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**Concept Note for a Workshop on**

 **“Interim Constitutions in Post-Conflict Settings”**

*December 4-5, 2014, Old College, Edinburgh*

*Hosted by*

*International IDEA and the Edinburgh Centre for Constitutional Law*

 *in association with*

*the Global Justice Academy, University of Edinburgh*

**The Initiative**

This is the inaugural event in a series of annual workshops to be known as the ‘Post-Conflict Constitution Building Dialogues.’ The series will be jointly hosted by the [Constitution Building Processes](http://www.idea.int/cbp/) programme of International IDEA and the [Edinburgh Centre for Constitutional Law](http://www.centreforconstitutionallaw.ed.ac.uk) (ECCL) at Edinburgh Law School. The [Global Justice Academy](http://www.globaljusticeacademy.ed.ac.uk) (GJA) of the University of Edinburgh will also be associated with the partnership. Each year, the workshop will deal with a selected theme of post-conflict constitution building and will bring together a network of academic and professional experts to share experiences, discuss contemporary challenges, reflect on current scholarship and policy practice, and identify possibilities for future directions in related thematic and context-specific work. The initiative is premised on the benefits of informed constitutional comparativism, an interdisciplinary approach to constitutional substance and processes, and the mutual benefits of regular and structured engagement between scholars and practitioners of constitution building. While there are important networks and *ad hoc* events on these matters around the world, to our knowledge there is no organised initiative that systematically addresses these aims. We believe that the partnership between IDEA, ECCL and GJA is ideally placed to fill this gap. The Dialogues series will therefore be a meeting point for theory and practice as well as academics and field experts from the global north and south, with the workshops designed to engender rigorous but constructive debate, knowledge sharing and opportunities for networking. The annual gathering would also feature a public keynote address by an eminent personality.

**The Theme for 2014**

We have chosen ‘Interim Constitutions in Post-Conflict Settings’ as the theme for the inaugural event in December 2014. We believe that this is an issue of both enduring and topical interest in the field of constitution building.

Constitution building processes in post-conflict settings are exceedingly difficult undertakings. Among the serious challenges these processes face, perhaps the first and foremost relates to the fact that actors who have hitherto been engaged in violent confrontation will now, at least notionally, be responsible for the (re)framing and (re)building of the post-conflict state. The history of past conflict and hostility would likely have been the source, or the consequence, of irreconcilable visions of not only the institutional organisation of the state – in terms of territorial divisions, forms of government, or degrees of decentralisation – but also of the very nature of the state, in terms of symbols, ideals, and identities. These fundamental disagreements between potential stakeholders constitute severe obstacles to engendering the processes of co-operation and compromise that are required for successful post-conflict constitution building.

Nonetheless, the post-conflict peace-building process should ideally include not only the agreements directly ending the conflict, but also a constructive and forward-looking negotiation on those ‘rules of the game’ that will facilitate an acceptable and sustainable peace for all. Thus while ideally a post-conflict peace agreement should set the stage for comprehensive constitutional negotiations, the challenge lies in intrinsic features of the immediate post-conflict context that preclude or limit the possibility of a process capable of generating agreement on a permanent constitution (see Elster 1995). In most post-conflict settings, trust amongst the parties is likely to be low, as is both the legitimacy and capacity of state institutions, which are usually tasked not only with leading the constitution building process but also with implementing the new constitutional dispensation. In this fragile and fluid political context, a constitution building process strives for permanency, as constitutions, especially in post-conflict-settings, are meant to embody a new social contract between citizens and the state, as well as the future political architecture of state and government. The high stakes and expectations involved, combined with the lack of trust, might render negotiating positions inflexible and might make the requirement for consensus result in deadlock. Hence the question arises as to whether there might be specific elements to constitutional design specifically, and the peace-building process in general, that might help in overcoming these challenges in post-conflict settings.

There is a need therefore to consider interim constitutions as a form of ‘political settlement’, i.e., a common understanding, usually between elites, that their competing interests are best served by the agreement and adherence to a basic political framework within which more fundamental disagreements might be further negotiated. A political settlement in this sense seeks to disincentivise armed conflict as a means of pursuing political goals. The adoption of an ‘interim’ constitution and/or the adoption of some form of transitional framework that is superior to the workings of inevitable political manoeuvrings within the immediate post-conflict setting could be one possible way of resolving the tension between fluidity and order, and contribute to sustainable peace. While there is some support for the proposition that there is a distinction between ‘interim’ and ‘transitional’ constitutions in post-conflict settings, for the purpose of this concept note we use ‘interim constitution’ as encompassing ‘transitional constitutions’.

The concept of an ‘interim constitution’ as an instrument of conflict transformation and/or democratic transition has a longer genealogy than is often assumed (for e.g., interim arrangements have been used in a number of decolonisation processes as well as in League of Nations and United Nations mandated territories), although its paradigmatic use was in the South African constitutional transition of 1994-6. In other countries, the record of its use (or attempted use) has been a mixed experience.

While the empirical dimensions of these varied successes and failures are in themselves interesting enquiries, there also deeper and more general questions that scholars and practitioners should be concerned with, in relation to the basis of the conceptual distinction between ‘interim’ and ‘permanent’ and how interim constitutions relate to or challenge the assumptions and concepts of ‘normal’ constitutionalism. To some, indeed, the very notion of an ‘interim’ constitution could be a counter-intuitive proposition. These questions in turn have a direct bearing on practical issues of constitution building, for example, whether the same standards of public participation apply to interim and permanent constitution-making, the principles of democratic constitutionalism that apply to each (e.g., the role of armed groups), or how each type of constitution is democratically validated. It is only if we have clarity about the fundamentals of the concept of interim constitutions that we can determine these issues in a principled way, so that the relationship between the interim constitution and other elements of the transition are designed to maximise its chances of success.

The temporal demarcation that is implied in the very use of the term ‘interim’ also has another serious implication in some contexts, namely, that it is not entirely clear what ‘post-conflict’ actually means. In most cases, there will be no clear division possible between phases of active conflict and post-conflict. In other cases, the multiplicity of issues and actors involved will mean that the setting displays characteristics of both conflict and ‘post-conflict’. In still others, the conclusion of active hostilities might well mean the settlement of the conflict, with no acknowledgment made to the deeper political root causes that must be addressed through constitutional means. How does the idea of interim constitutions relate to each of these scenarios? All these and other questions are implicit in the issues we will take up for discussion, and we adopt a broad interpretation to what is meant by ‘post-conflict.’

**The Literature**

Both the academic and policy literature on constitution making has over the recent past increasingly focused on issues of process in post-conflict settings (see, e.g., Benomar 2004; Ghai 2004; Ghai et al. 2012; Samuels 2006; Samuels and Wyeth 2006; Widner 2005) – specifically on ways to increase participation so as to avoid further polarisation and engender broad-based ownership (see Choudhry 2008; Miller 2010; Sunstein 2001, Lijphart (2004), Horowitz (2008)). Yet this literature has paid relatively little attention to interim constitutions as potential peace-making instruments.

More recently, however, the literature on constitution making has attempted to analyse both the role of interim constitutions in wider constitution building processes, as well as to flesh out possible alternatives to both interim and fully-fledged final constitutions. Jackson (2008) was one of the first authors trying to characterise and categorise both *transitional* and *incremental* constitutional processes as alternatives to “quick clean break” – fast and radical – constitutional processes. She mentions South Africa as an example of a successful transitional (or interim) constitutional process, listing a number of factors that likely contributed to its success: more time for negotiations and greater inclusiveness of the process, pre-constitutional agreements, and independent institutions – such as the Constitutional Court – all of which contributed to imbue the constitution with legitimacy, as well as the role of external actors as constitutional guarantors. But South Africa is a paradigm that many current post-conflict countries would find difficulty in emulating, not only because of a lack of comparably strong institutions, but also due to the absence of other more intangible factors such as exemplary political leadership and a vibrant civil society.

Both Lerner (2010) and Dixon and Ginsburg (2012) have dealt with alternatives to both “quick clean break” and interim constitutional processes. Lerner (2010) expanded on incremental constitutional processes as gradual processes of change, which might involve avoiding clear decisions, remaining ambivalent about controversial issues, using vague legal language or even adopting seemingly contradictory provisions, as in Northern Ireland. She contends, however, that there might be fundamental risks related to using the incrementalist approach in deeply divided societies. It would be interesting to explore this further.

Dixon and Ginsburg (2012) counter with a defence of “by-law” clauses as the best way to minimise both decision and error costs in constitutional design processes, as opposed to the use of ambivalence or vague legal language. “When it comes to decision costs, deferral helps promote constitutional agreement by both increasing the generality at which issues are debated, and decreasing the stakes of any actual decisions made at T1. When it comes to error costs, it helps reduce such costs by both increasing opportunities for information revelation prior to decision-making, and reducing formal barriers to legislative reversal relative to constitutionalization” (Dixon and Ginsburg 2012, 638). “By-law” clauses occur when constitutional designers deem a subject constitutionally relevant, but defer substantive choices on the issue to the legislative process via ordinary law. But also here, Dixon and Ginsburg implicitly argue that the existence of functioning institutions is a prerequisite for “by-law” clauses to be successful.

Therefore, in both Lerner (2010) and Dixon and Ginsburg (2012), countries using any of these alternative procedures would ideally possess functioning institutions, either in the form of an independent constitutional court that might interpret ambivalence, or in the form of an accountable and a legitimate legislature that may either define vague clauses or legislate where no regulation exists. Furthermore, both sets of authors do recognise the need for some form of interim provisions in post-conflict or highly-divided societies, to either define vague clauses at some point in the future (using “sunrise clauses”, for instance) or to act as temporary regulations while a final provision is negotiated. Also here, it might be interesting to further analyse the role of these alternative procedures in both conflict prevention and resolution.

Finally, Varol (2014) is perhaps the first author who systematically analyses what he calls “temporary constitutions or constitutional provisions.” Varol acknowledges the fact that constitutional designers make costly mistakes – derived either from cognitive biases and/or high decision costs – and therefore recognises the need for a gradual and incrementalist approach to constitution-making. A temporary constitutional format might not only favour incrementalism, but might also facilitate consensus, and help, at least temporarily, to avoid the “dead hand problem,” by which constitutional designers “continue to rule their unborn posterity long after their death” (44). Furthermore, at the end of his paper, Varol explicitly favours “temporary constitutions” (as opposed to “by-law” clauses), constitutional vagueness, and low amendment thresholds as potential alternatives to fully-fledged final constitutions.

At the same time, Varol also mentions a series of challenges that need to be taken into account for any “temporary” or interim constitution or constitutional provision to be successful, i.e., to meet the goals that it has set out to achieve. These challenges include: first, legislative inertia leading to maintaining the temporary constitution (or provision) for too long; second, new cognitive biases emerging when the old ones have not yet been resolved; third, the insecurity of being actually able to meet the temporary constitution’s deadlines or to react to specific sunset clauses; fourth, instability, though he contends that instability can also be brought by durable constitutions that install “undesirable constitutional provisions”. Varol posits that, “temporal limitations placed on fundamental structural provisions will tend to have a greater negative impact on constitutional stability (…). In contrast, a temporal limitation placed on a substantive provision is unlikely to have the same destabilizing effect” (2014, 51).

The way that these and other challenges play out in post-conflict settings, however, has not been analytically dealt with yet. These authors offer a sound theoretical introduction to interim (transitional or temporary) constitutions or constitutional provisions, as well as to potential alternatives to fully-fledged final constitutions. However, and as was mentioned before, these authors do not explicitly deal with interim constitutions or constitutional provisions as potential post-conflict peace-building instruments. Neither do they engage the specific challenges present in post-conflict settings or the impact of such constitutions or constitutional provisions in the broader peacebuilding framework.

On the other hand, the literature on conflict resolution and peacebuilding has been somewhat more forthcoming in understanding the peacebuilding role of constitutional processes in general. Peacebuilding includes state-building as an integral policy strategy, as “post-conflict peacebuilding aimed not only to consolidate peace after war, but also to prevent renewed violence in countries that had recently experienced conflict” (Paris and Sisk 2009, 5) by supporting or rebuilding the institutional framework of a given state. Constitution building has a central role in defining this framework, and can therefore be understood as an essential part of state-building.

The literature on conflict resolution and peacebuilding, however, has mostly not elaborated on the specific role of *interim constitutions* as part of the greater constitution building process. Bell (2008) might be an exception. She appears to approach the issue of interim constitutions by distinguishing between *traditional* and *peace agreement* *constitutions*. She characterizes *peace agreement constitutions* as being “often explicitly transitional, providing for their imminent revision, extension, or even demise” (151). Furthermore, she argues that peace agreements as such are part of wider constitution building processes, and an essential part of building sustainable peace. In other words, peace agreements are a distinctive form of constitutionalism (200), as they try to mediate between past and future, the old and the new state, or elites as public and as private actors (see also Samuels 2009, 175). And even if peace agreements might be designed as conflict resolution mechanisms, this role in fact cannot be decoupled from post-conflict constitution building processes.

From Bell’s work we can discern a complicated relationship between peace agreements and constitutional orders, with peace agreements sometimes comprising constitutions, and sometimes making provision for them in either interim, transitional, or permanent forms, as part of an on-going attempt to consolidate a clear power-map for the country in question. The questions for further exploration that arise from these insights would be: how do peace agreements relate to interim constitutions, and in what ways do interim constitutions capture and take forward, or contemplate revision, of the political settlement terms found in the agreement.  Also, what processes do they make for ensuring broader participation than in the peace agreement itself, and what parameters are they to work within, as provided by the peace agreement.

The timeliness of analysing the role of interim constitutions or constitutional provisions as peacebuilding mechanisms is self-evident given the increasing use of constitution building in peacebuilding processes. As mentioned above, there is a clear need to establish linkages between different strands of the academic literature at a normative level, i.e. the constitution-making and the conflict resolution and peacebuilding literature, but there is also a need for more in-depth comparative research of case studies and lessons learnt. In addition, gaps in the academic literature reflect in this case similar gaps in the policy world.

While individual case studies, as well as a limited number of comparative case studies, have been published on either constitution building processes in general, in particular the role of public participation, or specific substantial constitutional design issues, such as forms of government, court design, or decentralization, there is no similar comparative study of interim constitutions or collection of lessons learnt. Moreover, there are a series of questions on process and substance that have not been properly answered yet either. These include the following:

* At a conceptual level, how do we distinguish between interim and permanent constitutions, and if there are salient distinctions, what normative and structural implications follow?
* What factors determine whether a country designs its post-conflict constitutional process to include an interim constitution?
* What are the different forms of interim constitutions and how do they compare to each other?
* What are the linkages between a peace agreement and an interim constitution, and between a peace agreement and a ‘final’ constitution? Or more generally, what is the relationship between a political settlement and an interim constitution?
* What are key recurring features of interim constitutions, or do they vary from case to case? What makes them vary?
* What therefore are the more general normative and structural elements that we can identify as being unique to the concept of the interim constitution?
* What are the factors that contribute to their success or failure? And what are possible lessons-learnt?

These and other questions will be addressed throughout our discussions in the December 2014 workshop.

**Methodology**

The methodological approach that we will adopt in this and future workshops is a qualitative comparative framework using relevant case studies. These case studies will help us assess and contextualise the impact of interim constitutions, or any of their alternatives, on constitution building processes, and potential lessons learnt. Every session will include 3 to 4 case studies. There will be no formal papers or presentations, but the moderators and panellists will be given a set of potential issues that they must address. Based on this, the moderator will lead a semi-open discussion with the panellists, with a view highlighting similarities and differences between the different case studies with a final comparative input on all of them. In terms of participants, we envision a closed expert workshop format (except the keynote address which will be open to the public), with local experts or policy makers representing all regions of the world, and international experts on constitutional law and theory, conflict resolution, and constitution building processes. The number of participants will not exceed 25-30 people. Some suggested participants are listed in the agenda below.

**Objectives:**

* Inaugurating the Post-Conflict Constitution Building Dialogues and the new partnership between IDEA, ECCL and GJA
* Assisting in the design of further research and programming in the areas of post-conflict constitution building, political settlements, and new constitutional models
* Establishing a platform and network to facilitate on-going debate between scholars and practitioners on issues related to constitution building

**Expected Outputs:**

* A final report in discussion-paper format that will set the stage for a potential future publication on interim constitutions, and that will include key insights on interim constitutions and recommendations for post-conflict constitution-building processes for dissemination within the broader democracy-building community.

**Expected Outcomes:**

* Increased comparative knowledge and understanding of interim constitutions or constitutional provisions as part of broader peace-building processes.
* Enhanced visibility of IDEA, ECCL and GJA regarding their applied as well as theoretical work on constitution building.

**Proposed Agenda:**

*Date: December 4 – 5, 2014*

*Venue: University of Edinburgh*

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| **DAY ONE: December 4, 2014** |
| **Time** | **Location** | **Session** |
| 11:00 – 12:00 | Carstares Room, Old College | Registration and Brunch Buffet |
| 12: 00 – 12:30 | Raeburn Room, Old College | **Welcome**  |
| **Stephen Tierney**, Professor of Constitutional Theory; Director, Edinburgh Centre for Constitutional Law**Sumit Bisarya**, Senior Project Manager – Constitution Building, International IDEA**Christine Bell**, Professor of Constitutional Law; Director, Global Justice Academy |
| 12:30 – 14:00 | Raeburn Room, Old College | **Session I: Introduction**  |
| **Moderator: Stephen Tierney****Leena Grover:** The history of interim constitutions since 1945: what has been the evolution of the term and of the role of interim constitutions as peace-making tools.**Tom Ginsburg**: The definition, and scope of interim constitutions and constitutional provisions: what are interim constitutions, what do they contain, and how can they be distinguished both from peace agreements and final constitutions.**Cheryl Saunders**: The decision-making process: the who, when and why of interim constitutions.**Hassen Ebrahim**: Opportunities and challenges of participation and inclusiveness in the initial stages of post-conflict constitution building: challenges of legitimacy in interim constitutions. |
| 14:00 – 14:15 | Carstares Room, Old College | **Break** |
| 14:15 – 15:45 | Raeburn Room, Old College | **Session II: Peace Agreements and Interim Constitutional Arrangements** |
| **Moderator: Christine Bell**Guiding Questions: How did the peace process start? Was there a peace agreement? Who negotiated the peace agreement? To what extent did the peace agreement include a (interim) constitution or (interim) constitutional provisions? Did a constitution building process follow the signing of the peace agreement? If yes, did the peace agreement set the stage for the constitution building process, and how? How long did the constitution building process take? And how inclusive was the process? Did women participate throughout the process? Who was engaged in the process, only local actors or also international actors? How successful was the constitutional process in bringing about sustainable peace and in building up the state? What are the lessons-learnt and how could the process (counterfactually) have been improved?**Bosnia-Herzegovina: David Feldman****East Timor: Aderito de Jesús Soares** **Cambodia: Louis Aucoin**  |
| 16:00 – 17:00 | Lorimer Room, Old College | **Reception** |
| 17:00 – 18:30 | Lecture Theatre 175, Old College | **Keynote Address: Nicholas Haysom** |
| 18:30 onwards | TBA | **Conference Dinner** |
| **DAY TWO: December 5, 2014** |
| 09:00 – 10:30 | Raeburn Room, Old College | **Session III: Non-Inclusive Interim Constitutions** |
| **Moderator: Christie Warren**Guiding Questions: How did the conflict end or the transition start? What level of public support did the transitional government enjoy? Was there any involvement of other actors, e.g. women, opposition groups, minorities, civil society organizations, etc., in the constitutional process? What was the concrete substance of these interim constitutions? Did they include rules for the constitutional process design only, institutional design or also general principles? To what extent did the interim constitution provide real constraints on the interim government? Did the interim government leave power following the expiration of the interim constitution? How much of the interim constitution remained in the ‘permanent’ governance structure of the state? Did the interim constitution contribute in violence prevention? Did it further contribute to a sustainable political transition?**Egypt: Yussef Auf****Kosovo: Pieter Feith****Latin America: Javier Couso** |
| 10:30 – 10:45 | Carstares Room, Old College | **Break** |
| 10:45 – 12:15 | Raeburn Room, Old College | **Session IV: Opportunities and Challenges of Interim Constitutional Arrangements: Lessons Learnt** |
| **Moderator: Jason Gluck**Guiding Questions: When did the transition start? How was the decision to use an interim Constitution made? What was the substance of the interim constitution? How rigid was it? How long did the process take until there was a final/durable constitution in place? How inclusive was the process, from beginning to end? Who participated and how? Was the constitution building process successful in bringing peace and building up the state? What was the role of the interim constitution? How did it relate to the final constitution? What could have been improved along the process? What are the lessons-learnt in these different processes? And how could they contribute to improve current processes?**South Africa: Christina Murray****Poland: Lech Garlicki****Iraq: Zaid Al Ali** **Afghanistan: Barnett Rubin** |
| 12:15 – 13:15 | Carstares Room, Old College | **Buffet Lunch** |
| 13:15 – 14:45 | Raeburn Room, Old College | **Session V: Current Interim Constitutions and the Way Forward** |
| **Moderator: Michele Brandt**Guiding Questions: How did the constitution building process start, before or after the end of the conflict? How did the parties relate to each other? Was there a peace agreement? To what extent did the peace agreement contain interim provisions? What are the obstacles to moving from an interim to a final constitution? How inclusive has the process been up until now? Did it specifically include women and minorities? Who has been engaged in the process, only local actors or also international actors? Are there any lessons-learnt from other constitutional processes that you think could have or still might be relevant to the constitutional process in your country of expertise?**Nepal: Purna Man Shakya****Somalia: Adam-Shirwa Jama** **Libya: Mohamed Elghannam** **South Sudan: Susan Stigant** |
| 14:45 – 15:00 | Carstares Room, Old College | **Break** |
| 15:00 – 16:30 | Raeburn Room, Old College | **Session VI: Conclusion and Next Steps** |
| **Moderator: Sumit Bisarya****Wrap Up: Asanga Welikala**Guiding Questions:Can we generalise the usefulness of interim constitutions or constitutional provisions? Or in what circumstances does and interim constitution seem to be an appropriate peacebuilding tool?In general, was the use of interim constitutions successful in the broader peace-building framework (short-term and long-term), and why?What are common challenges in contexts of interim constitutions and how can these be overcome? (e.g. legitimacy, “stickiness”)Possible next topics and next steps for a joint publication. |