

LEGAL AND POLITICAL SCIENCE

POST-CONFLICT REGULATION: THE RULE OF LAW AND CONSTITUTION MAKING AS THE NUMBER ONE PRIORITY

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ABSTRACT

Regardless of the cause of conflicts in a state, when the violence is ceased its aftermath should be dealt with. The most effective and targeted scenario of post-conflict regulation for every specific state would be designed and executed. The international community can play a crucial role in encouraging or combating peace process and building peace. The adjustment mechanism combines peacemaking with elements of nation-building, humanitarian action, transitional justice and recovery. One of the key elements of such a process involves possible revision, rewriting or even adoption of a new constitution to ensure an effective peace and security. In most cases, however, it is impossible to exclude the history and agreements that led up to a decision to make or re-make a constitution. Constitution building involves steps and sequences, and is not necessarily linear. Despite the important role that this process can play, little attention has been paid to the ways of developing and implementing participatory mechanisms and involving citizens in the process of creating a constitution conducive to a lasting peace. However, even developed in the best way constitutional and institutional framework cannot guarantee a stable democracy or permanent conflict resolution, although it can help it. Turning to the case of Ukraine, its Constitution needs changes though not that profound as in Africa for instance. Primarily, stabilization and conflict resolution in the east of Ukraine requires working towards the formation understanding of values and normative basis among people that will make intentions and practical measures of the current government legitimate and necessary in the eyes of the vast majority of the population. Ukraine should also take due notice of the complexity and comprehensive character of the process of peace building which hopefully will be launched in the nearest future.

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Conflicts often arise because of the inability of the state's legal system to protect human rights and punish those responsible for violating those rights. Discrimination, corruption and abuse of power by law enforcement officials and armed forces in many cases contribute to inflating and aggravating conflicts and further complicating the restoration of friendly relations after the end of the conflict. Injustice literally forces people to take up arms.

Termination of open violence as a result of a peace agreement or a military victory does not mean peace. Cessation of violence is rather a so-called “post-conflict” situation, which involves the creation of “new opportunities that can be used or discarded”¹. The international community can play a crucial role in encouraging or combating peace process and building peace. The United Nations, the OSCE and non-governmental organizations (International Institute for Democracy and Electoral Assistance, International Republican Institute, Carnegie Endowment for International Peace etc.) play an increasingly important role in the restoration of peaceful life and overcoming the consequences of armed conflict².

Post-conflict regulation is aimed at helping states and societies scattered by war, and preventing the renewal of armed violence. The adjustment mechanism combines peacemaking with elements of nation-building, humanitarian action, transitional justice and recovery. However, such measures could imply the strengthening or restoring certain political, economic and social structures destroyed during the war.

The main idea of the concept of post-conflict regulation is to eliminate the main causes of war and to create conditions for a stable and lasting peace. To achieve such changes there is a need to ensure political certainty, unique strategy, significant resources and coordinated, coherent and integrated approach to planning and enforcing. Considering the variety of post-conflict regulation scenarios, it is difficult to develop general practice standards or guidelines for post-conflict management and peace-building. Even the UN Commission on peace building, created in 2005 by the Security Council and the UN General Assembly, focuses on the formulation of strategies with noting the specifics of every particular state.

Today there is no single universally accepted concept and definition of post-conflict regulation.

Norwegian sociologist Johan Vincent Galtung, who studies the nature of conflicts and everything that is associated with conflicts, has identified all the main objectives after the conflict phase of peace in a positive and negative sense (positive and negative peace). Peace in its negative sense - is the absence of direct and organized violence between groups of people or countries. Positive peace means the establishment of sustainable peace through cooperation between states or groups of people and the eliminations of the main causes of the conflict³.

The concept of post-conflict settlement is similar to the concept of building peace or peacebuilding, but the former has a broader meaning. According to the definition proposed by Johan Vincent Galtung, post-conflict regulation or peacebuilding is a comprehensive concept that is composed of and contains a set of processes, approaches and conditions designed to turn a conflict into stable peaceful relations. Thus, the term applies to a wide range of events and activities that precede or come after the formal onset of the peace⁴.

Post-conflict settlement is practically unreachable today in the format of participation of only the direct parties to the conflict, even with the goodwill of the latter and with international peacekeeping assistance. The fate of the settlement of the internal conflict, not to mention the interstate military conflict, often turns out to be in the sphere of interests of some external players, who are able to exert the most serious and sometimes decisive influence on the course and outcome of any political crisis or conflict.

In addition, there is no widely shared definition of constitution building or broad consensus on what it should entail. One objective of reaching a more clearly defined and accepted concept of the field of constitution building is to align discussion more on providing effective international support to constitution building processes⁵.

In this regard, the question of the fundamental possibility of settling modern and future military conflicts arises. Everything depends on what kind of meaning is put into the concept of “post-conflict settlement”.

One may state that any military conflict (or war) can hypothetically end in one of two scenarios below:

- a final resolution of a complex of irreconcilable contradictions, claims, grievances, that is, the victory of one of the parties, and then the opposing party fulfils all the conditions and requirements of the winner (unconditional victory);
- a solution (as a rule, temporary) of problems between the parties to the conflict on various grounds, and then diplomats and politicians join the efforts of the agents who with the help of international mediators are expected to reach a compromise satisfying all parties.

¹ Vincent Chetail, *Post-Conflict Peacebuilding: A Lexicon* (Oxford, 2009), p.15.

² Wendy Lambourne. *Pos-conflict peace-building: meeting human needs for justice and reconciliation//Peace, Conflict and Development*. – Issue Four, April, 2004. – P.2-24. – P.2.

³ Vincent Chetail. *Post-Conflict Peacebuilding: A Lexicon*. – Oxford, 2009. – P.15

⁴ Id.

⁵ International IDEA resources on Constitution Building Processes, *Constitution Brief*, April 2017, <<http://www.idea.int/sites/default/files/publications/constitution-building-after-conflict.pdf>>.

Obviously, in the first case, no settlement of the conflict by definition is required. The winner imposes his will on the losing side, and the latter, if allowed, can deal with “licking wounds”, restoring the economy and solving social problems.

In the second case, a post-conflict settlement is required, which covers virtually all spheres of life and activities of war-affected actors. This is an incredibly difficult task, if only because in today’s military conflicts it becomes difficult to determine the composition of the participants at all. Nevertheless, this is exactly the scenario which is mostly common.

The post-conflict resolution basically covers “reviving activities” in most crucial sectors. We believe that the utmost importance should be given to dealing with the legal sector and its “heart” – the constitution. In other words, one of the key blocks forming the essence of post-conflict resolution, this study is focused on is *restoring the rule of law*. Understanding how the legal sector of the state actually worked before and after the conflict, as well as how it should function in establishing the rule of law, should be the main feature of any peacekeeping operation. This is an extremely complex area, therefore, every peacekeeping operation should be conducted with the participation of experts who can analyze the roles of various key representatives of the justice sector - judges, prosecutors, lawyers, court administrators, police officers, prison officials, and ministries such as the ministry Justice, internal affairs and defense¹.

One of the key elements involves the creation of mechanisms for prosecution, termination of arbitrariness and punishment of those responsible, and also the reform, restoration of state bodies and institutions. At the same time the issue of granting amnesty should not be ignored. In his 2004 report on the “Rule of law and transitional justice”, UN Secretary General Kofi Annan described the rule of law as a “concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”². This definition outlines key conceptual and practical problems associated with establishing the rule of law in the context of post-conflict regulation.

In the heart of every legal system lies a constitution. In a lot of cases this highest law requires revision, rewriting or even adoption to ensure an effective peace and security. We deem it necessary to reflect on the essence of the constitution. The International Institute for Democracy and Electoral Assistance in its latest brief on constitution sums up the basic approach to understanding a constitution in the *practical* dimension, “A constitution is a body of basic laws and principles that describes the general organization and operation of the state and contains fundamental principles and norms that underlie and guide all government action. Given the fundamental nature of a constitution and its role in laying a groundwork to shape and support the state, a constitution is usually expected to be long-standing and somewhat difficult to change or undo. A constitution is simultaneously a legal, political, and social instrument. Legally, it enshrines human rights and creates a predictable legal landscape. As a supreme or higher law, its provisions provide a framework under which all regulations, legislation, institutions, and procedures operate. It articulates the rights of citizens that institutions, procedures or legislation must not infringe, and which the state must strive to ensure. Politically, it establishes, distributes and limits governmental power and provides mechanisms for deliberating and deciding on public policy. Socially, it may reflect a shared identity or civic vision of the state, expressing commonly-held values or foundational principles”³.

Respectively, the concept of 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.

¹ Rebecca Spence, Post-conflict peacebuilding: who determines the peace? in Re-thinking Humanitarian aim conference proceedings, University of Queensland, <<http://www.uq.edu.au/politics/conferences/nhc/index.htm>>.

² The rule of law and transitional justice in conflict and post-conflict societies Report of the Secretary-General Combatants, <<http://www.ipu.org/splz-e/unga07/law.pdf>>.

³ International IDEA Constitution Brief, supra note 7.

It also means taking a long-term perspective and following an overall aim or design for the ‘social contract’ of government as a whole, rather than occasional changes to deal with highly specific problems. “In contrast, the language of ‘constitution making’ is frequently used with a deliberate emphasis on the drafting and promulgation of a constitutional text. Constitution building is often one element in a larger process of change that affects the constitution. The tendency to identify and favour a ‘constitution making moment’ means to suggest a process with easy limits. In most cases, however, it is impossible to exclude the history and agreements that led up to a decision to make or re-make a constitution. Constitution building involves steps and sequences, and is not necessarily linear. Which actors are involved at a given time may depend on the sequencing and the stage reached in constitution building”¹.

Therefore, in light of recent developments in the rule of law field, the area of constitutions and their implementation has emerged as pivotal for the promotion and application of the rule of law in countries experiencing post-conflict political transitions. 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 processes². Constitutional rules and institutions must be capable of containing the tensions arising from political crises that pit branches of government, political parties, economic interests or even the ethnic or sectarian groups comprising the country’s population against each other. The extent to which constitutions are able to uphold rule of law at the ‘macro’ level, along with human rights norms and democratic principles, is tested in the course of such crises³.

As it has been mentioned above, many constitutions are framed following conflict and this is exactly the case when significant assistance to achieve valuable and comprehensive results is required. There is an intervention of the international community in the resolution of civil and intra-state conflicts which has led in many cases to external actors extending their roles into constitution building. External intervention in constitution building presents challenges and pressures on these exercises of sovereignty.⁴ Perhaps, understanding the evolving roles of international, regional and national actors in moments of constitution-building as well as constitutional crises can help to give greater insights into the impact that constitutional assistance activities can have on respect for the rule of law, including key rule of law aspects such as legality, transparency, accountability and legal certainty. It is crucial to remember that constitution making is a process and one should consider that it is important to fine-tune the process. While such processes should reflect the sovereign nature of national constitutions, as well as the need for local ownership and sensitivity to the local context, it is also important to understand and recognize the increasingly significant role that international and regional organizations have played in providing technical and normative advice for such processes in post-conflict settings since the end of the Cold War.

The design of a constitution and its constitution-making process can play an important role in the political and governance transition. Constitution making after conflict is an opportunity to create a common vision of the future of a state and a road map on how to get there. The constitution can be partly a peace agreement and partly a framework setting up the rules by which the new democracy will operate. However, it is utterly important to pay attention to both the contents of norms of the supreme law of the state and the *procedure* of its making. A few years ago, international constitutional support focused on providing guidance on the content of the constitution, and not on the process of its creation. But the way in which the supreme law is created in a country torn apart by war can play a key role in restoring or strengthening the state and the political system, and in ensuring sustainable peace. Especially, if it causes an inclusive process leading to the creation of a consensus-based roadmap, which contributes to a more equitable economic, political and social order. Despite the important role that this process can play, little attention has been paid to the ways of developing and

¹ International IDEA resources on Constitution Building Processes, Constitution building after conflict: External support to a sovereign process, 2011, <<http://www.idea.int/sites/default/files/publications/constitution-building-after-conflict.pdf>>.

² Rhodri C. Williams, Constitutional Assistance and the Rule of Law in Post-Conflict Transitions: an Overview of Key Trends and Actors, Research Report, Folke Bernadotte Academy, 2013, <<https://fba.se/contentassets/0a896bcc85b84e88b0ff1446b55be2d5/constitutional-assistance.pdf>>.

³ Christian Schaller, Towards an International Legal Framework for Post-conflict Peacebuilding. Berlin: German Institute for international and Security Affaires, 2009, p.13

⁴ Andrew Ladley, Constitution-Building After Conflict: External Support to a Sovereign Process, IDEA, 2011, <<http://www.idea.int/publications/catalogue/constitution-building-after-conflict-external-support-sovereign-process?lang=en>>.

implementing participatory mechanisms and involving citizens in the process of creating a constitution conducive to a lasting peace¹.

An ideal constitution-making process can accomplish several things. For example, it can drive the transformative process from conflict to peace, seek to transform the society from one that resorts to violence to one that resorts to political means to resolve conflict, and/or shape the governance framework that will regulate access to power and resources—all key reasons for conflict. It must also put in place mechanisms and institutions through which future conflict in the society can be managed without a return to violence.

Therefore, one could draw specific general features that could be taken into account in the course of constitution making, though the context and peculiarities of every state and nation should be taken into consideration. The following key elements have been tailored in the UN practice, which as be assumed from the above mentioned, is a pioneer and a leader in assisting nations building peace following different kinds of conflicts:

- ✓ “key constitutional principles or substantive provisions to guide the process and to be enshrined in the final constitution;
- ✓ the mandate and work plan for the constitutional organ/s;
- ✓ the timeframe for the process, with a schedule of when key tasks should be accomplished;
- ✓ a declaration that the constitutional organ/s drafting the constitution will be free of governmental control;
- ✓ transparent rules and mechanisms to establish constitutional organs and appoint/elect delegates—perhaps to appoint an inclusive and technically competent constitutional organ to draft the constitution and a democratically elected body to adopt the constitution, with at times specific procedures for appointment or nomination of marginalized groups, members of civil society or those with specific professional skills.
- ✓ the mandate of a supportive administrative body, such as a Secretariat;
- ✓ provisions that describe the incorporation of a participatory process that prescribes sufficient time and resources to conduct separate phases of civic education and consultation;
- ✓ review and/or enforcement mechanisms to ensure that the final draft of the constitution incorporates any agreed upon principles;
- ✓ transitional arrangements if necessary and mechanisms for implementation of the constitution;
- ✓ provision for financial oversight of the process;
- ✓ the role, if any, of the United Nations or international community.

The legal framework should also be well publicized to promote transparency and gain public support for the constitutional roadmap; this can assist the public to be clear about the steps of the process, the objectives of the constitutional review or reform process, and their role².

Nevertheless, it is believed that constitution should appear as a result of continuous dialogue with national organizers, suggesting widespread involvement of not only the warring parties (although they should be interested in the restoration of peace), but also civilians; not only political and economic elite, but also many public organizations and public, civil society in general. Such dialogue is a self-evident requirement for peace³. Therefore, one should recall the other side of the coin – the overestimated and intense role of international community in the process of bringing a country in the domain of peace again.

No wonder that restoration of the nations was one of the central principles of decolonization. Especially this trend characterises the early 21st century, when conflicts exacerbated ethnic and other grounds for polarization, undermined the validity of unstable citizenship in so-called nation-states. The international community has tended to focus on measures of separation of powers and the development of constitutional structures that dictate all major groups its will in the political process and the economy and minimize the ban and marginalization that force different conflict-prone groups

¹ Мишель Брандт, Джилл Коттрелл, Яш Гай, Энтони Реган, Разработка и реформа конституции: выбор процесса, Interpeace, 2011, <http://3n589z370e6o2eata9wahfl4.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/2015_06_25_Constitution-Making_Handbook_Russian.pdf> [Development and reform of the constitution: the choice of the process].

² The Conflict, Security and Development Group, A Review of Peace Operations: A Case for Change, London: Kings College, 2003, para 302.

³ Ганна Х. Ібноезер Філіп Х. Флурі, Після інтервенції: управління суспільною безпекою у постконфліктних суспільствах – від втручання до стійкого місцевого самоврядування, інформація дослідницької комісії, GKS – Vienna, 2005.

to raise arms against the state¹. This is exactly the case when one should note that creation of a constitution is a risky attempt because it can revitalize opposition, as in Iraq, the international community or the occupying forces will openly interfere in this process; or if this process is not meaningful; or if he does not based on political realities. Creating an atmosphere of trust among divided communities and restore social benefits trust between ethnic and religious communities or clans can be tactfully encouraged from above².

However, even developed in the best way constitutional and institutional framework cannot guarantee a stable democracy or permanent conflict resolution, although it can help it. However, the reverse process may also take place when there is an issue of badly designed structures can damage the democracy in institutionalizing of social divisions, politicize ethnic and other identities and even generate violence³. It is argued that it might take a while for the nation, the country to get over the conflict, to return to normal and peaceful life and lifestyle, thus its genuine support of such reviving process should extracted first.

Examining the issue of post-conflict regulation would be incomplete without turning to the situation in Ukraine, which has suffered from the Russian aggression in Crimean and the east of the state for more than two years already. The case of Ukraine is nonetheless unique as all other cases. We should not bring up the issue of adopting a brand new constitution and turn to the *tabula rasa* principle, as it is still submitted that our Constitution needs changes, which are not that profound as for instance in cases of post-conflict regulation in Africa. In a nutshell, such other components or blocks of the regulation, besides constitution making, which has not been discussed in the present piece as disarmament, reintegration, amnesty and holding elections in post-conflict territories is possible only upon withdrawing of Russian troops from the territory of Ukraine. In general, the unique hybrid nature of the conflict dictates its own rules of solution and tackling it.

Thus, stabilization and conflict resolution in the east of Ukraine requires working towards the formation understanding of values and normative basis among people that will make intentions and practical measures of the current government legitimate and necessary in the eyes of the vast majority of the population. In particular, it concerns the use of military force against terrorists, the establishment of the constitutional rule of law by law-enforcement agencies, humanitarian measures of renewable nature enforced by loyal to Kyiv local authorities. The creation of a new socio-political situation with a clear vision of positive prospects for further socio-economic development which takes into account the diversity of the population is the only key to stabilization. At the same time, “[i]t is widely acknowledged that the provision of security is the sine qua non of peace-building, and increasingly that the building or rebuilding of public institutions is key to sustainability; however, the fact remains that a successful political and governance transition must form the core of any post-conflict peace-building mission”⁴.

For instance, in countries such as Timor-Leste, where there has never been a democratic police service based on respect for human rights, or independent, free and fair judicial bodies, it is important to pay attention to the main state structures, the role of the police, courts, parliament, etc. In a democratic state, emphasizing the idea that people built a “house” - their own constitution, - the foundation of which is human rights and the rule of law. This approach worked very well with the training of Timor-Leste police⁵.

One should also mention in connection with post-conflict justice is that it should be focused on restitution as well, as it is extremely difficult or even impossible in such situations when a state is de facto divided like, for example, Cyprus or Azerbaijan. This is a very sensitive issue, if post-conflict peace is fragile, as in the former Yugoslavia, Croatia or Bosnia. The European Court of Human Rights (‘ECtHR’) had to deal with the consequences of World War II in terms of post-conflict restitution of property in case “Bronovskiy v. Poland” and rendered it the first “pilot” decision. As stated in the facts

¹ Clingendael, International Alert, SaferWorld, Towards a Better Practice Framework in Security Sector Reform, Broadening the Debate, Occasional SSR Paper No.1, August, 2002.

² Ferguson, Chris, UNDP: Conference on Justice and Security Sector Reform, Coherence, Cooperation and Comparative Strengths, GFN Paper no. 16, May, 2003.

³ Ball, Nicole, Evaluation of the Conflict Prevention Pools. The Security Sector Reform Strategy, Evaluation report 647, March, 2004.

⁴ Samuels, Kirsti (2006) "Post-Conflict Peace-Building and Constitution-Making," Chicago Journal of International Law: Vol. 6: No. 2, Article 10, <<http://chicagounbound.uchicago.edu/cjil/vol6/iss2/10>>.

⁵ Инструменты обеспечения господства права в постконфликтных государствах, Преобразование сектора правосудия, Управление Верховного Комиссара Организации Объединенных Наций по правам человека? 2006, <<http://www.ohchr.org/Documents/Publications/RuleoflawMappingru.pdf>>.

of the case, the ECtHR explained the features of the agreement, which was signed in September 1944 between the Polish Committee of National Liberation and the former Soviet Socialist Republic - Ukrainian, Belarusian and Lithuanian which was followed by 1 million 240 persons repatriated to Poland. The Polish government committed itself to compensate them for their property that they left in the Soviet Union. And of course, the ECtHR could not comment on the question of whether Poland has fulfilled obligations to the displaced persons pursuant to the agreement¹.

Conclusions. Termination of violence in a state as a result of concluding a peace agreement or a military victory does not always mean automatic bringing of peace. Cessation of violence is rather a so-called “post-conflict” situation, which involves the creation of new opportunities for a state to regain its place in the family of nations or receive one. This may also be regarded a chance for state to launch the process of peace building sometime followed by the external assistance. Therefore, in order to move from a state of war and achieve the state of lasting and sustainable peace faster and more effectively, the international community should to some extent intervene in the internal affairs of the state, devastated by war. This is the common practice today and perhaps the only way to rebuild the state.

Without specifically scrutinizing the basis and framework of such interference and sometimes even intervention, the piece has focused on possible positive outcomes from such assistance for a state surviving the process of post-conflict settlement as such impact may be positive both for the state itself and for the international relations of this state and with other countries and of course for the international community as a whole. The absence of a universally settled definition of peace building also points to the sensitivity of the concept and other procedures and concepts associated with it.

There is no “once size fits all” framework for the process of peace building and it is sometimes useful to have a more detailed framework that includes the principles to be enshrined in the constitution. At other times, the framework should be more skeletal and allow for flexibility to respond to the inevitable changes in the political context. Nonetheless, while stressing that the unique circumstances of the context will determine the degree of specificity and the content of the legal framework, it is possible to coin out potential elements to be considered for inclusion in the legal framework, such as thinking over key constitutional principles, setting the bodies and agents to be involved in the drafting process etc.

It is important to remember that constitution making as well as the setting the legal framework, reviving the rule of law in the country is a process, well functioning of which may be sometimes more important than the final outcome. This is why it is of utmost importance to take into account that legal framework should be well publicized as it vital for the promotion of transparency and gaining public support (and public in its broadest meaning should actively participate in this process) for the constitutional roadmap; this can assist the public to be clear about the steps of the process, the objectives of the constitutional review or reform process.

Ukraine should also take due notice of the complexity and comprehensive character of the process of peace building which hopefully will be launched in the nearest future. Still there are a lot of issues to be solved before recovering damage done to the economy, territories and population of our country, we should not ignore the international practice and experience, as this is the case where international and constitutional law go hand in hand and even consolidate to bring the state back to life again.

¹Ганна Юджівська, Тези з виступів учасників міжнародного круглого столу, Вісник Верховного Суду України, 2016, <[http://www.scourt.gov.ua/clients/vsu/vsu.nsf/7864c99c46598282c2257b4c0037c014/5e96c567f3c3be8ac2258021003e77da/\\$FILE/web_Visnyk_07_2016.pdf](http://www.scourt.gov.ua/clients/vsu/vsu.nsf/7864c99c46598282c2257b4c0037c014/5e96c567f3c3be8ac2258021003e77da/$FILE/web_Visnyk_07_2016.pdf)>.