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Introduction: Bargaining on constitutions – Political settlements and constitutional state-building

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Abstract

This article considers the relationship between constitutions and political settlements and locates the special issue articles within this wider discussion. The article points to the apparently paradoxical connection between disillusionment with internationalised state-building techniques on one hand, and increased international faith in constitution-making as a state-building tool on the other. Using understandings of the relationship of the constitution to political settlement which draws on 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 can be broadened to ensure the constitution's capacity to fulfil its normative role in restraining power and delivering broader social inclusion. The pieces which make up this special issue draw together development and legal discourses. This article suggests 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 as political and fraught as all other institution-building efforts.

I. Introduction

This special issue 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 state-building 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 are turning to politics for explanations. From the second, they paradoxically appear to place renewed faith in constitutions and international enforcement of them, as capable of remedying the deficits of past state-building approaches.

This introduction explores this apparent paradox and seeks to locate the other articles in our special issue 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' of democratisation and peace, this heady expectation has long been replaced with caution.[2] More recently, caution has moved to outright disillusionment. A quarter of a century of investment in transitions has seen a 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 taking hold worldwide, for several different reasons.

First interrelated 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 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.[3] 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'.[4]

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.[5] 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. [6] Peacebuilders and peacebuilding analysis increasingly seek to understand why the liberal political orders supported by their interventions have failed to come about, resulting instead in ambiguous 'hybrid' political orders. [7] Similarly, international legal norm-promoters who 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', [8] 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'. [9] 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, 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. [10] 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 concrete situations' and seek to understand the local conditions which influence whether truth commissions play a constructive or unconstructive role. [11]

Insofar as conflict resolution, development and international legal actors have formed analysis of why their interventions have failed, the most consistent suggestion has therefore 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. [12] 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. [13] 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 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. [14]

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 state-building. 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. [15] 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 it a starring conflict-resolution role. [16] 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 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'. [17] 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 forms of participative constitution-making process.[18] 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 peacemaking and political settlement, as in Yemen, Somalia or Libya, and be left with the burden of creating it in almost impossible circumstances of conflict.[19]

III. Constitutional development as statecraft: Locating the special issue

This special issue attempts to address the relationship between political settlement and constitutional development and the statecraft 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 an 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 simultaneously sets out the power-map for how the final constitution will be achieved. The coupling of ceasefires with constitutions has been criticised.[20] 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 ongoing 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 standpoint. 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 also 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.

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 an 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 subtext 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 for the groups and interests they reflect, or particular territorial balances of power.

As with Rodrigues's 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 crisis 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 countermoves 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 depoliticising 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 acting 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 a 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 rethought to take account of the constructivist relationship of the constitution to the democratic political order.

The fourth article, by Jenna Sapiano ('Courting peace: Judicial review and peace jurisprudence') 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 ongoing resolution of those tensions can be left to apex 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. [21] 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 prerequisite 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. [22] 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 'real' agreement. They consequently fail to understand the burden borne by traditional constitutional mechanisms such as eternity clauses, or apex courts, as mechanisms for consolidating and extending agreement in contexts of fragile elite balances 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 ongoing, 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, by a court, or by unwitting international actors.

Thirdly, each article 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 constitutions, 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 state-building 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 state-building 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 issue, 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 ongoing bargaining relegates constitutions to once-off institutional 'moments'. This conception of constitutions needs to be rethought 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 both 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 issue 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.

[2] See generally, SP Huntington , The Third Wave: Democratization in the Late Twentieth Century (Oklahoma University Press, Norman, OK, 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.

[3] J Cilliers and TD Sisk , Assessing long-term state fragility in Africa: Prospects for 26 'more fragile' countries (Institute for Security Studies Monograph, Number 188, Pretoria, South Africa, 2013).

[4] A de Waal, *The Real Politics of the Horn of Africa: Money, War and the Business of Power* (Polity Press, Cambridge, 2015) 17.

[5] See further C Arnson (ed), *El Salvador's Democratic Transition Ten Years After the Peace Accord* (Woodrow Wilson Reports on the Americas, Washington DC, 2003) at <https://www.wilsoncenter.org/sites/default/files/elsalvador.pdf>.

[6] See in particular: *Word Development Report 2011* (World Bank, Conflict, Security, and Development, Washington DC, 2011) available at <http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011_Full_Text.pdf>; S Brown and J Grävingholt , From Power Struggles to Sustainable Peace: Understanding Political Settlements (Conflict and Fragility, Paris: OECD, 2011); W Evans, *A Review of the Evidence informing DFID's 'Building Peaceful States and Societies' Practice Paper* (DFID

Research and Evidence Division Evidence Products, Paper 1: Political Settlements, Peace Settlements, and Inclusion, London, January 2012); A Whaites, *States in Development: Understanding State-Building* (DFID, London, 2008); AusAID, *Framework for Working in Fragile and Conflict-Affected States: Guidance for Staff* (Australian AID, Canberra, 2011).

[7] R Mac Ginty , International Peacebuilding and Local Resistance: Hybrid Forms of Peace (Palgrave Macmillan, Basingstoke, 2011); R Mac Ginty, 'Hybrid Peace: The Interaction between Top-Down and Bottom-Up Peace' (2010) 41(4) *Security Dialogue* 391; V Boege, A Brown, K Clements and A Nolan, 'On Hybrid Political Orders and Emerging States: State Formation in the Context of "Fragility"', *Berghof Handbook* (Berghof Foundation, Berlin, 2008) available at <http://www.berghof-handbook.net/documents/publications/boege_etal_handbook.pdf>. See further M Barnett and C Zürcher, 'The Peacebuilder's Contract: How External Statebuilding Reinforces Weak Statehood' in R Paris and TD Sisk (eds), *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations* (Routledge, New York, NY, 2009) 23.

[8] S Unsworth, 'What's Politics got to do with it? Why donors find it so hard to come to terms with politics, and why this matters' (2009) 21(6) *Journal of International Development* 883.

[9] J Di John and J Putzel , Political Settlements: Issues Paper (DFID, Governance and Social Development Resource Centre, London, June 2009).

[10] United Nations, *Uniting Our Strengths for Peace – Politics, Partnership and People* (Report of the High-Level Panel on United Nations Peace Operations, United Nations, New York, NY, 16 June 2015); United Nations, *The Challenge of Sustaining Peace* (Report of the Advisory Group of Experts for the 2015 Review of the United Nations Peacebuilding Architecture, United Nations, New York, NY, 2015); United Nations, *The Global Study on Women, Peace and Security* (United Nations, New York, NY, 2015).

[11] International Center for Transitional Justice and Kofi Annan Foundation, *Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?* (International Center for Transitional Justice, New York, NY, 2014) vii, available at <https://www.ictj.org/sites/default/files/ICTJ-Report-KAF-TruthCommPeace-2014.pdf>.

[12] See e.g. Framework Convention for the Protection of National Minorities and Explanatory Report (1 February 1995) <http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm>; and United Nations Declaration on the Rights of Indigenous Peoples 2007 at <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

[13] See art 9, Charter of the Organization of American States (OAS) (30 April 1948) <http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp>. Arts 19–22, Inter-American Democratic Charter (11 September 2001) <www.oas.org/charter/docs/resolution1_en_p4.htm>; Art 30, The Constitutive Act of African Union (AU) (11 July 2000) <http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf>; Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (hereinafter – Lomé Declaration) of Organisation of African Unity (later AU) No. AHG/Decl.5 (10 July 2000) < http://www.peaceau.org/uploads/ahg-decl-5-xxxvi-e.pdf>; AU African Charter on Democracy, Elections and Governance (hereinafter – African Charter) (2007) <http://www.ipu.org/idd-E/afr_charter.pdf >.

[14] 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>.

[15] M Loughlin, *Foundations of Public Law* (Oxford University Press, Oxford, 2011).

[16] For core literature see J Elster , (ed) 'Forces and Mechanisms in the Constitution-making Process' (1995) 45 Duke Law Journal 364; Y Ghai (ed), Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States (Cambridge University Press, Cambridge, 2000); S Choudhry (ed), Constitutional Design for Divided Societies: Integration or Accommodation? (Oxford University Press, Oxford, 2008); K Samuels , Constitution building processes and democratization: A discussion of twelve case studies (International IDEA, Stockholm, 2007).

[17] Ibid 288 and 310.

[18] T Ginsberg, Z Elkins and J Blount, 'Does the Process of Constitution-Making Matter?' (2009) 5 *Annual Review of Law and Social Science* 201.

[19] See further C Bell and K Zulueta-Fülscher, 'Sequencing peace agreements and constitutions in the political settlement process' (International IDEA Policy Paper, Stockholm, 2016).

[20] M Kaldor, 'How Peace Agreements Undermine the Rule of Law in New War Settings' (2016) 7(2) *Global Policy* 146.

[21] There are, of course, some exceptions, notably S Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press, Oxford, 2008).

[22] For an interesting discussion of this dynamic see C McCrudden and B O'Leary, *Courts and Consociations: Human Rights versus Power-Sharing* (Oxford University Press, Oxford, 2013), discussing the European Court of Human Rights' approach to power-sharing in Bosnia-Herzegovina.