsuperscript{486} The law remains controversial both in its passing and its implementation.

In keeping with a strict reading of the Constitution, the Court may review the procedural constitutionality of an amendment, not the content.\textsuperscript{487} However, in a series of decisions from 2003,\textsuperscript{488} the Court has introduced the constitutional replacement doctrine as a doctrine on ‘unconstitutional constitutional amendments’, similar to the Indian Supreme Court’s basic structures doctrine. The doctrine sanctions the Court to review the content of amendments on the grounds that it modifies or replaces the essential element of the Constitution.\textsuperscript{489}

The Santos government, elected in 2010, pushed forward the peace process with the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN). As part of these efforts, the ‘Legal Framework for Peace’\textsuperscript{490} was passed as a constitutional amendment, introducing Transitional Articles 66 and 67 as an ‘exceptional’ transitional justice framework to facilitate the peace negotiations and achieve ‘a stable and lasting peace’.\textsuperscript{491} The amendment has been criticised for contravening certain human rights provisions of the 1991 Constitution and international human rights law.\textsuperscript{492} However, the Court, exercising the constitutional replacement doctrine, ruled on the content of the Legal Framework for Peace amendment, accepting its constitutionality on the grounds that the essential principles of the constitution were not undermined by the amendment so long as it was proportional to the intended objective of facilitating peace.\textsuperscript{493} Again, as in all the

\textsuperscript{485} Ibid para 6.2.2.1.1 – 6.2.2.1.7.30.


\textsuperscript{487} See Arts 241 and 379.


\textsuperscript{489} Bernal (n 96).

\textsuperscript{490} Legislative Act 1/2012.

\textsuperscript{491} Although the transitional justice mechanisms established under this amendment are to be ‘exceptional’ there is no clear timeline given.

\textsuperscript{492} For more on the tensions between (temporary) transitional justice mechanisms and (more permanent) constitutions, see JM Méndez, ‘Constitutionalism and Transitional Justice’ in M Rosenfeld and A Sajó (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press, 2012) and C Bernal, ‘Transitional Justice Within the Framework of a Permanent Constitution: The Case Study Of The Legal Framework For Peace In Colombia’ (2014) 3 Cambridge Journal of International and Comparative Law 1136.

\textsuperscript{493} Judgment C-579/2013 (in which the Court accepted that prosecutions of members of illegal armed groups could be selected and prioritised as part of the transitional justice mechanism) and Judgment C-577/2014 (in which the Court ruled
cases reviewed in this section, the Court was able to find a way to both honour the agreement so as to shield the political settlement and future peace negotiations, while tweaking it to better protect human rights, so as not to back track too far on the constitution’s protection of human rights and international law.

The most recent peace agreement reached between the Colombian government and the FARC must first be approved in a referendum. The law on the referendum was, by process, referred to the Constitutional Court (both sides having agreed to commit to its ruling), which was upheld, with some condition. For example, the decision of the referendum would be binding only on the executive and not on other branches of government, and the agreement, if approved, would not automatically be incorporated into the constitution or law. In June 2016, Congress passed temporary constitutional amendments to allow them to expedite the approval procedure for the agreement and to grant the President powers to issue a decree to enforce the agreement. These amendments are subject to review by the Constitutional Court. The Court’s response may shore up its role as the guardian of the peace, reinforcing this function that the Court has already taken on itself.

All three jurisdictions therefore, illustrate how courts often balance the requirements of the letter of the constitution, with its underlying purpose as being to bring about peace. They show the ways in which courts will adopt flexible approaches to ensuring the constitution is not used to defeat the underlying political agreement that enabled it.

V. INTERNATIONAL HUMAN RIGHTS COURTS: SUPPORTING OR UNDOING THE ‘PEACE JURISPRUDENCE’?

While so far I have focused on domestic jurisprudence, often these same cases and fact patterns are subject to subsequent international human rights court rulings. These have the capacity to take quite different decisions, posing the question of whether international or regional human rights courts understand the relationships of rights to peace differently than domestic courts.

The European Court of Human Rights

A claim was brought before the ECtHR concerning a challenge by two applicants, both citizens of Bosnia-Herzegovina, on the grounds that their Jewish and Roma origins made
them ineligible to stand for election to the House of Peoples and the Presidency, both governed by the power-sharing arrangement. The applicants, Dervo Sejdić and Jakob Finci, did not have a declared affiliation with the three ‘constituent peoples’ barring them from standing for election, which, they argued, amounted to racial discrimination under the Convention and Protocols.494

The ECtHR came to the opposite view from the Constitutional Court, finding, by fourteen votes to three, a violation of Article 14 (prohibition of discrimination) of the ECHR, together with Article 3 of Protocol No. 1 (right to free elections) and Article 1 of Protocol No. 12 (general prohibition of discrimination) to the Convention.495 The Court concluded that Bosnia-Herzegovina had moved on sufficiently from the conflict settled by the Dayton Agreement, and, therefore the objective of peace articulated by the Bosnian Constitutional Court was not a sufficient reason for overriding the individual equality rights of the challengers. In spite of accepting that ‘[t]he nature of the conflict was such that the approval of the “constituent peoples” … was necessary to ensure peace …. [there have been] significant positive developments in Bosnia and Herzegovina since the Dayton Agreement.’ 496 The Court, quite dramatically found that the Constitution which comprised part of the Peace Agreement violated the ECHR. The contradictory decisions from the Constitutional Court and the ECtHR on similar facts illustrate the quite different balancing acts possible when applying the doctrine of proportionality and the ways in which differently positioned courts will evaluate the imperatives of peace differently.

The decision of the ECtHR has been criticised by Christopher McCrudden and Brendan O’Leary,497 who are concerned that the approach adopted by the Court in this case may reveal a new precedent of court’s being sceptical to consociational (power-sharing) arrangements. I agree with McCrudden and O’Leary’s argument that ‘the historical and political contexts in which the provisions of constitutions and peace agreements are drafted – especially peace agreements that are constitutional texts – need to be properly understood, especially by courts’ and that ‘[a]pparently repugnant provision may have defensible political origins’.498 I also agree with their assessment of the ECtHR decision as

494 The claim was based on Art 14 of the Convention, Art of Protocol No. 1 and Art 1 of Protocol No. 12.
495 Sejdic and Finci v. Bosnia and Herzegovina, European Court of Human Rights (ECtHR), 27996/06 and 34836/06, 22 Dec 2009. Two separate applications were submitted to the Court in summer 2006, which were joined and heard before the Grand Chamber in 2009, three years after the Constitutional Court decision. The decision has not yet been fully implemented.
496 Ibid, para 45,47. On the issue of proportionality, as the Court was competent ratione temporis to consider the period after the ratification and the Protocol No. 1, it did ‘not need to decide whether the upholding of the contested constitutional provisions after ratification of the Convention could be said to serve a “legitimate aim” since … the maintenance of the system in any event does not satisfy the requirement of proportionality’ (para 46).
497 McCrudden and O’Leary (n 71).
498 Ibid, xv.
being problematic, although it is necessary to note that there were strong dissenting opinions.\(^{499}\)

This case of Sejdić and Finci reveals how the international court came to its decision in contrast to the Bosnia Constitutional Court’s approach of proportionality. The imperative of peace had passed for the ECtHR, which in essence called ‘time’ on the transition during which a ‘peace jurisprudence’ could apply. In his dissenting opinion, Justice Bonnello is critical of the Court for ignoring the realities of the peace in Bosnia and is sceptical that the Court should ‘behave as the uninvited guest in peacekeeping multilateral exercises and treaties that have already been signed, ratified and executed.’\(^{500}\) He also questions the Court’s reasoning that the situation in Bosnia had changed sufficiently making the power-sharing arrangement no longer necessary. The case may seem a clear violation of human rights, as Justice Bonnello concedes, however, the reasoning of the majority opinion can also be criticised for going too far in preserving the electoral rights of the two applicants over the imperatives for the peace agreement in the first place. In the case before the Constitutional Court, Justice Feldman (cited above) had signalled that time will move the political settlement on so that compromises such as that in Dayton may no longer be necessary, but that time had not yet arrived. There is also a serious question, as Justice Bonnello indicates, as to whether the ECtHR (or any international court) is the appropriate institution to determine when that time has come and peace has been achieved sufficiently to enable the dismantling of the power-sharing arrangements.

**Inter-American Court of Human Rights**

A more flexible approach to a ‘peace jurisprudence’ seems to be operating in the Inter-American Court of Human Rights. In a case before the Court concerning Colombia’s response to the murder of judicial officials, the Court held that the punishment for serious violations of the law must be proportionate to the crime and that ‘[e]very element which determines the severity of the punishment should correspond to a clearly identifiable objective and be compatible with the [American Convention on Human Rights].’\(^{501}\) The Court interpreted the Justice and Peace Law (Law 975), and in so doing, signalled, *obiter dicta*, that it accepted the Colombian Constitutional Court’s reasoning on the principle of

\(^{499}\) Partly concurring and Partly dissenting opinion of Judge Mijovic, joined by Judge Hajiyev, and Dissenting opinion of Judge Bonnello in Sejdić (n 103).

\(^{500}\) Dissenting opinion of Judge Bonnello in Sejdić (n 103).

proportionality: the punishment which the State assigns to the perpetrator of illicit conduct should be proportional to the rights recognized by law and the culpability with which the perpetrated acted, which in turn should be established as a function of the nature and gravity of the events. However, the Court stopped short of declaring the act of reducing sentences in consideration for demilitarization and confessions as being consistent with the Convention:

Given that uncertainty exists with regard to the content and scope of Law 975, and the fact that the initial special criminal proceedings are underway which could provide juridical benefits to individuals who have been identified as having some relationship to the events of the Rochela Massacre, and taking into account that no judicial decisions have yet been issued in these proceedings ... the Court deems it important to indicate, based on its jurisprudence, some aspects of the principles, guarantees and duties that must accompany the application of the juridical framework of the demobilization process.

In this case, the Court appeared sympathetic to the need for a contextual application of human rights law that was understanding of the imperatives for peace and appeared to view its role as one of sketching out the parameters that the law should stay within, in terms of ‘principles, guarantees and duties,’ rather than give a black and white answer to the question of compliance with human rights law.

A second Inter-American Court judgement on the issue of amnesties after non-international armed conflict is worth mentioning briefly because it signals a reinforcing of this approach perhaps with a forward glance to Colombia’s peace process to the FARC, although this case concerns the situation in El Salvador. The Court again considered the human rights implications of El Salvador’s transitional justice mechanisms.

The Inter-American Commission of Human Rights found that ‘[i]n approving and enforcing the [General Amnesty for the Consolidation of Peace Law (1993)], the Salvadoran State violated the right to judicial guarantees [Art 8(1)] ... and the right to judicial protection [Art 25].’ Having failed to comply with the recommendations of the Commission Report on Merits No. 177/10 concerning the application of the Amnesty Law to the investigation of the

502 Proportionality is also a principle in international law, under which full amnesties are prohibited, however, while ‘[i]nternational law may require that punishment be proportionate to the seriousness of the crimes committed ... neither international law nor judicial practice has yet determined with any certainty what quantum of penalty is proportionate’ (See Méndez (n 100) 1278).

503 La Rochela Massacre (n 109) para 196.

504 La Rochela Massacre (n 109) para 192.

alleged massacre of approximately 1,000 civilians between 11 and 13 December 1981 by the Salvadoran army, the Commission submitted the case to the jurisdiction of the Court. Justice Garcia-Sayán, in his concurring opinion, held that:

States have a legal obligation to address the rights of the victims and, with the same intensity, the obligation to prevent further acts of violence and to achieve peace in an armed conflict by the means at its disposal. Peace as a product of a negotiation is offered as a morally and politically superior alternative to peace as a result of the annihilation of the opponent. Therefore, international human rights law should consider that peace is a right and that the State must achieve it. Thus, in certain transitional situations between armed conflicts and peace, it can happen that a State is not in a position to implement fully and simultaneously, the various international rights and obligations it has assumed. In these circumstances, taking into consideration that none of those rights and obligations is of an absolute nature, it is legitimate that they be weighed in such a way that the satisfaction of some does not affect the exercise of the others disproportionately.

The opinion of Justice Garcia-Sayán gives perhaps the best articulation of the concept of balancing of rights, which cannot be achieved all at once, and the principle of proportionality. Unlike the ECtHR, which went quite far in pushing for constitutional re-working in Sejdić, the Inter-American Court, in La Rochela and The Massacres of El Mozote, has been more sympathetic to the fragile balance that is demanded for peace.

International courts are perhaps less well placed to make balanced judgements as to how the demands of justice should be weighed against the demands of peace as they may be less alive to the local requirements of the compromise and, in any case, may not be seen as the legitimate authority to navigate between these tensions. In such circumstances, it is perhaps best to follow the reasoning of the Inter-American Court in La Rochela, which set out broad parameters for what makes the compromise more acceptable in human rights terms. International courts that do not adopt a ‘peace jurisprudence’ risk intervening directly to ‘destroy’ the political settlement, with little capacity to assist in the reconstruction of a new alternative one. This was the risk taken by the ECtHR in Sejdić which, by prioritising individual rights over groups rights and failing to sufficiently understand the difficulty of constitutional change, put in jeopardy the foundations of the political settlement without providing an alternative solution. The Court failed to


understand that ‘the philosophy and practice of contemporary constitutionalism offers a mediated peace’ and while in ‘theory and practice this is seen as second best to a just peace,’ it is overreaching to make a determination on what that ideal peace should look like if it is at the expense of undoing the compromise arrangement that was necessary for a state of peace in the first place.

VI. CONCLUSION

A peace process does not end with the implementation of a new (or revised) constitutional arrangement, and constitutional courts should be considered an instrumental actor in this ongoing process, and through judicial review engage as one of many actors in a continuing (re)negotiation. No matter what the original intentions of political actors to allow for a strong constitutional court, the peace agreement constitution cases under indicate that domestic courts often uphold the core tenets of peace, even when those clash with literal interpretations of the constitutional text or more absolutist notions of how human rights apply.

How then are we to understand the legitimacy or otherwise of these decisions? I suggest that courts seeking grounds on which to limit constitutional rights are recognising the ending of conflict as a proper purpose of the constitution. However, introducing a requirement of proportionality also allows space for the court to maintain discretion as regards those rights that can be limited and the extent and time to which such limitations are valid. The use of the doctrine of proportionality is a mechanism for courts to continuously (re)negotiate the constitution, which will shift as the state transitions from conflict. The courts in such cases are in a position to reinterpret the political settlement between the elite driven compromise and the on-going demands of transition.

Courts are relevant actors in considering how a state transitions throughout the political settlement. They are not neutral arbiters of the constitution but may also play a vital role as peacebuilders or spoilers of the peace agreement. They are less visible then other institutions and may uphold or unwind the political settlement more gently. Both domestic and international courts play this role. While domestic courts often are highly aware of the political context of their decisions and can produce a nuanced ‘peace jurisprudence’, international human rights courts, however, have often made different rulings and a review

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of how the same or similar cases have been dealt with illustrates examples where courts have adopted different approaches and become ‘unwinders of ethnic political bargains’.509

The interpretation of ‘peace agreement constitutions’ demands that constitutional courts navigate between an elite pact and a more open constitutional way of doing business, where both remain important to any emerging constitutionalism. In the cases considered, the domestic courts were asked to mediate between the tensions inside the political settlement, and in all examples, interpreted peace to be the most important constitutional value, or the primary purpose of the constitution. As these examples make clear, judicial institutions are as important as political institutions in guaranteeing a stable political settlement. The judiciary has, in some ways, limited the pace at which development of the political settlement has taken place, maintaining the constitutional link to the peace agreement, while acknowledging that the link should not preserve elite pacts against challenge permanently or without limits. The constitutional courts in all cases used similar reasoning that has impact on the meaning of post-conflict peace and the future of the post bellum state. In so doing, the courts have understood the constitution as an activity rather than an end-state, preventing the constitution from being frozen in time.

509 RH Pildes, ‘Ethnic Identity and Democratic Institutions: A Dynamic Perspective’ in S Choudhry (ed), Constitutional Design for Divided Societies: Integration or Accommodation? (OUP, Oxford, 2008) 195. Pildes, as an example, uses the Constituent Peoples Case (Constitutional Court of Bosnia and Herzegovina, Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of BiH, Case U 5/98, Partial Decision (30 Jan 2000), Partial Decision (19 Feb 2000), Partial Decision (1 July 2000), Partial Decision (19 Aug 2000)), in which the Bosnian Constitutional Court declared unconstitutional provisions of the entities constitutions that limited citizenship in the entity on the basis of ethnicity. The Court found that all ethnic groups were ‘constituent peoples’ under the constitution. While Pildes argues that this decision dismantled part of the ‘accommodationist’ political settlement, the decision also entrenched the ethnic divide in the constitution, recognising collective ethnic rights of the ‘constituent peoples’, and in so doing found a balance between democratic principles and international law, on the one hand, and peace, on the other. For more on this case see AM Mansfield, ‘Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina’ (2003) 103 Columbia Law Review 2052. McCrudden and O’Leary take this phrase from Pildes, suggesting that courts can determine the success or failure of consociational arrangement, however, they admit that there has been very little research done on this question see (n 71) 43. Pildes also suggests that there is a temporal element to courts acting as ‘unwinders’ – the idea of time as an important factor in political settlements is also reflected in the ideal of the ‘constitutional moment’, which is elusive in a peace agreement constitution, see (n 76).