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CONSTITUTION BUILDING IN POST CONFLICT STATES

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Abstract

One of the key elements of post-conflict peace and post-conflict state building is the creation of a new legal order as an appropriate tool for political and governance transition. In this sense, the adoption of a new constitution after a conflict, especially an armed conflict, and particularly an internal armed conflict, is a main component and necessity of a political transition. Post-conflict constitution-building can certainly provide an opportunity to shape the institutional and governance framework. The Constitution can play in some way, a peace agreement role, but it is surely a framework that sets up the rules by which the state will function in the future. Hence, the adoption of a new constitution by post-conflict states signalizes a clear break with the past.

This paper is focused on the constitutional process as one of the main aspects of post-conflict state-building. In this sense, we tried to find adequate answers to several, according to the author's opinion, relevant questions regarding legal and political processes followed by many challenges and opportunities.

Key words: post-conflict states, fragility, constitution building, participation

Introduction

Significant social and political changes that have been happening in some countries after conflicts, and particularly after armed conflicts, have almost always caused a new phase in their legal order building. Post-conflict states are fragile by default, with institutions weak after years of conflict. Transition processes, particularly those from war to peace, are challenging because in that time states almost always have limited capacity to provide citizens security and to meet their everyday basic needs. Moreover, post-conflict societies are often divided, and human rights abuses can be more widespread. Discrimination, abuse of power, self-determination demand, are just some of the known factors that might produce fresh waves of constitutional processes.

In the development phases of the world constitutionalism, a trend of adopting new constitutions was particularly noticed in the periods of the great revolutions in the 18th and 19th centuries; the period between the two world wars; the period after the Second World War, as well as the period of the last decade of 20th century, when new sovereign and independent states were created from the great socialist federations. In confirmation of the fact that many constitutions are framed following a conflict, it is important to note that a new constitution is adopted in every fourth post-conflict country. Building or rebuilding of public institutions is key to sustainability, among other, because on average, more than 50 percent of states emerging from conflict return to conflict and a substantial proportion of transitions have resulted in weak or limited democracies (Samuels, 2006). Therefore, the purpose of adopting new constitution after an armed conflict is to resolve conflict incompatibility and take other measures to prevent the recurrence of violence. The adoption of new constitution in post-conflict states certainly signalizes a clear break with the past. At the same time, it is one of the main component and main necessity of a political transition. Constitution building processes after an armed conflict are in line with conflict transformation to peace building objectives. As basic legal documents, constitutions play a key role in establishing standards for the rule of law and rules by which power is exercised. Hence, there is no doubt that the idea of post-conflict constitution building is to eliminate the main causes of war and to create basic preconditions for a stable and lasting peace. The constitution may in some ways play the role of a peace agreement, but it is certainly a framework that sets the rules according to which the state will function in the future. Finally, building a constitution after a conflict is certainly an opportunity to create

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a common vision for the future of a country.

Since there is no single model for successful constitution-making, the choice of process of constitutional building will almost always vary depending on the political, historical, and regional context of each case. However, constitution building is often only one element in a wider process of social and political change. This element refers to the steps in the construction cycle that include the initiation, negotiation, drafting, adoption, and implementation of the constitution.

Fragility of post-conflict societies

There is no internationally agreed definition of the term 'fragile states or 'fragility', however, most development agencies define it principally as a fundamental failure of the state to perform functions necessary to meet citizens' basic needs and expectations. Fragile states are commonly described as incapable of assuring basic security, maintaining rule of law and justice, or providing basic services and economic opportunities for their citizens (Mcloughlin, 2012). Post-conflict states are fragile by default and from many aspects. The transition processes, particularly those from war to peace, are challenging because during that time states institutions are usually weak and with limited capacities to provide security to citizens and to meet their everyday basic needs. In a fragile state context, the state is not able to protect or deliver on all the rights of its citizens (Lockhart, 2005). Moreover, post-conflict societies are often divided, and human rights abuses can be more widespread. The termination of violence, which usually is a result of signed peace agreements, does not always mean real peace. Hence, violations of the basic human rights are often present in post-conflict societies where abuses can be widespread. Although human rights protection is often given high priority in peace agreements, still protection of the population is one of the biggest challenges in post-conflict time. Gender-based violence, forced migration, even ethnic cleansing, and genocide, could be some of the real threats even in post-conflict societies. On the other hand, security and justice systems are often weakly institutionalized and frequently provided by non-state actors. Restoring or building effective and reliable justice systems in post-conflict vulnerable states is widely argued to be essential for preventing a renewal of violence. Moreover, the post-conflict period covers a range of threats not only to security, but also to people's well-being. Disease, malnutrition, starvation, and lack of basic services which is often present, are some of the secondary effects of armed conflicts. The failure to deliver basic services including health, education, and justice is understood as both a cause and characteristic of fragility. States that fail to meet a society's basic needs and expectations are seen to inherently lack legitimacy and resilience, and fragile situations in turn give rise to the deterioration and fragmentation of services. The impacts of fragility on service delivery are widely documented, and include inequitable coverage and access, the proliferation of non-state service providers (including international NGOs), and the breakdown of long-route accountability (Mcloughlin, 2012). However, these are basic features of almost all post-conflict societies. On the other hand, the specific characteristics of specific countries or regions are determined by some factors such as: the reasons that caused the conflict, the extent of the violence, the duration of the conflict, the consequences of the conflict, as well as the nature of the conflict (internal or international; ethnic, national, religious, political, etc.). The causes of the conflict and its nature are probably the most important because the transitional process of moving the state towards peace will aim to eliminate those factors, to achieve lasting peace and normal functioning of the state without the danger of the conflict repeating itself. Nevertheless, there is no doubt that in a transition environment, it is not possible to restore services and meet all needs immediately.

Developed in the best way, the constitution can help but not guarantee stable institutions and democracy. In this post-conflict environment, the international community could be involved with the delivery of humanitarian assistance; the monitoring and recording of violations of international humanitarian and human rights law and reporting of such violations to those responsible and other decision-makers; in institution-building, governance, and development programs; and, ultimately, in the deployment of peacekeeping troops (Lockhart, 2005).

Post-conflict constitution building as a complex legal and political process

It is evident that post-conflict peacebuilding not only poses considerable political, strategic, and operational challenges but that it also has important legal implications (Schaller, 2009). In this sense, constitution building in post-conflict states is a complex legal and political process, and it is part of the wider transition from conflict to peace and sustainability. Constitutional reform determines the state

structure and forms the framework for the legal and judicial order, it improves the delineation of government power, settles power conflicts among groups and regions, improves the courts' mandates, creates or strengthens judicial independence and enshrines citizens' basic rights (Voorhoeve, 2007). Post-conflict regulation is aimed at helping societies scattered by war, and preventing the renewal of armed violence and such measures could imply the strengthening or restoring certain political, economic and social structures destroyed during the war (Vasylchenko, 2018). Societies emerging from conflict face the difficult task of channeling future political action through institutional paths. Hence, constitution building is a very important process to stabilizing transitional post conflict time. However, once a transition path is articulated as a matter of government policy, and/or agreed with the international community, the latter can play a crucial role in holding the government accountable to its promises and to international standards of human rights across many areas of governance (Lockhart, 2005). The constitution-building process as a vital component of national reconciliation should really represent the will of the citizens and their consensus for the future of the state. Constitutional norms set out fundamental parameters that shape the extent to which rule of law principles are respected across a number of fields including public administration, criminal justice, adjudication of civil disputes and even the outcomes of informal and customary decision-making processes (Williams, 2013).

Considering the variety of post-conflict societies, it is really difficult to develop general practice standards for post-conflict constitutional building. Although in practice the term 'constitution making' is frequently used with an emphasis only on the drafting and promulgation of a constitutional text, however on the very beginning of this process, the key points are: identifying the priorities, assigning roles and responsibilities to actors, and developing strategies for functioning in those circumstances. A hierarchy of needs approach states that the priority in terms of citizens is protection of lives and provision of basic security. On the other hand, the concept of progressive realization of economic and social rights may be also of particular use (Lockhart, 2005). Anyway, the new or amended constitution is expected to cope with the actual challenges that face the post-conflict country. Hence, as a diverse multivalent process, constitution building implies: a) founding new structures as well as redeveloping existing ones as part of an ongoing process; b) developing and adding long term value to governance and the political system; and c) reducing exclusivity-many actors can contribute to aspects of 'building', such as negotiators, designers, drafters, the people, activists, specialists, public servants, and international advisers, among others (International IDEA, 2011).

On the other hand, post-conflict societies are marked by stark mistrust and unresolved security threats which could significantly hamper the constitution drafting process. Particularly, because termination of open violence and the peace agreement does not always mean real peace and wellbeing. If the armed conflict has continued during the constitution-making process, this could significantly impair the ability of stakeholders to reach a consensus on the future of the state. Experience demonstrates that when the conflict has not ended and the negotiations on a peace agreement and on the constitution making are conflated, constitutional principles may be compromised. Experience of constitution-making, while conflict continues, demonstrates that constitution-making cannot serve as a peace process. Minimum conditions need to be in place before constitution-making commences. If peace negotiations and the adoption of a constitution fail, attention is directed to short-term considerations of ending the conflict, as opposed to long-term concerns of institution building. It is therefore advisable for these two processes to be separated (Benomar, 2003). Moreover, the importance of the post-conflict constitution building process is that it can increase trust between diverse political actors and for the former enemies to overcome the suspicions they hold against each other and learn to work together in one political system. This is especially relevant and important regarding internal armed conflicts. Of course, there always should be domestic or international pressure to keep all the players at the negotiating table and then implement the results. In this regard it is worth to mention that the results from research which tested whether or not post-conflict constitution-making can contribute to peace, through statistical analyses shows that post-conflict constitution-making matters: post-conflict countries that adopt a new constitution are statistically significantly less likely to experience conflict recurrence compared to those that do not (German Institute of Development for Sustainability IDOS, 2019). Based on an analysis of 236 post-conflict episodes between 1946 and 2010, this Briefing Paper presented two main results with clear policy implications emerge: First, writing a new constitution reduces the risk of conflict recurrence. International efforts to support post-conflict constitution-making are hence well-founded. The theoretical argument suggests that it is important that constitution-making processes enable an extensive inter-elite dialogue that helps build trust in the post-conflict period; Second, post-conflict constitution-making processes that take longer are more beneficial for peace. This is likely because the trust-building effect of constitution-making only occurs when enough time enables bargaining and the development of a broad compromise (German Institute of Development for Sustainability IDOS, 2019). International actors frequently pressure post-conflict countries to go through these processes very quickly, in only a matter of months.

However, the results question this approach, as very short constitution-making processes do not positively affect peace.

Participation in decision making as a key element in constitution building processes

The public participation in the post-conflict constitution building is given much attention because participatory processes are essential for constitutional success. Participation can provide a forum for the negotiation of solutions to the divisive or contested issues that led to conflict or violence. Participation can also bring fragmented elements of a state together to think about a future vision of the state and to build a road map on how to get there (Samuels, 2009). It can also lead to the democratic education of the population, begin a process of healing and reconciliation through societal dialogue, and forge a new consensus vision of the future. Moreover, after the conflict, it is very important to restore the trust of citizens in their state, and to re-establish the social contract between citizens and the state. In order for public to be informed about the steps and objectives of the constitutional building, the process needs to be enough transparent. This will certainly underpin the creation of stability, security, and sustainability. Constitution underpins the fundamental belief that those in power are subject to checks and balances and can be expected to rule in the best interest of the population (Samuels and Hawkins, 2006). However, initiating changes to the political culture of a society is one of the most difficult aspects of any post-conflict transition. It requires substantial changes to behavior as well as to expectations and norms. These sorts of societal changes require long-term strategies involving large segments of society (Samuels, K., 2006). Anyway, constitution building is a field with many actors who could be:

- 'insiders' (mostly national actors) whose involvement is crucial in the development of any strategy for external actors.

- 'outsiders' (usually external advisers and assistance providers, but also individual states, groupings of states, regional organizations, aid agencies, international institutions, non-local non-governmental organizations.

Although it is a process directly related to national sovereignty, international and regional advisors and organizations have however an important role in assisting by providing technical and normative advice. Moreover, today's common practice in rebuilding post-conflict societies is the intervention of the international community in the internal affairs of the state. International and regional actors have an evolving role in providing 'constitutional assistance' to national actors engaged in both the narrow technical process of drafting or amending constitutional texts (*constitution-making*) and the broader societal project of ensuring that such texts fulfill their potential by providing fair, legitimate and effective parameters for democratic governance (*constitution-building*) (Williams, 2013). Although this is probably the only way for successfully rebuilding the post-conflict society, still the choice of process of constitution building should be left as much as is practicable to national actors. Experiences indicate that an inclusive constitution-making process is beneficial to the legitimacy and longevity of the constitution. The challenge is to get them to participate in these processes, reflecting on external assistance from their perspective. This process must reflect an agreement within the population about how to live together. Most countries, which have undergone constitution-making processes in the past two decades, have in various ways attempted to incorporate the public because transparency and clarity on the rules and procedures followed at the various stages of the process are crucial and will ensure that the public has confidence that the constitution-drafters will respect its contributions (Benomar, 2003). National actors should actually try to understand how the legal sector worked before and how it should work after the conflict. In this regard, it is extremely important for this process to include representatives of the justice sector. Finally, constitutional advisors and competent expert committees may also contribute positively to the process. However, despite the importance of national concepts such as sovereignty, the constitution building has always included some elements of international involvement. In this context, it is extremely important to work together with national actors to identify, set and achieve concrete results related to support or assistance regarding the constitution building process. Nevertheless, it is worth underlining that external actors cannot succeed in their support goals if they fail in first gaining access to decision makers and then building influence. An explicit principle of the work of the United Nations in constitution building is to support compliance with international standards on human rights, which has implications for both process and content. On the other hand, national actors who can influence the local context are generally best placed to decide on process issues (International IDEA, 2011).

Because the post-conflict constitution is expected to cope with the real problems and challenges in the country, this process should be primarily locally driven, because if external actors have too prominent role, then that process could be counterproductive. It is generally accepted as best practice that external

support should leave domestic parties 'in ownership' of constitution building in both substance and process. On the other hand, the internal actors could establish the terms and frameworks needed for the process. As the international community can play a significant role in either nurturing or undermining of fragile peacebuilding process (Lambourne, 2004), it can also play a significant role in constitution building processes. However, although the international community in general can play a significant role, especially in post-conflict transitions and constitutional interventions, still the international actors sometimes could have some interest in the outcome of the constitutional process. In any endeavor, the best intentions can have unintended effects, sometimes even disrupting the social environment and creating new elites that are not rooted in society, especially when there is an inevitable tension between the need for a quick outcome that will satisfy expectations or international demands and the time needed to build consensus for an outcome that will prove to be lasting (Samuels and Hawkins, 2006). Hence, it is very important to identify the line between what is enough to help national actors and allowing them to make their own decisions. This is important because the role of external actors and international assistance can be both constructive and problematic (International IDEA, 2011). The participation of external actors, international organizations, and even the UN, is not always a guarantee of successful constitutional construction and providing a reliable basis for lasting peace in the respective state. In its efforts to improve economic and social development, international aid could undermine the sovereignty of the fragile states through the creation of parallel structures, a lack of harmonization, the non-state provision of services, and a lack of predictability. Hence, we agree with those authors who point out that in order to design state building strategies in the fragile societies, the operation of the current international system must be reoriented towards a model where partnership and coproduction of sovereignty becomes the aim of both national leaders and international partners (Ghani, Lockhart, and Carnahan, 2005). Some examples from the practice of post-conflict constitutional construction, for example in some former Yugoslav republics, have shown that compromise hybrid constitutional solutions have kept states on the edge of possible renewed conflicts for decades.

Conclusion

In many post-conflict states, there was a need for revision or adoption of a new constitution in order to achieve effective sustainable peace and security. The creation of a new constitution, as well as recreation of the existing constitution are processes that face difficult challenges. It is a particularly difficult process when the goal of the new or amended constitution should result in significant changes in the political and legal system. Such processes should be made in correlation with the social, political and legal circumstances in order to ensure their proper application in the long term. If the wider environment is not considered, the changes can create disagreements and conflicts that will fuel divisions and tensions, especially in segmented multi-ethnic societies. On the other hand, if the state is not ready to solve real or imposed problems without the help of international factors, it can result in its specific transformation in a constantly turbulent political scene. Finally, constitution building should not be undertaken through an exclusionary and provocative actions that can undermine the development of sustainable peace and a legitimate state (Samuels, 2009). If divisive provisions are adopted that privilege certain groups over others, the fragile democracy will certainly undermine, and conflict could probably exacerbate.

We must not lose sight of the fact that creating or changing a constitution is an extremely sensitive matter. The international community in general can play a significant role, but it is not excluded that sometimes the international actors could have some interest in the outcome of the constitutional process. The practical implementation of new or amended constitutional provisions always involves a complex interaction between formal and informal institutions and processes. The interactions based on the constitutional provisions will be reflected in the processes between different interest groups and should last for a long time. Hence, post-conflict constitution-making processes can accomplish several significant effects. Firstly, the new constitution can drive the transformative process from conflict to peace. In other words, constitution building can transform the society from one that resorts to violence to one that resorts to political means to resolve conflict. Secondly, the new constitution should create mechanisms and institutions through which future conflicts can be managed without a return to violence (World Justice Forum IV, 2013). Finally, the new rules can certainly set a new agenda or change the rules of the game and start a process of reform, but formal institutions will only be effective when they are not in conflict with informal ones, and yet, to do so, they must be integrated into a kind of transformative social processes (Samuels and Hawkins, 2006).

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